UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/070/ JAB/2009/020
Judgment No.: UNDT/2010/069/ Corr.2
Date: 26 April 2010
Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Rose Marie Dennis, OSLA

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

Notice: This judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. This case concerns the placement, after his separation from the Organization, of a note adverse to the applicant on his personnel file. The applicant, under former staff rule 111.2(a) requested an administrative review of the decision to place the note (described by him as "inappropriate and nebulous") on his file, and sought the evidence justifying the note, in particular the ultimate findings of the investigation, to provide him an effective opportunity to address the note. The reply on behalf of the Secretary-General, referred briefly to the history of the investigation leading to the note and stated that he had been informed of the findings in a draft report, invited to provide comments on them and further documentation was later provided. The position of the Administration was that this material provided the applicant with sufficient information to enable him to comment on the note.

2. The applicant appealed to the Joint Appeals Board (JAB) requesting findings that the note had been had been unlawfully placed on his file since he had not been notified in writing of the allegations and given a reasonable opportunity to respond to them or informed of the right to seek counsel, and the applicant maintained that the allegations against him were without merit, with a consequential recommendation that the note be removed from his file.

3. In a previous decision of the 31 December 2009 (confidential Order 190 (NY/2009) – may not be publicized without further order of the Tribunal) I dealt with several preliminary questions concerning the scope of the hearing necessary to determine the questions raised by the application. In that decision, I summarised salient facts, discussed certain legal issues and determined that, contrary to the submission of the respondent, the note in question was adverse in the relevant sense (vide ST/AI/292) but that the note itself was misleading. Following certain directions, I ordered that the application be set down for trial on the merits. That trial has now taken place.

4. This judgment repeats some but not all of the earlier discussion for the purpose of placing the legal and factual questions in context.

Applicant's submissions

5. The note implies that the applicant may have committed misconduct, and he is therefore entitled to require the Secretary-General to consider whether he had in fact misconducted himself, in effect to charge him with misconduct or not and, in the former event, complete the disciplinary process prescribed by the rules or, in the latter event, to regard the matter as closed and remove the note. This obligation derives from the contractual entitlement of the applicant that the Secretary-General act in accordance with the requirements of good faith and fair dealing, so that the applicant has an opportunity to clear his name and vindicate his good reputation.

Respondent's submissions

6. The Secretary-General does not, at present, intend to continue any investigative process, whether disciplinary or not, against the applicant. Consideration may be given to such a process if the applicant seeks to or rejoins the Organization. The note does not itself make any allegations and the applicant's file does not contain any. No issue of clearing the applicant's name therefore arises. Nor, even if the file did contain a note of the investigators' allegations, is there a right to anything more than to make a comment in accordance with sec 2 of ST/AI/292.

7. At all events, a staff member, *a fortiori* a former staff member, has no contractual right to require the Secretary-General to undertake disciplinary proceedings although the Secretary-General may do so, even if the staff member has been separated, if it is in the interests of the Organization to do so: *Manson* (1995) UNAT 742.

Facts

8. In substance, these are not in dispute. The applicant, then a senior official with International Civil Service Commission (ICSC), retired in October 2005. In January 2006 he returned to work as a consultant for the ICSC. In 2006 the Procurement Task Force of the Office of Internal Oversight Services (PTF/OIOS) commenced an investigation into procurement at ICSC. The applicant was notified in April 2007 of the proposed adverse findings, reviewed the documents in June 2007, and met with investigators in July 2007. In October 2008 a note was posted on the official status file of the applicant as follows –

> [The applicant] was separated from service with the Organization effective 1 October 2005. A matter was pending which had not been resolved due to his separation.
>
> In the event that [the applicant] should seek further employment within the United Nations Common System, this matter should be further reviewed by the Office of Human Resources Management. For information please contact the Administrative Law Unit, OHRM, at United Nations Headquarters.

