



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/013/
JDC/2008/002
UNDT/NY/2009/014/
JDC/2008/003
Judgment No.: UNDT/2010/034
Date: 25 February 2010
Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

CABRERA (Applicant 1)

and

STREB (Applicant 2)

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Edwin Nhliziyo (Counsel for Applicant 1)
Bart Willemsen, OSLA (Counsel for Applicant 2)

Counsel for respondent:

Stephen Margetts, ALU

Introduction

1. These cases involve summary dismissal for serious misconduct.
2. Both applicants received a letter dated 8 November 2007 informing them that the Secretary-General had decided that they be summarily dismissed in accordance with staff regulation 10.2 applicable at that time. The dismissal took effect immediately upon receipt by the applicants of the letter of 8 November 2007.
3. The decision of the Secretary-General was arrived at after considering a report from the Procurement Task Force (PTF) dated 20 June 2007. The PTF carried out an investigation into conduct which had taken place on an evening in August or September 2002. It was alleged that both applicants accepted hospitality from a representative of a vendor company and that such hospitality was lavish and inappropriate. Furthermore it was in violation of the Organization's guidance, rules and policy and inconsistent with the high standards of conduct expected of staff members in the Procurement Division.

Background

4. The applicants lodged an appeal against this decision by presenting an application for review to the Joint Disciplinary Committee (JDC). It was the consistent position of the respondent that the decision to summarily dismiss the applicants was legally correct and arrived at as a result of a proper and fair investigation and that the penalty of summary dismissal was proportionate to the seriousness of the disciplinary offence.
5. The JDC conducted its review and presented its report and recommendations for the attention of the Secretary-General. By the time the JDC was abolished on 30 June 2009 the Secretary-General had not had the opportunity of considering the report and recommendations of the JDC. In the circumstances these cases were transferred to the United Nations Dispute Tribunal (Tribunal).

The Tribunal's Order

6. The parties were invited to a case management discussion which took place on 14 August 2009. Applicant 2 was physically present and Applicant 1 joined by an audio link. He was able to participate in the case management discussion and to give instructions to his counsel.

7. After a detailed consideration of the issues and an exploration of various options for the further conduct of the case, including the question whether the Tribunal should have access to the JDC report and recommendations, agreement was reached.

8. It was ordered by consent:

- a. The cases of Applicant 1 and Applicant 2 would be joined together for the purpose of considering the documents and arriving at a Judgment in the cases.
- b. That the JDC report, including its recommendation, will not form part of the material before the Judge.
- c. However all the documents which were before the JDC would be considered on the basis that they contained all the parties' arguments and submissions.
- d. That the Judge will consider issues in the following sequence:
 - i. Was there a careful and fair investigation into the allegations against each of the applicants?
 - ii. Were the requirements of natural justice complied with?
 - iii. Were the parties and each of them given every opportunity to say whatever they wished to say in their own interests?

- iv. Were the applicants given the opportunity to advance arguments, submissions as to special circumstances and mitigation before a decision was taken on the appropriate penalty?
- v. Was there sufficient material before the Secretary-General to justify a finding by him that there was misconduct?
- vi. If so, was the misconduct in question of sufficient severity to merit a finding of serious misconduct?
- vii. If not, could the sanction of dismissal be justified?
- viii. If the misconduct was of sufficient severity to merit a finding of serious misconduct was the sanction of dismissal appropriate?
- ix. If it was, was the extreme sanction of summary dismissal fair in the circumstances?
- x. If it was not, should there have been dismissal on some other terms and if so, what?

9. The fact that disciplinary proceedings took place five years after the event in question requires an explanation. The incident only came to light as a result of evidence given in a criminal trial in the course of a federal prosecution in the Southern District of New York, arising out of the PTF report dated 27 July, 2006.

