



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/008
UNAT/1581
Judgment No.: UNDT/2011/218
Date: 29 December 2011
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

MASSAH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Clarence E. Clarke

Counsel for the Respondent:

Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM

Introduction

1. The Applicant, a national of Cameroon, was employed as a Security Officer with the United Nations Mission for the Referendum in Western Sahara (“MINURSO”). His duty station was Laayoune, Morocco. On 14 March 2007 the Secretary-General dismissed the Applicant from service following findings by the Joint Disciplinary Committee (JDC) that he had engaged in serious misconduct.

2. On 29 February 2008 the Applicant filed an Application with the former United Nations Administrative Tribunal contesting the Secretary-General’s decision.

3. On 1 January 2010 the matter was transferred to the Nairobi Registry of the United Nations Dispute Tribunal, as part of the transitional measures related to the introduction of the new system of Administration of Justice.

4. On 27 July 2010, the Applicant died. The Applicant’s Counsel, Mr. Clarence Clarke, indicated that he would continue to pursue the case on behalf of the Applicant. On 21 April 2011, the Tribunal received written confirmation from the beneficiaries of the Applicant’s estate that they had authorized Mr. Clarke to act as Counsel and to continue the proceedings on their behalf.

Facts

5. The Applicant was employed by MINURSO from 18 January 2000 until 14 March 2007. He was hired as a Security Officer and at the relevant time he was discharging the duties of the Officer-in-Charge of Security.

6. In July 2005 Mr. Abdulaziz Labbi, a MINURSO Liaison Officer, provided the Chief Administrative Officer (CAO) of MINURSO, Mr. Paul Aghadjanian, with a compact disc (CD) containing 85 images, many of which were sexually explicit. Mr. Labbi stated that the pictures were of local women taken at the home of the Applicant during parties he held there. Mr. Aghadjanian copied the images from the CD onto his office computer, returned the CD to Mr. Labbi, and notified

the Officer-in-Charge (OIC) of MINURSO, Mr. Philippe Elghouayel, as well as the Office of Internal Oversight Services (OIOS), which undertook an investigation.

7. On 2 August 2005 the Applicant was called to a meeting by Mr. Aghadjanian. Also present were Ms. J. Redl, Chief Civilian Personnel Officer (CCPO), and Mr. Elghouayel. The alleged misconduct was discussed. According to the Applicant, pressure was put on him to resign and he did tender his resignation. However, on 10 August 2005, the Applicant sent a memorandum to Mr. Elghouayel declaring his intent to withdraw his resignation. Even so, Mr. Elghouayel purported to accept the resignation and it was to take effect on 10 September 2005, allowing for a 30-day notice period.

8. During this notice period, the Applicant became ill and was evacuated to Rabat, Morocco, for treatment. Meanwhile, on 30 August 2005, an African Union Ambassador informed MINURSO that he was aware of threats against the Applicant's life. MINURSO advised OIOS of this and conducted its own security assessment, concluding that it would be a security risk for the Applicant to return to the Mission. On 10 September 2005, the Applicant's resignation was effected and he was repatriated.

9. On 23 September 2005 the Applicant formally contested the acceptance of his resignation by appeal to the Joint Appeals Board (JAB). On 3 October 2005, the JAB concluded that "no administrative procedure [should] be initiated to separate Appellant from service until the material facts concerning the circumstances of his resignation are established..." On 4 October, in a letter to the Applicant, the Secretary-General accepted the recommendation of the JAB and suspended the decision to separate the Applicant pending determination of the merits of the case. Accordingly, the Applicant was placed on Special Leave with Full Pay (SLWFP) until 31 March 2006, in the expectation that he would file an appeal on the merits. The Applicant never filed such an appeal, but the investigation into his conduct continued, under the supervision of Mr. Vladimir Dzuro of OIOS.