9. It is agreed that disciplinary proceedings had not in fact been commenced against the applicant, though he was the subject of an investigation report, which had made adverse findings. On 11 March 2008 PTF/OIOS transmitted a copy of its report to the Office of Human Resources Management (OHRM). It appears that, since disciplinary proceedings had not commenced and the applicant was no longer a staff member, OHRM took the position that it was not possible to commence such proceedings. The purpose of the note on his file (which contains no further information about the investigation) was to bring to the attention of any person having the right to consult the file the existence of the pending matter and inform them that the Administrative Law Unit could be approached for information.

The correctness of the note

10. For reasons that were explained in the earlier decision, no matter was actually *pending* so far as the applicant was concerned. The investigation that had been

completed was a "preliminary investigation" within the meaning of sec 3 of ST/AI/371. Certainly the requirement of sec 3 that the head of office or responsible officer should immediately report the matter to the Assistant-Secretary-General, OHRM, appears to have been engaged, and it may be that this was done, although the evidence does not go quite so far. However, it seems clear that, not surprisingly, no consideration was given pursuant to sec 4 or sec 5 to the issue of suspension and, in so far as sec 6 is concerned, the only decision made must have been that the case was *not* to be pursued, although this may have been intended and possibly expressed (the evidence does not say) as a decision not to pursue the matter, unless the applicant were to attempt to rejoin the Organization. In that sense, the decision not to pursue the matter was conditional but, in my view, the possibility that the decision might change was necessarily so indefinite and speculative that it could not be described as *pending*. It would, I think, have been correct to describe the matter as incomplete or unresolved since, although the investigation had in fact been completed, the course of action prescribed by ST/AI/371 (either to charge the applicant and undertake the ensuing disciplinary proceedings or decide that the case should be closed) had not been completed. The correct description of the position was that allegations had been made against the applicant as the result of a preliminary investigation, which had not been considered pursuant to ST/AI/371 because the applicant had left the Organization. I cannot see that there is a proper basis for anything other than an accurate note to be placed on a staff member's file, although obviously the note does not need to be comprehensive.

11. Although this does not strictly concern the content of the note, it is important to acknowledge the context in which the question arises. The Administration must be able to deal with its files in any reasonable way thought to be necessary or desirable. They comprise the records of its affairs. Placing notes of relevant matters on files is a vital part of the management of any undertaking and it is necessary, in most cases, that the records be comprehensive at the risk of including irrelevant or inconsequential matter, since it is not always possible to know what will be required in the future. The records, for obvious reasons, need to be as accurate as the

circumstances permit, but some level of inaccuracy must be accepted since it will not always be either necessary or useful to enquire into the true facts or chase every rabbit into every burrow. On the other hand, the records ought not to be misleading. In my view, it is also essential that each page of each document should be numbered in order to enable the integrity of the file not only to be maintained but demonstrated. These considerations are all self-evident. The records necessarily include everything significant that is done by or affects its employees or agents in the course of their responsibilities, though of course this does not need to be collected in the one file. Where necessary or convenient, the files might need to be cross-referenced in some way. The fact that, in this case, a significant inquiry was undertaken, in relation to undoubtedly important matters in which the applicant was involved one way or another made it not only reasonable but essential for an appropriate note to be placed on his file. What that note should have contained was very much a matter for management although it obviously had to be accurate for reasons requiring no explanation. Fairness required, as the instrument recognized that, if the note were adverse, the applicant must be entitled to place his side of the story on the record and therefore as part of the records of the Organization.

