

Translated from French

Judgment No. 2010-UNAT-087

Judge Jean Courtial, Presiding Judge.

Synopsis

1. The Secretary-General summarily dismissed Mr. Don Stanley Liyanarachchige for serious misconduct. The staff member challenged this disciplinary measure before the Dispute Tribunal, which rejected his appeal.
2. The Appeals Tribunal recalls that in a system of administration of justice governed by law, the presumption of innocence should be respected. The onus should therefore be on the administration, which is charging a staff member with misconduct, to establish the factual basis for the disciplinary measure taken against the staff member. In the present case, the charges are solely based on anonymous statements made to an Office of Internal Oversight Services (OIOS) investigator. The Appeals Tribunal is of the view that, while the use of statements gathered in the course of the investigation from witnesses who remained anonymous throughout the proceedings, including before the Tribunal, cannot be excluded as a matter of principle from disciplinary matters, a disciplinary measure may not be founded solely on anonymous statements.
3. The Appeals Tribunal finds that the Dispute Tribunal erred in law in upholding an administrative decision to dismiss a staff member for serious misconduct taken in violation of the requirements of adversarial proceedings and due process. The Appeals Tribunal reverses the contested judgment and rescinds the administrative decision to dismiss Mr. Liyanarachchige. It sets compensation at an amount equivalent to 12 months' net base salary of the Appellant that the Secretary-General may elect to pay as an alternative to his reinstatement arising from the rescission of the decision to dismiss him.

Facts and procedure

4. Mr. Liyanarachchige, a staff member of the United Nations, was assigned to the United Nations Operation in Côte d'Ivoire (UNOCI). In February 2007, the Ivorian police raided several local businesses suspected of operating illegal brothels. The raids resulted in the apprehension of numerous suspected victims of human trafficking and forced prostitution. OIOS initiated an investigation and interviewed a number of women who stated that they had been compelled to work as prostitutes in order to pay off debts. Two of the women interviewed, referred to as V01 and V03, identified Mr. Liyanarachchige as one of their clients.
5. On the basis of the OIOS report, Mr. Liyanarachchige was accused of violating former staff rules 101.2 (a) and 110.2. Specifically, he was charged with: (1) sexual exploitation and abuse in violation of ST/SGB/2003/13 on special measures for protection from sexual exploitation and sexual abuse; (2) improper use of United Nations property for transporting passengers in a United Nations vehicle without authorization; (3) conduct that is inconsistent with the obligations of any staff member of the United Nations and the standards of conduct expected of an international civil servant. Such misconduct allegedly violated staff regulation

1.2 (b), (e), (f), (g) and (q), section 3.2 (c) of ST/SGB/2003/13 and section 22 of ST/SGB/2002/13 entitled “Status, basic rights and duties of United Nations staff members”.

6. Following the receipt of the written comments of Mr. Liyanarachchige on the charges against him, the Secretary-General summarily dismissed him on 8 May 2009. Mr. Liyanarachchige challenged that decision before the United Nations Dispute Tribunal. During the hearing in Nairobi, five witnesses were called to testify, four by Mr. Liyanarachchige, and the fifth by the Secretary-General. V01 and V03, who had been repatriated to the Philippines, did not appear.

7. On 9 March 2010 the Dispute Tribunal rendered judgment No. 2010/041 rejecting Mr. Liyanarachchige’s appeal. The Tribunal found that the identification of Mr. Liyanarachchige by V01 and V03 from a photographic array put together by an OIOS investigator was amply substantiated, notwithstanding some contradictions in the statements of the witnesses as to the physical size of Mr. Liyanarachchige. The Dispute Tribunal also took the view that the fact that Mr. Liyanarachchige had not been afforded the opportunity of confronting V01 and V03 at the hearing had not undermined the adversarial nature and fairness of the proceedings. Summary dismissal was deemed the appropriate measure in the light of the charges against the Appellant.

8. Mr. Liyanarachchige, who had been granted an extension of the time limit for filing an appeal, appealed the Dispute Tribunal judgment on 27 April 2010. The Secretary-General filed an answer to the appeal on 14 June 2010.

Submissions

Appellant’s appeal

9. Mr. Liyanarachchige contends that the Dispute Tribunal erred in law in finding that hearsay evidence based on anonymous witness statements was admissible. While the evidence of V01 and V03 was decisive in establishing the charge of misconduct, the Applicant was never given the opportunity to confront them. By founding its judgment on such evidence, the Tribunal violated Mr. Liyanarachchige’s right to a fair trial.

10. The Dispute Tribunal also erred in law by accepting as admissible and of probative value the alleged identification of Mr. Liyanarachchige by V01 and V03 from photographs.

11. Mr. Liyanarachchige also contends that the Dispute Tribunal drew the wrong conclusions from the unsubstantiated statements of V01 and V03, which were made for the purpose of identifying him. He contends that V01 and V03 may have seen him in a restaurant where he ate every day, especially since he has an artificial eye. He claims that the Tribunal did not take into account the contradictions in the statements of V01 and V03 about his physical appearance, the UNOCI vehicle usage records, and the lack of corroboration of the witnesses’ evidence as to their alleged encounters. He further claims that the Secretary-General did not establish the credibility of the statements of V01 and V03, noting that the latter could benefit from implicating United Nations staff members. Therefore, the Secretary-General did not meet his burden of proving misconduct.