OIOS Investigation

10. OIOS produced a report dated 17 November 2005 (“the OIOS Report”). In the course of the investigation, the Applicant was interviewed twice. OIOS examined his office computer and found approximately 58,000 images. Some of these images were said to be photographs taken by the Applicant himself and others were allegedly downloaded from the internet. In the OIOS Report, it is stated that a significant portion of the photographs found depicted naked women displaying their sexual organs in graphic detail. The photographs from the CD depicted naked women in sexually graphic poses.

11. According to the OIOS Report, when questioned by MINURSO senior personnel on 2 August 2005, the Applicant was shown the photographs from the CD and admitted that he had taken them. In this regard, during his interviews with the OIOS investigators, the Applicant admitted that he had taken some of the photographs contained on the CD which was given to the CAO but he said that they were his private photographs, which he had stored on his private computer back in his apartment in Laayoune. He said that those who illegally copied the pictures and gave them to the CAO were the ones who were guilty of distributing the images, not the Applicant. The Applicant suggested that Mr. Labbi, who had a key to his apartment, had probably entered it without permission, accessed his private computer, and carefully selected the images which he put on the CD.

12. Regarding the large number of photographs found on his office computer, the Applicant told OIOS that he liked to organise parties and he would often take pictures of people during the parties. He stored the photographs on his private computers which he kept in his apartment, but from time to time he needed to free up space on the camera and in that case, he would download some photographs to his office computer. He would then select those pictures that he wanted to give to his friends and leave them on the MINURSO network. The other pictures, he would delete. The Applicant told OIOS that it was possible that some of those pictures he temporarily put on his office computer were photographs depicting naked women, but he stated that he would remove them and store them permanently on his private computer.

13. The Applicant further admitted taking pictures of a naked local female in 2003, but stated that he did not recall taking any photographs of other naked women in his apartment in Laayoune.

14. The Applicant was asked whether any of the pictures from the CD provided to the CAO were taken during parties at his home. The Applicant denied that any of the pictures of naked women were taken at his home, but admitted that some of the other photographs were taken there. He confirmed that he knew all of the photographed women, but could not recall their names.

15. The Applicant was asked whether he had ever received an email at his UN email account which contained images of naked people. The OIOS record of interview records his response as follows:

Mr. Massah admitted that since he came to MINURSO he received, sent and forwarded a number of pornographic images from his official UN computer and UN email. He indicated that he had received numerous pornographic emails from various people from the UN and MINURSO staff members...¹

16. When presented with a printout of sample pornographic images retrieved from his office computer, the Applicant confirmed that they were indeed stored on that machine. He said that he often gave his password to his colleagues so that they could use his computer when he was not present in the office.

17. The OIOS investigators interviewed members of MINURSO staff, who testified that the Applicant had shown them pornographic photographs on his office computer.

18. Following receipt of the OIOS Report, Ms. Jane Holl Lute, Assistant Secretary-General for Peacekeeping Operations, sent a memorandum to the Assistant Secretary-General for Human Resources Management, referring the Applicant's case and stating:

In light of the overwhelming documentary evidence against Mr. Massah, combined with his own admissions, DPKO strongly

¹ Record of Interview, paragraph 66.

recommends that OHRM initiate swift disciplinary action against Mr. Massah. DPKO contends that Mr. Massah, the Officer-in-Charge of Security, has admitted to engaging in acts which not only amount to serious misconduct but have potentially placed the physical security of MINURSO personnel, himself and the victims depicted in his photos at risk. DPKO firmly maintains that the alleged acts, if true, constitute a substantial dereliction in duty in that as a security officer, Mr. Massah knew or should have known the impact of his actions on the security of the mission. Consequently, the allegations, if true, would require Mr. Massah's summary dismissal in order to protect the best interests and integrity of the Organization.

19. On 31 March 2006 the Applicant was again placed on SLWFP. On 5 April 2006 he received a letter from the Director, Division for Organizational Development, Office of Human Resources Management (OHRM), presenting him with allegations of misconduct.