10. The defendant in the criminal proceedings was a senior United Nations Procurement Officer. A representative of two vendors, who were in a business relationship with the UN, through the procurement process, was a prosecution witness. In the course of his evidence he indicated that he had offered lavish hospitality to two staff members of the UN Procurement Division. He claimed that he had spent about USD6,000 that evening providing them with drinks and

entertainment in the form of female companionship and a visit to a lap-dancing nightclub. The criminal trial itself and the evidence given by the representative of the two vendors was widely reported in the United States media and internationally. This led Member States to express grave concern at what they considered were serious issues regarding the impropriety of the Procurement Division. They requested that immediate action be taken by the Secretary-General against any UN staff members concerned. It is important to record, in view of the concerns expressed by both applicants, that there was no evidence either in the course of the criminal trial or in the PTF investigation that either applicant engaged in conduct which amounted to the conferring of favours or benefits on the representative of the two vendors. Furthermore, it was common ground that, as far as Applicant 2 was concerned, this was the only incident of him accepting such hospitality. In the case of Applicant 1 it was conceded that there were two other occasions where he accepted hospitality from the representative of the two vendors on a modest scale in comparison to the hospitality offered to both of the applicants on the night in question, giving rise to these disciplinary proceedings.

11. Important issues arise in these cases:
 - a. Should a one-off incident of proven misconduct as occurred in these cases be regarded as so serious as to merit summary dismissal?
 - b. Was the Secretary-General unduly influenced by the opinions and pressure from Member States who expressed grave concern at the press reports? In other words, but for the adverse publicity and the concerns expressed by Member States, would the Secretary-General have come to the same conclusion?
 - c. Is it legitimate for the Secretary-General to pay heed to the opinions and concerns of Member States in carrying out his disciplinary functions in relation to staff members?

12. Whatever be the answers to these questions it has not been disputed by any of the parties that there was a duty on the Secretary-General to ensure that any investigation conducted on his behalf should be done with the utmost propriety and the observance of internationally respected norms of justice and fairness in conducting internal disciplinary proceedings. All staff members are entitled to the protection afforded to them by the UN's internal procedures for the handling of disciplinary cases.

Applicable rules

13. Former staff regulation 10.2 stated that "The Secretary-General may summarily dismiss a member of staff for serious misconduct". Paragraph 9(c) of ST/AI/371 "Revised Disciplinary Measures and Procedures", of 2 August 1991, states that the evidence should clearly indicate that misconduct had occurred and that if the seriousness of the misconduct merited separation from service the Assistant Secretary-General of Human Resources may recommend to the Secretary-General:

9. On the basis of the entire dossier, the Assistant Secretary-General, Office of Human Resources Management, shall proceed as follows:

(...)

(c) Should the evidence clearly indicate that misconduct has occurred, and that the seriousness of the misconduct warrants immediate separation from service, recommend to the Secretary-General that the staff member be summarily dismissed. The decision will be taken by or on behalf of the Secretary-General.

14. The Procurement Division's "Guidelines on Acceptance of Gifts and Hospitality by the Procurement Division Staff" (rev.1) of 18 January 2001, which is relevant, provides as follows:

"It is an overriding importance that staff members acting in an official procurement capacity should not be placed in a position where their actions may constitute or could be reasonably perceived as to show favourable treatment to an individual or entity by accepting offers of gifts and hospitality or other similar considerations. The staff member should have regard not simply as to whether they feel themselves to

have been influenced, but to the impression that their actions will create on others. Due to the needs to stress the importance of the appearance of strict independence and impartiality of staff in the Procurement Division, the following guidelines are provided:

In principle, UN staff members shall not accept any honour, decoration, favour, gift or remuneration from any source without first obtaining the approval of the Secretary-General.”

15. It should be observed straightaway that these cases do not involve the acceptance of “any honour, decoration, gift or remuneration”. However the provision of lavish hospitality could conceivably come under the description of “favour”.

16. Following an internal audit and investigation into certain apparently questionable practices in the Procurement Division, a policy of zero-tolerance was implemented with regard to the acceptance of hospitality from vendors. However, it is important to note that this rule was not applicable at the material time. There was within the Procurement Division a culture of acceptance of modest hospitality from vendors. It would be fair to observe that a senior procurement officer had a certain attitude towards such issues as a consequence of which he found himself facing a criminal prosecution and subsequent conviction.