12. Mr. Liyanarachchige requests the Appeals Tribunal to reverse the judgment of the Dispute Tribunal, rescind the Secretary-General's decision to summarily dismiss him and order his reinstatement.

Secretary-General's answer

13. The Secretary-General argues that Mr. Liyanarachchige has not identified any error of the UNDT that would force him to reverse his decision to summarily dismiss Mr. Liyanarachchige. As to the argument that the Tribunal erred in law, the Secretary-General submits that the statements of V01 and V03 constitute direct evidence and not hearsay evidence. The OIOS investigator who testified at the hearing outlined the methods used for the identification by V01 and V03 of Mr. Liyanarachchige from photographs. The Dispute Tribunal had properly ruled on the admissibility and the weight of all the evidence relating to the identification of Mr. Liyanarachchige.

14. The Secretary-General argues that Mr. Liyanarachchige was not denied due process in not being afforded the opportunity to cross-examine the witnesses referred to as V01 and V03. The right to confront witnesses does not trump the need to afford protection to witnesses. Mr. Liyanarachchige was in presence of all the elements of the charges and the facts surrounding them and was thus in a position to make a comprehensive response. The Dispute Tribunal had rightly concluded that Mr. Liyanarachchige did not suffer any injury from not being able to cross examine the witnesses.

15. With regard to the argument that the Dispute Tribunal committed factual errors, the Secretary-General contends that Mr. Liyanarachchige's explanation as to how the witnesses recognized him is implausible and that the inconsistencies in the statements are insufficient to refute the charges and justify the rescission of the judgment. Mr. Liyanarachchige's claim that the witnesses had a stake in falsely accusing him is not plausible. The Secretary-General submits that the UNDT was correct in finding that he had met the required burden of proof by providing evidence in support of the charges, and that he had properly exercised his discretionary power in summarily dismissing Mr. Liyanarachchige for serious misconduct.

16. The Secretary-General requests the Appeals Tribunal to validate the judgment and reject the appeal in its entirety.

Considerations

17. In a system of administration of justice governed by law, the presumption of innocence should be respected. Consequently, the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.

18. In the present case, Mr. Liyanarachchige argues that the administration failed to meet the requirements of adversary procedure in establishing the facts.

19. The use of statements gathered in the course of the investigation from witnesses who remained anonymous throughout the proceedings, including before the Tribunal, cannot be excluded as a matter of principle from disciplinary matters, even though anonymity does not permit confrontation with the witnesses themselves but only with the person who recorded the statements of the anonymous witnesses.

However, such statements may be used as evidence only in exceptional cases because of the difficulties in establishing the facts, if such facts are seriously prejudicial to the work, functioning and reputation of the Organization, and if maintaining anonymity is really necessary for the protection of the witness. Furthermore, it should be possible to verify the circumstances surrounding anonymous witness statements and to allow the accused staff member to effectively challenge such statements.

20. It should be recalled, however, that even assuming that the above-mentioned conditions were met, a disciplinary measure may not be founded solely on anonymous statements. In disciplinary matters as in criminal matters, the need to combat misconduct must be reconciled with the interests of the defence and the requirements of adversary procedure. In this case, the charges are based solely on statements made to the OIOS investigator by anonymous witnesses.

21. It follows from the above that the UNDT erred in law by finding that the Secretary-General had not violated the requirements of adversarial proceedings and the rights of the defence in taking the decision to summarily dismiss Mr. Liyanarachchige solely on the basis of the statements of anonymous witnesses.

22. The Court reverses the contested judgement and rescinds the administrative decision to dismiss Mr. Liyanarachchige. In accordance with the provisions of article 9, paragraph 1, of its Statute, the Court sets compensation at an amount equivalent to 12 months' net base salary of the Appellant that the Secretary-General may elect to pay as an alternative to reinstating him arising from the rescission of the decision to dismiss him.

Judgment

23. The Appeals Tribunal reverses judgement No. UNDT/2010/041 of 9 March 2010.
24. The Appeals Tribunal rescinds the Secretary-General's decision of 8 May 2009 to summarily dismiss Mr. Liyanarachchige. It sets compensation at an amount equivalent to 12 months' net base salary of the Appellant that the Secretary-General may elect to pay as an alternative to reinstating him arising from the rescission of the decision to dismiss him.
25. Judge Boyko has appended a separate and concurring opinion to this judgment.

(Signed) Judge Courtial
Presiding

(Signed) Judge Garewal

(Signed) Judge Boyko

Dated this 27th day of October 2010 in New York

Original and authoritative version: French

Entered in the Register on this 29th day of December 2010
in New York, United States of America

(Signed) Weicheng Lin, Registrar, UNAT