Charges

20. The Applicant was charged with sexual exploitation by taking pornographic nude photographs of local women in Laayoune, in breach of ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse). He was further charged with violating sections 4.1 and 5.1 of ST/SGB/2004/15 (Use of Information and Communication Technology Resources and Data) based on the discovery of the 58,000-odd images on the hard disk of the Applicant's UN office computer as well as a number of emails containing erotic and pornographic images in the Applicant's UN Lotus Notes email account.

21. The Applicant submitted a formal response to the charges by letter dated 16 April 2006, in which he stated:

...OHRM is fully aware of the criminal acts (burglary of personal property and extortion), willful none [sic] compliance with United Nations policies (mission directives) and coercion (frustrated forced resignation) on the part of other staff members against the defendant but nevertheless overtly omitted these unlawful deeds from this case...

22. The matter came before the Joint Disciplinary Committee (JDC) on 7 December 2006. The Applicant was represented by counsel and attended himself

via teleconference. In its report, which is undated, the JDC concluded that the conduct of the Applicant constituted “sexual abuse” which supported the first charge against him.

23. Regarding the second allegation, the JDC considered first whether or not the relevant photographs amounted to “pornography”. The JDC concluded on this issue:

Having examined the photographs, the Panel decided that at least several of the photographs—such as those depicting female sexual organs with foreign objects inserted, or the one showing, at a very close range, Mr. Massah’s hand touching the woman’s vagina—were unquestionably of a pornographic nature...

24. In view of the Applicant’s admissions about receiving, forwarding and showing other staff members erotic and pornographic images and video files, the JDC concluded that the Applicant was in breach of ST/SGB/2004/15 and that he had “failed to observe the high standard of conduct and acted in a manner unbecoming an international civil servant and thus discredited the United Nations.” The JDC therefore recommended that the Applicant be separated from service.

25. On 14 March 2007, having considered the conclusions of the JDC, the Under-Secretary-General for Management, Alicia Bárcena, wrote to the Applicant advising that he would be separated from service without notice or compensation in lieu thereof.

26. The Applicant appealed this decision.

The Application before the Dispute Tribunal

27. Hearings in this matter took place on 5, 6 and 26 July 2011. Due to technical difficulties, the Applicant’s Counsel was not able to participate in the hearing on 26 July. A further hearing took place on 29 November 2011 to enable him to do so.

28. Due to the Applicant's untimely death, this Tribunal was not able to hear from him. The Respondent called Mr. Aghadjanian, Mr. Dzuro, Mr. Ahmed Zayed, and Mr. Said Amine. These witnesses were each cross-examined by Counsel for the Applicant.

29. Mr. Aghadjanian, CAO of MINURSO at the material time, told the Tribunal that he had obtained the CD containing the allegedly obscene materials from Mr. Labbi, who was then the Liaison Officer of MINURSO. Mr. Labbi told Mr. Aghadjanian that he had received the CD from a woman in Layounne. Mr. Aghadjanian downloaded the CD onto his office computer in the presence of Mr. Labbi and they viewed the files together. Mr. Aghadjanian subsequently had a meeting with the then OIC of MINURSO, Ms. Redl, and the then CCPO, Mr. Elghouayel to discuss the discovery. Mr. Aghadjanian added that the Applicant offered to resign out of fear, but was not pressurized to do so. The witness stated that the Applicant was afraid because what he had done was against the culture of the place where the Mission was located.

30. Mr. Said Amine was an Administrative Assistant in the Security Section of MINURSO at the time. The Applicant was his supervisor. He told the Tribunal that he identified two of the women amongst those pictured as being the cleaners working in the Applicant's apartment. He also added that the Applicant used to organise parties at his place with many women attending.

31. Mr. Dzuro was one of the investigators in the case and he stated to the Tribunal that OIOS interviewed a number of staff members as well as non-staff. The personal computer of the Applicant was never examined in the OIOS investigation. The Applicant's official computer was checked and a number of emails with attachments containing allegedly obscene images or films were found. The assistance of Mr. Zayed, a United Nations Civilian Police (CIVPOL) officer, was enlisted to help with the investigation in view of language difficulties. Mr. Zayed testified that he had learnt that the Applicant had relationships with local prostitutes. On one occasion he was passing by the office of the Applicant and he saw some "pornographic" pictures on the Applicant's computer.