The right to disciplinary proceedings

12. This question depends, in respect of alleged misconduct occurring prior to 30 June 2009, upon the proper construction of Chapter X of the former Rules and ST/AI/371 and, in respect of later alleged misconduct, upon the proper construction of Chapter X of ST/SGB/2009/7. I am of the view that, given the purposes to which these provisions are directed, (and subject to the possible single exception mentioned below) they can only be instituted against persons who are at the time of institution staff members even though they were staff members at the time of the alleged misconduct. The first and most obvious basis for this conclusion is that, as at separation, the contract between the Organization and the staff member has come to an end, except in respect of those matters which either expressly or by necessary implication have survived, for example, the obligation of the Organization to pay the staff member's entitlements if they have still not been paid. All the disciplinary

measures that can be imposed following an adverse decision resulting from a disciplinary process assume subsisting employment (though it might be terminated). Although the recovery of monies owed to the Organization does not assume continued employment, nor does it assume misconduct and, hence, disciplinary proceedings – the Organization can identify debts and proceed to recovery by conventional procedures. The only possible exception to the requirement that the person against whom disciplinary proceedings are instituted must be a staff member at the time of institution is where there has been a separation and monies are owing by the Organization to the staff member that may be mulcted to reimburse losses incurred by his or her misconduct. Even here, however, since the financial loss incurred must result from wilful, reckless or grossly negligent actions, the finding that an act or omission in breach of contract has occurred leading to the loss is sufficient to found liability and it is unnecessary, in point of law, to characterize it as misconduct in order to obtain recovery. Where there are good reasons for characterizing conduct as amounting to misconduct, no doubt disciplinary procedures are necessary, but if it is merely desired to obtain recompense, it is not necessary to prove more than a breach of the contractual obligation to comply with the applicable legal instruments and act with due care and attention. I am inclined, therefore, to the view that the mere objective of obtaining recompense is not an exception to the general rule that misconduct proceedings must at least be commenced before the staff member is separated. Reference should be made to secs 1 and 2 of ST/AI/2004/3, which limit recovery to "gross negligence" which in almost every case would at all events amount to misconduct, cf sec 10.1(b), Chapter X of the new staff rules. This is but the logical consequence of identifying the conditions in the contract that either expressly or implicitly survive its termination.

13. It would, for obvious reasons, be desirable to promulgate a specific rule specifying survival (or otherwise) in these circumstances.

14. By virtue of his or her position as Chief Administrative Officer of the Organization, the Secretary-General clearly has all necessary powers to conduct such investigations and enquiries as might be thought necessary or desirable to administer

the Organization, and the mere fact that a staff member has separated cannot hinder, let alone prevent, any such action even if that staff member's conduct is in question. In this respect it matters not whether the focus of the inquiry is on proper or improper conduct; the administration is entitled to know what its staff has or has not done. It is simply that such investigations or inquiries cannot be disciplinary proceedings under Chapter X, because these depend entirely upon the subsistence of the contractual entitlement to subject a staff member to them, on the one hand, and the contractual obligation of the staff member to suffer them in accordance with the relevant instruments, on the other. In principle, it cannot follow, of course, that they could not take the same form if, for some (unlikely) reason it was decided that this should be done but the proceedings would still be undertaken under the general powers of management and would not, in point of law, be disciplinary proceedings.

15. I think it is also clear that a staff member has no right to require the Secretary-General to institute any disciplinary proceeding. The relevant instruments repose of the decision to institute such proceedings in the Secretary-General. No doubt that decision must be made properly, in compliance with the obligations of good faith and fair dealing, but I cannot see any basis for any entitlement in the staff member to require that disciplinary proceedings be taken against him or her. I should note, however, that whether a staff member is entitled to require disciplinary proceedings to be taken against another staff member is by no means so easy to decide: it seems to me that there are good arguments to be made on both sides of this question and, although the UN Administrative Tribunal has decided on a number of occasions that there is no such entitlement, the reasons given are less than persuasive. However, this difficult question is not before me and I say no more about it. I mention it only because I did not want my view about the lack of entitlement of a staff member to require disciplinary proceedings be taken against him or her to be thought to encompass the situation in which a staff member seeks to require disciplinary proceedings to be taken against another staff member.

16. It follows that the applicant is not entitled to require the Secretary-General to institute disciplinary proceedings against him, whether to give him an opportunity to clear his name or for any other reason.