17. While the culture at the time may have been permissive in this regard, the question still remains as to whether the conduct in which these applicants engaged went beyond the limit of that permissive culture. The representative of the two vendors, who was convicted for bribery in separate criminal proceedings, engaged in conduct found to be highly improper. His offer of hospitality was not made with a benign motive but designed deliberately to seek to gain a commercial advantage for the companies he represented. There could be no doubt in the mind of any reasonable person that the vendors’ representative was interested in trying to secure benefits and advantages for himself and his companies from the UN Procurement Division.

18. Although there was no finding that the applicants had conferred any benefits on the two vendor companies or any other company, the key issue is whether there

was a breach of the relevant UN rules, guidelines and policies which are binding on all staff members of the United Nations.

19. The United Nations Administrative Tribunal's (UNAT) jurisprudence is replete with a number of cases dealing with disciplinary matters and the appropriate principles to be followed in considering whether or not a case of serious misconduct had been made out, and if so, whether the sanction of summary dismissal was appropriate. In my Judgment *Manokhin* UNDT/2009/006, a case which also concerned disciplinary action following an internal investigation, I stressed the importance of examining the thoroughness and fairness of internal UN investigatory procedures. I considered whether the internal disciplinary investigations complied with the principles of natural justice and concluded that there were no procedural irregularities in the investigation and that the sanction of summary dismissal was proportionate to the misconduct. As stated in my previous Judgment *Kouka* UNDT/2009/009, the case that is usually referred to is the UNAT Judgment No. 941 *Kiwanuka* (1999). In that case, the UNAT set out certain standards, which comply, broadly speaking, with the principles of natural justice and internationally recognized standards for reviewing administrative decisions in relation to disciplinary matters in an employment context.

20. Judgment *Kiwanuka* encapsulates internationally recognized norms of fairness which can be summarized as follows:

- a. Whether the facts resulting in summary dismissal had been established (that is, whether the findings made are reasonably justifiable and are supported by the evidence);
- b. Whether the established facts legally amount to misconduct or serious misconduct;
- c. Whether there has been a failure to consider significant facts or whether irrelevant facts have been considered;

- d. Whether there has been any significant procedural irregularity;
- e. Whether there has been any improper motive or abuse of process;
- f. Whether the disciplinary measure is legal;
- g. Whether the disciplinary measure is proportionate to the misconduct;
and
- h. Whether the Administration has acted in an arbitrary manner.

The Tribunal's findings

21. There is a huge volume of documentation in the case, not all of which is directly relevant to the issues to be determined. It does, however, provide evidence of the context in which these matters took place. The reasons for the change in policy and the importance of adopting a policy of zero-tolerance towards the acceptance of hospitality are material considerations; so is the question whether there was any incriminating evidence to suggest that these two applicants had engaged in much wider abuse of the procedures of the Procurement Division. Alternatively, was this a one-off isolated incident of much lesser severity for which the appropriate sanction should not be the extreme sanction of a summary dismissal?

22. The Tribunal finds as follows in relation to the principles which are determinative of the question whether the decision to summarily dismiss the applicants was lawful or not.

Proper investigation

23. The senior Procurement Officer on trial was senior in rank to both applicants. He was convicted following a trial before the New York State criminal courts. The representative of the two vendors was a prosecution witness who indicated in the course of giving evidence that he had entertained two members of the Procurement