The Applicant's submissions

32. The Applicant contends that the evidence used by the Respondent was stolen. It is therefore illegally obtained and is tainted and inadmissible. When issued with a parking violation by a Security Officer in July 2005, in an attempt to coerce the Applicant into dropping the charge, Mr. Labbi threatened the Applicant with exposure of the photographs. When this attempted coercion failed, he turned the photographs over to Mr. Aghadjanian.

33. Mr. Labbi's explanation to OIOS as to how he came to have the CD was not even believed by OIOS. He told them that he had been given the CD by a woman he met on the streets of Laayoune. She told him she had taken the CD from the Applicant's home. Such a story was clearly fiction. Rather, it was Mr. Labbi who broke into the Applicant's apartment to steal the photographs, and the CD is therefore inadmissible as illegally obtained.

34. The Applicant further contends that the investigation was partial and unfair and that there is no evidence that the Applicant distributed pornographic images, or that the content of the photographs amounts to pornography. The Applicant states that none of the images portrays sexual activity of any kind or is even titillating, referring to a dictionary definition of pornography as "the explicit description or exhibition of sexual activity...intended to stimulate erotic rather than aesthetic or emotional feelings".

The Respondent's submissions

35. The former JDC correctly determined that the Applicant's conduct in taking photographs of local women constituted "sexual exploitation and abuse" within the meaning of ST/SGB/2003/13. Even if the women consented to their photographs being taken by the Applicant, the fact that he stored these on his UN computer, which later became public, is a violation of trust. ST/SGB/2003/13 does not require specific intent for sexual exploitation to take place. In this case, the record shows that the Applicant acted in an exploitative manner, taking into account the very large number of nude photographs taken by the Applicant.

36. The evidence shows that the facts were properly established before the JDC. The witness Mr. Dzuro provided a full explanation of the procedural steps taken to collect the evidence in this case. He confirmed that around 58,000 pornographic images were retrieved from the hard drive of the Applicant's official computer, and that the Applicant admitted to have taken at least some of these photographs himself.

37. The Applicant's actions constituted serious misconduct and it was quite proportional to impose the sanction of summary dismissal in all the circumstances of the case.

Consideration

38. The role of the Tribunal in reviewing disciplinary cases is to examine the following:²

- a. Whether the facts on which the disciplinary measure was based have been established;
- b. Whether the established facts legally amount to misconduct under the Regulations and Rules of the United Nations;
- c. Whether the disciplinary measure applied is proportionate to the offence; and
- d. Whether there was a substantive or procedural irregularity.

39. As regards issue (a) above, in the case of *Molari* UNAT-2010-164 the Appeals Tribunal considered the issue of the standard of proof required in disciplinary cases. The Appeals Tribunal held 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

² *Mahdi* 2010-UNAT-018; *Abu Hamda* 2010-UNAT-022; *Haniya* 2010-UNAT-024; *Aqel* 2010-UNAT-040; and *Maslamani* 2010-UNAT-028.

than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable.³

Sexual exploitation and abuse

40. The Applicant is charged with sexual exploitation in breach of ST/SGB/2003/13. Sexual exploitation is defined in Section 1 of the Bulletin as:

...any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.

The Bulletin goes on to state at Section 3.1, that “[s]exual exploitation...violate[s] universally recognized international legal norms” and at Section 3.2 that the purpose of the specific standards set out in the Bulletin is “to further protect the most vulnerable populations, especially women and children”.