17. The situation may be different where proceedings have been instituted but, before completion, the staff member is separated. Again, this question must depend upon the proper construction of the relevant rules. Leaving aside the possibility of reimbursement for losses incurred by misconduct, it seems to me that the nature of the potential outcomes requires the construction that the proceedings are ended by the separation. It has been said that the existence of some interest, sometimes described as "compelling", in the Organization might justify the continuation of disciplinary proceedings after the separation of the staff member: see *Manson* (1995) UNAT 742 (which, it might be noted, does not suggest any legally – as distinct from a possibly administratively – significant outcome). In my view, since the contract is at an end, the staff member cannot be compelled to be involved, let alone cooperate, in any way and the continuation of the proceeding cannot have any legal effect, whatever other purpose it might conceivably serve. I have been unable to envisage, as at present informed, any possible "compelling" reason that might necessitate or make it desirable that there be a power to continue disciplinary proceedings where the staff member has been separated in light of the powers at all events possessed by the Secretary-General to investigate any matters thought to be necessary and make findings that are justified. On the other hand, since the staff member must be able to insist that disciplinary proceedings that have been instituted must be completed if the contract of employment is subsisting since he or she plainly has an interest in his or her reputation. Put otherwise, any decision to terminate disciplinary proceedings must, like all administrative decisions affecting the staff, comply with the requirements of propriety, in short, be made in good faith and by way of fair dealing must take into account the legitimate interests of the staff member. It is but a short step to imply the survival of this right after separation.

The right to comment

18. For obvious reasons, the right to comment on a note placed in the staff member's file must survive the termination of the contract and a condition to that effect may readily be implied. Sec 2 of ST/AI/292, which gives this right does not limit the terms of the comment, although it obviously must be confined to the purpose for which the right is given, namely to place on record the staff member's position in respect of the adverse matter. The applicant argues that he is entitled to place a comprehensive comment on the file, if he feels that this is necessary. Providing that everything which is stated can reasonably be related to the adverse matter he wishes to dispute, this argument is plainly right. The respondent does not dispute the applicant's entitlement in this regard.

19. At issue is the claim of the applicant that the right to comment means that he be given access to the material to which the note is directed or to which it refers, whether implicitly or expressly, and it matters not that this material is not actually on the file itself. The respondent contends that it is not obliged to give any more information than has already been provided.

20. The only file upon which the applicant is entitled to place his comment is his official status file. The mere fact that the matter referred to is split amongst several files cannot be decisive as to the matters upon which he is entitled to comment. It is obvious that, if the investigation report had been placed upon his official status file, he must have been entitled to see it. Indeed, this follows from the terms of the instruction itself since, in that event, the report, must be regarded as the "note". This is a matter of substance, not form. It seems to me that the applicant must be entitled comment on the material to which the note explicitly or implicitly refers, even if that material is not on the file and therefore is not physically contained in the note. The decisive consideration must be the nature and extent of the material in the note and to which it refers, even if obliquely or by way of implication. The extent of the right to comment must depend on substance and not form. In this case, it is inescapable that the note implicitly refers (and especially to any informed examiner – almost

inevitably to be the case) to an investigation report and, by extension the findings and recommendations of the investigators. Any other conclusion would be so unrealistic as to be fanciful. Accordingly, the applicant is entitled to see the investigators report, together with any conclusion or decision that may have been made under ST/AI/371 in respect of it.

Conclusion

21. The applicant is not entitled to have the note removed simply because no disciplinary proceedings were undertaken in respect of the investigation report. However, the note in its present form is inaccurate and must be removed. Its replacement, if any, must be accurate and first shown to the applicant, who must be given a copy of the investigation report to enable him to place such comment on the file as he wishes, providing it is reasonably connected to the investigation. In the event of any dispute about these questions, it may be decided by another judge of the Tribunal.

22. In all other respects the application is dismissed.

(*Signed*)

Judge Adams

Dated this 26th day of April 2010

Entered in the Register on this 26th day of April 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York