Division staff to the extent of approximately USD6,000. The entertainment included dinner, drinks, female company and a visit to a lap-dancing nightclub. Both applicants subsequently identified themselves as the individuals referred to in the representative's testimony. An important question is the extent to which the PTF relied on the evidence of a person of questionable character. The applicants were entitled to express their concern about reliance on the testimony of such an individual. However, both applicants admitted, in substantial part, that the version given by the representative of the two vendors was more or less correct. They took the point that when they met him it was not prearranged but a chance encounter. They said that they had paid for their respective rounds of drinks and that it was not correct to say that he paid the entire bill for the evening. They did not, however, disagree with the fact that the cost of the evening's entertainment was borne substantially by the vendors' representative. It was the vendors' representative's evidence that one of the applicants had assisted his company subsequently by drafting correspondence. This was not found to be the case in the detailed investigation carried out by the PTF. Whatever advice may have been proffered to the vendors' representative was consistent with the practice of providing guidance to vendors and companies who were being considered for bids for those contracts.

24. The vendors' representative did not co-operate in any investigation conducted by the PTF.

25. There was no evidence that the PTF exerted any undue pressure on either applicant. They were given a full opportunity to put forward their respective arguments and contentions.

26. It is being submitted that the events in question related solely to private matters and that it was a breach of the applicants' human rights and right to privacy for those private matters to have been used in the course of disciplinary proceedings. It was argued that such private conduct did not affect the applicants' status as international civil servants and did not affect their independence and impartiality in the course of their duties. It should be observed that in spite of the detailed

investigation, there was no finding that impugned the independence and impartiality of the applicants. However, there does remain the question that whatever may have been in their minds, did they put themselves in a position whereby they were engaged in activity that was incompatible with their duties in the Procurement Division? Did they in fact engage in activity that could have had an adverse impact upon their status and the public perception of themselves as international civil servants engaged in procurement duties? What was the degree of risk that their activities could have given the wrong impression to others by their socializing with the representative of vendor companies? Could they possibly have put at risk the integrity of the UN Procurement Division and the standing of the UN itself?

27. Whatever may be the shortcomings of the PTF investigation there was sufficient material before the PTF in the form of corroboration through the individual versions of each applicant to provide the Secretary-General with the basis for accepting the PTF report to commence disciplinary action against them.

Failure to report

28. It was common ground that neither applicant had reported the incident to senior managers. In this connection a distinction is to be drawn between the applicants. Applicant 2 was Applicant 1's line manager. His evidence was that on the day following the events in question he made it known to Applicant 1, in no uncertain terms, that such conduct was inappropriate and was not to be repeated. He considered that it was a one-off incident on both their parts and he did not consider it appropriate to take the matter further since he had rebuked Applicant 1. He considered that he was guilty of a temporary lapse from his otherwise high standards. He conceded that he was guilty of an error of judgment and nothing else. Applicant 1 on the other hand duly accepted the rebuke and took the view that since his supervisor was present and was aware of the incident, there was no need for him to say anything further. The matter was not reported formally.

29. On the question of disclosure to a higher authority it should be noted that the senior Procurement Officer was at that time the recipient of gifts and favours and other benefits from the representative of the two UN vendors and for which he was subsequently convicted. Neither applicant was aware, at the time, of the senior Procurement Officer's improper dealings with the vendors' representative.

Cooperation with the PTF investigation

30. This issue has to be seen in two parts. First, the extent to which the applicants cooperated or, alternatively, withheld cooperation, in the PTF investigation into the events following the vendors' representative's disclosure at the criminal trial. The second area to explore is the PTF investigation prior to this stage when in response to an internal audit report they were established to look into various practices and procedures within the Procurement Division.

31. I find that in relation to the investigation following disclosure in the criminal trial the applicants admitted that the incident in question took place, albeit they played down their particular role. However, they conceded in substantial measure that they had accepted the hospitality offered and that it was excessive in that it was outside the range of what was permissible, even during that period prior to the adoption of the policy of zero-tolerance.

32. However, when they were questioned, separately, in the course of the internal investigation *prior* to the disclosure by the vendors' representative, neither applicant disclosed the fact that they had received hospitality from him. They had sufficient opportunity to do so.