41. It is the view of this Tribunal that there is insufficient evidence to suggest that the Applicant’s conduct was in breach of this Bulletin. There is not an iota of evidence to establish any act of sexual exploitation (as defined above) was perpetrated by the Applicant. All that the evidence points to is that the Applicant took pictures of women in his apartment. There is no evidence to suggest that the Applicant forced these women into these pictures or that he profited monetarily, socially, or politically from taking them. Nor is there any evidence to establish any act of sexual abuse which is defined in the Bulletin as “the actual or threatened physical intrusion of a sexual nature whether by force or under unequal or coercive conditions.”⁴

42. It is a matter of concern and regret that when faced with situations like those in the present case, more care is not taken by the investigators to consider the particular breaches of the relevant United Nations rules they have in mind when embarking on an investigation. In any investigation the situation may change as the evidence unfolds but at the end of the day when all the evidence has

³ *Molari* UNAT-2010-164, para. 2, citing *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.

⁴ ST/SGB/2003/13, Section 1.

been gathered, the investigators and those responsible for developing the charges should ensure that these are not mere shots in the dark. Nor should such an exercise be of a speculative nature.

Violation of ST/SGB/2004/15

43. The second charge against the Applicant is that he had made use of his official UN computer to store, download and share pornographic materials, in violation of Sections 4.1 and 5.1 of ST/SGB/2004/15. The relevant part of Section 4.1. reads as follows:

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)

The relevant part of Section 5.1 reads as follows:

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

44. It has never been easy to define what pornography is. “Pornography” is not defined in the Bulletin, or in the Commentary annexed thereto. It is not defined in any of the existing Staff Rules and Regulations or Secretary-General’s Bulletins or Administrative Instructions or Information Circulars. The Tribunal must therefore resort to the ordinary dictionary meaning of the word, which is given as:

The explicit description or exhibition of sexual subjects or activity in literature, painting, films, etc., in a manner intended to stimulate erotic rather than aesthetic feelings; literature etc. containing this.⁵

45. At times pornography is confused with, or not differentiated from, obscenity. A distinction must also be made between materials which may be artistic in nature and value, and those which may be considered pornographic. In the case of *Miller v. California*, 413 U.S. 15 (1973), Chief Justice Warren Burger of the United States Supreme Court laid down a test for obscene or pornographic materials as follows:

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin*, supra, at 230, quoting *Roth v. United States*, supra, at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

46. In the United States case of *Jacobellis v. Ohio* 378 U.S. 184 (1964), Justice Potter Stewart stated, of the term "hardcore pornography":

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it...

47. Assured and comforted by these words of wisdom or caution, the Tribunal has had a look at the materials discovered on the hard drive of the Applicant's official computer and has concluded that the nature of the materials is sexually graphic and amounts to lascivious obscenity and extreme hardcore pornography.

48. In the preamble to the Charter of the United Nations it is stated, *inter alia*, "[w]e the Peoples of the United Nations Determined [...] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person..." The use of the word "dignity" in the Charter conjures respect for morality and the beliefs of people, including staff members of the Organization. This would in

⁵ *Shorter Oxford English Dictionary*, (Oxford University Press, 2007).

itself mean that staff members should conduct themselves in such a way as to respect their own dignity and that of their colleagues. To that end many bulletins and directives have been issued by the Secretary-General on prohibited conduct. And one prohibited conduct is the use of information technology for the purposes of obtaining pornography, viewing, or distributing it. The Organization as an international entity has established the necessity for a restriction on the use of information technology not only to protect morals within the Organization but also the dignity of the staff members. To that end it is appropriate to refer to what the European Court of Human Rights stated in *Handyside v United Kingdom* (1976) 1 EHRR 737:

There is no uniform conception of morals. State authorities were better placed than the international judge to assess the necessity for a restriction designed to perfect morals.

49. Having concluded that the material discovered on the Applicant's official computer contained hardcore pornographic images (even if not all of it was pornography), the Applicant cannot escape liability for misconduct. After all, he admitted to having stored the material on his official computer. Whether or not the photographs on the CD were taken by the Applicant, the simple fact remains that by putting photographs containing images which this Tribunal considers to be pornographic onto his official UN computer, the Applicant is in violation of ST/SGB/2004/15. Whatever his motives, this simple fact is inescapable.