33. Did the vendors' representative obtain any benefit? It is correct that in the course of the criminal trial it was clear that the vendors' representative's motive in providing hospitality to the applicants was to obtain benefits and advantages for the companies that he represented. The respondent's case relies heavily on the fact that the vendors' representative's testimony was given under oath in the trial and that he

was subjected to cross-examination and that his testimony was accepted by the jury. In my view, this places far too much weight on the evidence given by an individual whose character was called into question in the criminal trial. There is no evidence that I have seen that he was subjected to rigorous cross-examination on matters that affect the applicants. Had the PTF relied solely on the vendors' representative's evidence without any corroboration I would have been disinclined to accept it as a valid basis to found a charge of misconduct? However, the vendors' representative's account is broadly similar to that given by the applicants. Whilst there is no evidence that the vendors' representative in fact obtained the advantage or benefit that he was obviously seeking, the question for consideration is whether the applicants, by their participation, had placed themselves in a position of potential or actual conflict of interest. Further, it would have been abundantly clear to both applicants that prior to the vendors' representative's testimony there were serious concerns about the way in which the Procurement Division operated, and particularly the apparently close relationship between the senior Procurement Officer and the vendors' representative. It would have been clear that the vendors' representative's and the senior Procurement Officer spent more time in the office together, behind closed doors, than was the normal practice in the case of contractors visiting the Procurement Division's offices in order to consult the staff members concerned and to obtain guidance on procedures. The line of questions put to them in the course of the PTF investigation should have made it abundantly clear that disclosure of their evening's entertainment may well have been relevant to an examination of the vendors' representative's activities. It is fair to say that at the time neither applicant was aware of the extent to which the vendors' representative had succeeded in his efforts at obtaining favours from the senior procurement officer. However, as experienced and mature staff members, they would have been aware, from the investigations that were going on at the time, that there were serious concerns about the activity of the vendors' representative and what appeared to be his unsavoury activities. They had a duty at the time to make the PTF aware of the events in question so as to enable the PTF to obtain further information regarding the vendors' representative's activities. This

failure to disclose the fact of the night out with the vendors' representative has not been satisfactorily explained. It would have been relevant and, possibly helpful to the PTF had they done so at the time. Such information would have assisted the PTF in its enquiries into the department as a whole. Any attempt on the part of the applicants to justify their behaviour on the basis that they thought that the evening's entertainment was a private matter or that it was irrelevant to the internal investigation is difficult to accept.

Procedural irregularity?

34. There was no evidence of procedural irregularity on the part of the PTF in the course of the investigation. The question whether the Secretary-General was in any way unduly influenced by the media coverage from the court case and the allegations of corruption in the Procurement Division are a matter to be dealt with in paragraph 40 below. It would have been clear to both applicants that they had a duty to reveal to the PTF investigators what they knew about the vendors' representative's conduct. They would have been aware of the fact that companies which the vendors' representative represented were at the centre of allegations of corruption and that as experienced staff members they had a duty to provide as much information as possible to assist the investigation. They may have felt that they had a duty to protect themselves against self-incrimination. At the time they would have had no idea that a criminal trial would result and during which the vendors' representative would be providing damaging evidence that would by inference be implicating them.

Assessment

35. The relevant facts established in the course of the PTF investigation, dated 20 June 2007 were corroborated in large measure by both applicants, albeit with slight nuances on the evidence.

36. The Secretary-General was entitled to conclude that misconduct had occurred in clear breach of the relevant staff rules and regulations and guidelines which are

part of the policy issued by the Procurement Division. The relevant part B of the “Guidelines on Acceptance of Gifts and Hospitality by the Procurement Division Staff” (rev.1) of 18 January 2001 is the following:

It is an overriding importance that staff members acting in an official procurement capacity should not be placed in a position where their actions may constitute or could be reasonably perceived as to show favourable treatment to an individual or entity by accepting offers of gifts and hospitality or other similar considerations. The staff member should have regard not simply as to whether they feel themselves to have been influenced, but to the impression that their actions will create on others.

37. This leads to the next question as to whether the conduct which they had admitted to could reasonably have indicated or incurred the risk of so indicating, that favourable treatment was or would or might be conferred on the representative and the group of companies he represented. Could such an impression be created in the minds of reasonable persons observing the events of the evening?

38. The answer to this question must be in the affirmative, given the importance that must be attached to the requirement of independence and impartiality of the staff engaged in Procurement Division. As part of the guidelines staff members are advised that the test to be used would be to ask themselves if they would feel comfortable about discussing the matter with their supervisor or colleagues. The answer in this case is obviously in the negative because neither applicant felt comfortable disclosing this matter to any other person.

39. In the applicants’ favour is the fact that no evidence was uncovered that they allowed their objectivity to be impugned in any way as a result of having received hospitality from the vendors’ representative. However, it would have been inappropriate if the Secretary-General were to have taken the view that so long as there was no evidence of the applicants’ impartiality actually being compromised they would not have committed misconduct or serious misconduct. Any such construction ignores the importance that must properly be attached to ensuring public confidence in the integrity of the UN Procurement Division.

The views of Member States

40. It must be accepted that Member States have a legitimate interest in drawing their concerns to the attention of the Secretary-General. This is so in relation to any matter but particularly where the use of public funds is involved and where serious allegations are made in the course of a criminal trial which are subsequently reported in the national and international press. Should the Secretary-General allow such concerns and, arguably, pressure, to influence him to bypass and to disregard norms of fairness and justice, as enshrined in the Charter, Bulletins, Regulations and Rules to mete out unduly harsh and disproportionate punishment to a staff member? In my opinion, regardless of the degree of concern by a Member State or States, staff members are still entitled to have their human rights respected. They are entitled to have the benefit of a fair and impartial investigation, to a fair and unbiased consideration of the evidence and an assessment of their behaviour and a finding that is consistent with the evidence obtained. In evaluating these considerations it is not inappropriate for the Secretary-General to factor into the equation the views and concerns of Member States. However, his decision must stand alone on its merits. It must be fair, impartial and in keeping with international norms of justice and fairness.

Conclusion

41. To return to the issues identified at the case management conference (see paragraph 8) and the applicable legal principles (see paragraph 20) the Tribunal concludes that:

- a. The applicants were properly subjected to a disciplinary hearing.
- b. The disciplinary procedures operated fairly.
- c. The applicants disclosed their part in the events in question at a time when they had no option but to do so. They did not volunteer the fact of their receipt of hospitality from the vendors' representative when

they had the opportunity to do so during the course of the PTF investigation.

- d. Neither applicant reported the fact that they had received lavish hospitality from a UN vendor.
- e. There was no finding that the applicants had conferred any favours or privileges on the representative's group of companies.
- f. Whatever criticisms the applicants have or may have had about the shortcomings of the PTF investigation they admitted in substantial part the facts on which the disciplinary charges were based.
- g. In accepting hospitality from the vendors' representative they put at risk the reputation and standing of the UN Procurement Division.
- h. There was widespread adverse media reporting of the allegations made by the vendors' representative and this attracted legitimate expressions of concern and criticism on the part of Member States.
- i. There was sufficient material before the Secretary-General, after a fair and impartial investigation, and having regard to the applicants' long service record, to reach a finding of serious misconduct.
- j. The applicants were given a full opportunity to put forward arguments, comments, submissions and mitigation before a decision was taken as to the appropriate sanction.
- k. The Secretary-General has a duty and responsibility to require of staff members and officials the highest standards of conduct so that they do not in any way place themselves in a position where they could put at risk the reputation and standing of the United Nations.

42. For all these reasons there was sufficient evidence that both applicants had committed misconduct and further that the misconduct was serious. In all the circumstances it cannot be said that the sanction of summary dismissal was unfair or disproportionate to the seriousness of the offences.

Judgment

43. The applications are dismissed.

(Signed)

Judge Goolam Meeran

Dated this 25th day of February 2010

Entered in the Register on this 25th day of February 2010

(Signed)

Hafida Lahiouel, Registrar, New York