Was the disciplinary measure proportionate to the offence?

50. The investigation revealed that approximately 58,000 images were stored by the Applicant on his official computer. This Tribunal has not examined every photograph, but it is plain that a very large number if not all of the material is pornographic. As such, this is not a minor act of misconduct, and the Secretary-General has, of course, a broad discretion in imposing disciplinary measures. However, in considering the question of the proportionality of the sanction, the Tribunal must look at how the Applicant's treatment compares with that of other staff members committing similar transgressions. With this in view, the Tribunal has examined the Report of the Secretary General entitled "Practice of the

Secretary-General in disciplinary matters and possible criminal behaviour, 1 July 2006 to 30 June 2007”,⁶ which time period includes the date of dismissal of the Applicant. It is clear that the Applicant’s case is referred to in paragraph 31 of this Report, which reads as follows:

A staff member used a United Nations computer to send and receive pornographic video clips and photographs. The staff member also solicited and paid for sexual favours from local women in a mission area. The staff member further took pornographic photographs of local women, which photographs later became public. *Disposition*: separation from service after the advice of a Joint Disciplinary Committee.

51. Paragraph 31 falls under section “D. Sexual exploitation and sexual abuse”. Given that this Tribunal has found that there is no evidence whatsoever to support a charge of sexual exploitation, the Applicant’s case would in fact appear better suited to section “E. Computer-related misconduct”. This section includes six other cases of pornography being stored, received and/or distributed on or via official computers. The relevant paragraphs read as follows:

A staff member received and widely distributed pornographic video clips and photographs using a United Nations computer. *Disposition*: demotion of one grade with no possibility of promotion for three years after waiver of referral to a Joint Disciplinary Committee.

A staff member received and distributed pornographic video clips and photographs using a United Nations computer. *Disposition*: loss of three steps in grade; three-year deferral for within-grade salary increment after waiver of referral to a Joint Disciplinary Committee.

A staff member received and distributed pornographic video clips and photographs using a United Nations computer. *Disposition*: loss of three steps in grade; three-year deferral for within-grade salary increment after waiver of referral to a Joint Disciplinary Committee.

A staff member received and stored pornographic video clips and photographs using a United Nations computer. *Disposition*: loss of two steps in grade; two-year deferral for within-grade salary

⁶ A/62/186.

increment after waiver of referral to a Joint Disciplinary Committee.

A staff member received and stored pornographic video clips and photographs using a United Nations computer. *Disposition*: loss of two steps in grade; two-year deferral for within-grade salary increment after waiver of referral to a Joint Disciplinary Committee.

[...]

A staff member accessed pornographic material over a period of 16 months using a United Nations computer. *Disposition*: loss of two steps within grade and three-year deferral for within-grade salary increment after waiver of referral to a Joint Disciplinary Committee.⁷

52. It is noteworthy that the Applicant in this case was sanctioned with summary dismissal (described as separation from service without notice or compensation in lieu thereof), the most severe of the nine disciplinary measures available to the Secretary-General, whereas the six other staff mentioned above were given much less severe punishments. The Tribunal does not know the precise details of the misconduct of these other staff, but the fact that the Applicant's case appears under section "D" rather than "E", and the nature of the description it has been given, strongly suggests that the Applicant's case was treated more seriously because of the allegations of sexual exploitation and abuse. As this Tribunal has found the latter charge to be unproven, the only fair conclusion is that the sanction of summary dismissal was disproportionate.

Was there a substantive or procedural irregularity?

53. One of the criticisms levelled at the investigation is the remittance of the CD by Mr. Labbi to Mr. Aghadjanian. Mr. Clarke for the Applicant submits that the CD was illegally obtained by Mr. Labbi, and this triggered the whole investigation leading to the discovery of the pornographic materials on the office computer of the Applicant. The illegal obtaining of the CD is therefore the fruit of the poisoned tree which taints the whole investigation.

⁷ A/62/186, paragraphs 32-38.

54. There is no doubt that there was a very disturbing failure on the part of the investigators not to ascertain fully the circumstances in which Mr. Labbi obtained the CD. His account was not, after all, believed by the investigator, Mr. Dzuro. Mr. Labbi was also a man suspected of being a spy within MINURSO, and who perhaps flouted parking rules and practised coercion. That no investigation was carried out on this aspect of the case shows that the investigators decided swiftly to go against the Applicant once the CD was given to Mr. Aghadjanian. Neither Mr. Aghadjanian nor any responsible officer thought it fit to query Mr. Labbi further.

55. This distinctive feature however cannot come to the rescue of the Applicant. Though the CD was illegally obtained it is not *per se* inadmissible. In criminal matters obtaining in the common law system, which is governed by exclusionary evidentiary rules, illegally or improperly obtained evidence is not inadmissible *ab initio*. The admissibility or otherwise depends on the discretion of the judge who should weigh in the balance the fairness of the proceedings and the need to admit relevant evidence. Does the probative value outweigh the prejudice caused to the Applicant? The Tribunal does not consider that the CD greatly prejudices the Applicant because the CD itself has not established any charge. The greater incriminating evidence was not that on the CD, but the 58,000-odd images found on the Applicant's official computer.

56. The CD did, however, trigger the investigation resulting in the charge of misusing information technology, which the Tribunal finds proven. In the case of *Jeffrey v. Black* (1978) QB 490, the accused was originally arrested for stealing a sandwich. Police officers then searched his home without his consent and without a search warrant, and found cannabis there. The court held that the improperly or irregularly obtained evidence was, nonetheless, admissible.

57. When dealing with disciplinary cases, the standard of proof to establish a particular charge is lower than the standard in a criminal case but higher than that obtaining in civil matters. In the case of *Liyanarachchige* 2010-UNAT-087, it would appear that the Appeals Tribunal placed the bar very high by ruling that no charge can be established against a staff member on the sole evidence of an

anonymous witness unless there is some other evidence to link the staff member to the charge. This is a rule that is applicable in criminal cases. Does that mean that a staff member who is suspected of misconduct has much lower rights than those of a suspect in a criminal case? The question is pertinent and relevant because of the obligation resting on a staff member to collaborate with investigations within the Organization. When such collaboration is forthcoming, or the staff member has not much choice, the latter is questioned and any evidence gathered from that staff member, whether it is incriminating or not, is subsequently used against him or her. This is done without any word of caution being administered to that staff member as to the consequences of his or her answering questions which may elicit incriminating answers.

58. The Applicant here did confess to the investigators that he had stored and downloaded the images found on his official computer, although he claimed they were not pornographic. Had this confession, which was obtained without any caution or words of warning being administered to the Applicant, stood alone, this Tribunal would have declined to act on it. However, the confession is buttressed by the evidence secured from the search of the official computer which was investigated without any taint of illegality, the Applicant having consented to such an exercise.

Conclusion

59. The Applicant was wrongly charged with sexual exploitation which the Tribunal finds had no basis in the evidence and could not be said to have been proven. Whilst he was without doubt guilty of misuse of information and communication technology resources, the penalty of summary dismissal was disproportionate. The Secretary-General must be even-handed in meting out punishment, notwithstanding his broad discretion in this regard. Where the norm appears to be loss of steps in grade or, at worst, demotion, it can only be said that the Applicant was unfairly treated.

60. Since the Applicant is now deceased, the only appropriate remedy is compensation. In the circumstances, the Tribunal awards the Applicant, under art.

10.5 of the Statute of the Dispute Tribunal, the sum of four months' net base salary effective March 2007.

61. Under art. 10.5 of the Statute of the Dispute Tribunal, the total sum of compensation is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

62. The compensation and interest ordered by this Tribunal is to be paid to the estate of the Applicant.

(Signed)

Judge Vinod Boolell

Dated this 29th day of December 2011

Entered in the Register on this 29th day of December 2011

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi