



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/062
Judgment No.: UNDT/2010/122
Date: 12 July 2010
Original: English

Before: Judge Thomas Laker
Registry: Geneva
Registrar: Víctor Rodríguez

ZEREZGHI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Marcus Joyce, OSLA

Counsel for respondent:
Josianne Muc, ALS/OHRM, UN Secretariat
Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. On 19 January 2010, the applicant, a former staff member of the United Nations Interim Administration Mission in Kosovo (UNMIK), filed an application with the United Nations Dispute Tribunal (UNDT) to appeal the decision dated 21 October 2009 to impose on him the disciplinary measure of dismissal pursuant to provisional staff rule 10.2 (a) (ix).

Facts

2. On 12 June 2000, the applicant entered the service of UNMIK in Pristina, Kosovo, as an Administrative Assistant (Travel) at the FS-4 level, under an appointment of limited duration (300 series of the former Staff Rules). Effective 1 April 2004, his appointment was converted to fixed-term under the 100 series of the former Staff Rules and effective 1 September 2004, he was reappointed at the FS-5 level as Travel Assistant. From 1 September 2004 to 30 April 2008, the applicant performed the functions of Officer-in-Charge of the UNMIK Travel and Visa Unit. Effective 1 May 2008, further to the reclassification of his post, he was appointed as Travel Officer/Chief of the Travel and Visa Unit and promoted to the FS-6 level. The applicant's last fixed-term appointment covered the period from 1 July 2009 to 30 June 2010.

3. From January 2003, UNMIK had contracted a local company, MCM Travel Group (MCM), to provide official air travel services to UNMIK and its staff.

4. By email dated 5 March 2007, an UNMIK Procurement Assistant informed the applicant and his direct supervisor, the Chief of General Services, that MCM contract was due to expire on 31 March 2007 and asked whether the contract should be extended.

5. By email dated 6 March 2007, the applicant responded as follows: "Please extend [MCM contract] for one year based on the satisfactory performance of MCM. I would like to also remind you that [the Chief, GSS] has retired and is no longer here."

6. In April 2007, the Conduct and Discipline Unit (CDU), UNMIK, received an anonymous complaint alleging that “an international staff member in charge of the Travel Unit ... benefit[ed] from free airline tickets for personal trips for himself and his family from MCM and British Airways”.

7. On 12 June 2007, the Investigations Division of the Office of Internal Oversight Services (ID/OIOS) received a report from an UNMIK staff member, alleging that MCM had provided the applicant free airline tickets to fly on Austrian Airlines and free upgrades to business class with British Airways.

8. Between June 2007 and March 2008, ID/OIOS conducted interviews and gathered documentation in connection with the allegations made against the applicant.

9. On 31 March 2008, the applicant was interviewed by two ID/OIOS Investigators.

10. After the applicant’s interview, ID/OIOS conducted additional enquiries.

11. By email dated 3 June 2008, ID/OIOS informed the applicant that it was “in the process of completing its investigation report concerning the fact that [he had] received free tickets from Austria[n] Airlines and that whilst on uncertified sick leave [he had] left the mission to reach Vienna ... for private errands”. ID/OIOS gave the applicant until 10 June 2008 “to comment or respond to the draft investigation report, and to offer any information or evidence [he] deem[ed] appropriate and relevant”.

12. By email dated 6 June 2008, the applicant made the following comments:

“As discussed earlier although you have shown me the agent coupon with the paid taxes, it [is] still not a proof that I have not paid to the Travel agency. Like I had mentioned to you maybe they have sold me a ticket that they are provided for free, I can not confirm that. So the assumption just because you have those copies that I did not pay is false. Having said this I also told you that since it is personal travel I did not know that if I negotiated cheaper prices that I was responsible to report it to the UN. Since this is the first mission, I did not know that if the airlines for example invites us for Dinner to show us their products etc, I have to report this. The fact remains that I have no influence on the MCM contract, since this is done through procurement office and then goes to the LCC, I believe. I was not involved in that process, except to

provide destination list etc. I did do an evaluation list which I have attached for your ease of reference.

In terms of leaving the mission area on the 09 I have fully approved [Movement of Personnel form]...”

13. By email dated 1 July 2008, ID/OIOS again informed the applicant that it was “in the process of completing its investigation report concerning the report of free tickets from Austria[n] Airlines ... and that whilst on uncertified sick leave [he had] left the mission to reach Vienna ... for private errands”. ID/OIOS gave the applicant until 8 July 2008 “to comment or respond to the draft investigation report, and to offer any information or evidence [he] deem[ed] appropriate and relevant”. There is no record on file as to whether the applicant responded to that email.

14. On 26 September 2008, the Acting Director, ID/OIOS, transmitted to the Under-Secretary-General for Field Support (USG/DFS) the investigation report on the allegations made against the applicant. Based on the evidence gathered in the course of the investigation, ID/OIOS stated that it could not substantiate the allegation that the applicant had received free upgrades to business class with British Airways. It concluded, however, that he had received at least three free Austrian Airlines tickets from MCM in 2005 and 2006, as follows:

Austrian Airlines free tickets		
Destination	Travel dates	Ticket No. & price paid
Vienna	Monday, 26 September 2005 – Sunday, 9 October 2005	257 4408293231 Tax EUR 152
Vienna	Tuesday, 25 April 2006 – Sunday, 21 May 2006	257 4408387977 Tax EUR 174
Vienna	Saturday, 21 October 2006* – Tuesday, 24 October 2006*	257 4408335611 Tax EUR 77

* The Tribunal notes that the travel dates for ticket number 257 4408335611 as indicated in the ID/OIOS investigation report and in the respondent’s reply are erroneous. According to the information provided by Austrian Airlines (see annex III to the respondent’s reply), this travel took place in 2005, not 2006, more specifically from Friday, 21 October 2005 to Monday, 24 October 2005. This

error, however, did not affect the applicant's rights and has no impact on the conclusions of the Tribunal.

ID/OIOS also concluded that the applicant had at least on three occasions, in 2006 and 2007, left the mission area without proper authorization, i.e. without completing a Movement of Personnel form (MOP) and without recording his absence in his attendance records, as follows:

Unauthorized absences from the mission area Travel dates
14 April 2006 – 17 April 2006
20 October 2006 – 23 October 2006
15 February 2007 – 16 February 2007

ID/OIOS further concluded that the applicant's conduct failed to meet the standards required of a UN staff member as per staff regulation 1.2 (b) applicable at the time and was in contravention of former staff regulations 1.2 (g) and 1.2 (l).

15. By memorandum dated 5 November 2008, the USG/DFS referred the case of the applicant to the Assistant Secretary-General for Human Resources (ASG/OHRM) for appropriate action.

16. On 6 March 2009, based on the ID/OIOS investigation report, OHRM charged the applicant with:

- a. "Travelling on three trips out of UNMIK mission area on Austrian Airlines in September 2005, April/May 2006 and October 2006 [in fact October 2005, as explained above] on tickets which originated from MCM in respect of which the airlines' records indicated that [he] paid only the taxes associated with each such ticket and, despite receiving what was, or appear[ed] to be, this benefit or favour from MCM, nevertheless assessing MCM's performance under its contract [with UNMIK] in March 2007 which resulted in a one-year extension of that contract"; and,
- b. "Being absent from the mission area of UNMIK in April 2006, October 2006 and February 2007 without filing a duly completed

MOP or ensuring that [his] attendance records correctly reflected [his] absences from the mission area.”

OHRM further informed the applicant that, if established, his behaviour would constitute a violation of the standards of conduct expected of UN staff members, and specifically of staff regulation 1.2 (b) (integrity), (g) (obligation not to use official functions for private gain), as well as staff regulation 1.2 (l) and staff rule 101.2 (k) (acceptance of honour, decoration, favour, gift or remuneration). OHRM gave the applicant two weeks to respond to the charges and informed him of his right to seek the assistance of counsel in his defence.

17. On 30 April 2009, the applicant responded to the charges of misconduct. As regards the first charge, he denied receiving free Austrian Airlines tickets from MCM. He explained that it was a common practice for travel agencies to have free tickets made available to them and in his case, it was “highly probable that the [travel] agent him/herself, perhaps not caring to travel personally ... did not want the ticket(s) to simply expire and so, to make money, s/he just sold it to [him] in an ‘across the counter’, unrecorded transaction”. He added that he only did his duty when he recommended the extension of MCM contract based on satisfactory performance. As regards the second charge, he admitted to it but explained that he had had to leave the mission area on short notice due to “exigent family reasons”.

18. By letter dated 21 October 2009, handed to the applicant on 29 October 2009, the ASG/OHRM conveyed the decision to dismiss the applicant from service, taken by the USG for Management on behalf of the Secretary-General as a disciplinary measure.

19. On 19 January 2010, the applicant filed an application with the UNDT to appeal the decision to dismiss him from service.

20. On 10 February 2010, the Tribunal requested the respondent to submit its response to the application by 15 March 2010. On 16 February 2010, the Tribunal further requested the respondent to submit a copy of the ID/OIOS investigation file.

21. On 15 March 2010, the respondent submitted its reply.

22. On 12 April 2010, the applicant submitted observations to the respondent's reply.

23. On 27 April 2010, the Tribunal held an oral hearing. The applicant and his counsel attended in person, whereas counsel for the respondent participated by video-conference. In preparation for the hearing, the Judge had requested the parties to focus on the following issues:

- a. Whether there is evidence that the applicant did not pay for three tickets issued to him by MCM;
- b. If so, whether the sanction was proportionate to the act of misconduct;
- c. Whether the applicant's failure to report absences from the mission area amounted to misconduct;
- d. Whether the investigation and disciplinary processes were tainted by procedural irregularities.

24. By order No. 53 (GVA/2010) dated 3 May 2010, the Tribunal instructed the respondent to obtain MCM records of all Austrian Airlines tickets issued to the applicant, and of all related payments made by the applicant, between July 2005 and June 2006. The order was motivated *inter alia* by the point raised by counsel for the applicant at the hearing that OIOS had failed to pursue a potentially exculpatory lead in the course of its investigation by not requesting MCM, which was then a UN contractor, to produce the receipts of the three tickets in question.

25. On 25 May 2010, counsel for the respondent produced, in response to the Tribunal's order, a "memo to the case file" provided by ID/OIOS. The memo summarized the efforts made by ID/OIOS in February 2008 to obtain information regarding tickets issued to the applicant and stressed that at the time, the manager of MCM had claimed that his office only kept such information for six months and thus could not provide information regarding tickets issued in 2005 and 2006. OIOS nevertheless contacted MCM again further to the Tribunal's order, but failed to obtain any response. It was noted that MCM no longer had a contract

with UNMIK and therefore did not have any legal obligation to cooperate with OIOS.

26. On 9 June 2010, the applicant submitted comments on the above-mentioned “memo to the case file”.

Parties’ contentions

27. The applicant’s principal contentions are:

- a. The first charge is unsubstantiated. There is no evidence that the applicant did not pay for the three tickets issued to him, allegedly free of charge, by MCM. On the contrary, the MCM manager testified that he never issued free tickets to the applicant. The fact that the tickets show as free of charge with only taxes paid on the airline’s records does not prove in any way that he was not charged by MCM for these tickets; it merely demonstrates that free tickets were issued by the airline to MCM. The applicant paid the tickets in cash;
- b. The first charge is illogical. The applicant did not extend MCM contract and did not have the authority to do so, but merely made a recommendation to that effect, which could have been rejected; in other words, he was not the decision-maker. Therefore, MCM could not have sought any benefit from the applicant since the applicant could not deliver any gain to MCM. It follows that MCM had no reason to provide the applicant with free tickets to secure their already existing contract. In recommending the extension of MCM contract, the applicant was simply performing one of his job functions. Furthermore, it is standard practice to recommend such an extension if the company’s satisfactory performance has not been put in question;
- c. Since the first charge against the applicant is not supported by evidence, the disciplinary measure imposed on him is unlawful;

- d. As regards the second charge, i.e. leaving the mission area on three occasions without submitting an MOP form, the applicant has provided proof of exigent circumstances relating to these three trips, such as his wife's illness or the need to urgently meet a bank-imposed deadline. Additionally, these trips were undertaken on a week-end and not during working days;
 - e. Moreover, the second charge relates to facts that do not qualify as misconduct;
 - f. Procedural irregularities tainted the investigative and disciplinary proceedings, namely: (a) Failure to give the applicant the opportunity to be interviewed by the CDU, yet references to a CDU report were inappropriately made in the ID/OIOS investigation report; (b) The applicant was never afforded an opportunity to review or comment on the CDU investigation report; (c) OIOS did not share with the applicant his own interview record; (d) OIOS did not share with the applicant the interview records of other material witnesses, depriving him of his right of cross-examination; (e) the applicant was not given the opportunity to have counsel or a neutral third-party present during his interview with OIOS;
 - g. Provisional staff rule 10.3 (b) provides that: "Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct." Even if the charges against the applicant had been proven, which they were not, imposing the most serious disciplinary measure was excessively harsh and not indicative of measures imposed by the Secretary-General for similar charges.
28. The applicant requests:
- a. His reinstatement effective 1 November 2009;
 - b. Compensation for harm to his career and reputation;

- c. That his personnel file be cleared of any adverse material relating to this matter.
29. The respondent's principal contentions are:
- a. Under the consistent jurisprudence of the former United Nations Administrative Tribunal (UNAT), once a *prima facie* case of misconduct is established, the staff member must provide satisfactory proof to justify the conduct in question. The Administration's burden of proof is not that employed in a criminal proceeding, where a prosecutor must prove the guilt of an accused beyond a reasonable doubt. Rather, the Administration must present evidence that raises a reasonable inference that a violation of the law has occurred. The UNDT held similar principles in UNDT/2010/024, *Diakite*, and UNDT/2010/041, *Liyanarachchige*;
 - b. The facts establish a *prima facie* case against the applicant and there is credible and sufficient evidence to support the allegation that he received three free tickets from MCM, i.e. documentary evidence provided by Austrian Airlines and testimony from various sources that the applicant received these tickets for payment of only the taxes. Furthermore, the applicant failed to provide evidence that he had paid the full fare for the tickets;
 - c. The applicant's positive assessment of MCM performance was taken into account in the decision to extend its contract and consequently, he was in a position to provide gain to MCM. Given his role in the extension of MCM contract, the applicant had all the more reason for not accepting free tickets from MCM. By so doing, he put himself in a situation of the appearance of a conflict between his private interests and those of UNMIK;
 - d. As regards the admitted unauthorized absences from the mission area, the explanations provided by the applicant do not excuse him from obtaining an approved MOP and/or ensuring that his attendance records correctly reflected his absences;

- e. As regards the alleged procedural irregularities, the applicant was given at all stages of the process the opportunity to tell his side of the story. His allegations on the CDU “report” are irrelevant since the applicant was not charged, and disciplinary proceedings were not undertaken, on the basis of that “report”. The applicant does not have a right to cross-examine witnesses in the course of an investigation. The applicant does not have a right to have counsel or a neutral third-party present during his interview with OIOS;
- f. The sanction was proportionate to the act of misconduct, in light of the circumstances of the case, UNAT jurisprudence and the Secretary-General’s practice.

Considerations

- 30. The issues for determination are the following:
 - a. Whether there is sufficient evidence that the applicant did not pay for three tickets issued to him by MCM;
 - b. Whether the applicant’s failure to report absences from the mission area amounted to misconduct;
 - c. Whether the investigation and disciplinary processes were tainted by procedural irregularities;
 - d. What are the appropriate remedies, if any.

Whether there is sufficient evidence that the applicant did not pay for three tickets issued to him by MCM

31. The MCM manager denied issuing free tickets to the applicant. The respondent considers this testimony to lack credibility because it was not in the interest of MCM, an UNMIK contractor, to admit to its wrongdoing, if any. The Tribunal finds this credibility assessment to be reasonable; the evidence shows indeed that MCM used free tickets for unauthorized purposes, either by giving them or selling them to the applicant. However, since OIOS had reasons to doubt the credibility of the MCM manager, it is difficult to understand why OIOS accepted at face value his contention that MCM only kept records for six months.

32. Article 9, "Cooperation with OIOS", of the contract between UNMIK and MCM stipulated that: "Having regard to commercial confidentiality, the Contractor shall cooperate with [OIOS] if, in the course of an investigation, it seeks information from the Contract[or] connected with this Contract." As an UNMIK contractor, MCM was under an obligation to provide OIOS access to its records, in which evidence could have been found as to whether the applicant had paid or not for the incriminated tickets. It is regrettable that more efforts were not done at the time to access such records and obtain such crucial evidence.

33. Having further reviewed the facts of the case and the evidence available, the Tribunal can only reach the conclusion that the evidence in support of the charge that the applicant did not pay for three tickets issued to him by MCM is insufficient.

34. First, while the documentary evidence provided by Austrian Airlines does show that the applicant travelled on three occasions with free tickets, for which only taxes were paid, it does not sufficiently establish that the applicant did not pay for these tickets to MCM. The Austrian Airlines records obtained by ID/OIOS reflect the position between MCM and the airline, not the transaction between the applicant and MCM.

35. Additionally, the applicant was first interviewed by OIOS and confronted with the allegations in March 2008, that is, two and a half years after the first two tickets were issued in 2005 (tickets ending 231 and 611) and 22 months after the third one was issued in 2006 (ticket ending 977). While it is true that the applicant gave a rather skimpy explanation to OIOS, it was not reasonable given the passage of time to expect the applicant to remember in detail the circumstances surrounding the purchase of these tickets, let alone to retrieve and provide evidence that he had paid the full fare for the tickets.

36. Finally, concerning the testimonies relied upon by the respondent, they mostly contain unsubstantiated hearsay and rumours that, in the circumstances of this case, lack probative value.

37. In view of the foregoing, the Tribunal concludes that the evidence adduced by the respondent in this case does not sufficiently support the charge that the

applicant did not pay for three tickets issued to him by MCM. Accordingly, the applicant should be given the benefit of the doubt in respect of this charge.

Whether the applicant's failure to report absences from the mission area amounted to misconduct

38. About the second charge, i.e. leaving the mission area on three occasions without authorization, the facts are not disputed by the parties. What is at stake is whether or not these facts qualify as misconduct, and if so, what the appropriate sanction would be.

39. The respondent's submissions are limited on this account. The respondent merely submitted that the applicant was absent from the mission area in April 2006, October 2006 and February 2007 without obtaining an MOP authorization and/or ensuring that his attendance records correctly reflected his absences from the mission area.

40. The Tribunal will not question the respondent's determination that the applicant's actions in this respect amounted to misconduct warranting the imposition of a sanction. However, in the specific circumstances of the case, the Tribunal considers a dismissal to be disproportionate to the offence.

41. It is clear from the records that the applicant failed, on three occasions, to comply with his obligation to obtain an MOP authorization before leaving the mission area.

42. It is not so clear, however, to what extent he also failed to ensure that his attendance records correctly reflected his absences. Neither OIOS in its investigation report, nor the respondent in its submissions, mentioned that two of the three unauthorized absences were over an extended week-end and that out of the ten calendar days concerned, four were over the week-end and two were bank holidays. There remain four working days, but for three of them, namely Friday, 14 April 2006, Friday, 20 October 2006 and Thursday, 15 February 2007, it is unclear whether the applicant was absent the whole day or part of the day or whether he only left at the end of the working day, as the applicant's car log records and mobile phone records obtained by OIOS would seem to indicate. Thus, there remains one working day only, yet one working day too many, i.e.

Friday, 16 February 2007, for which there is no doubt that the applicant failed to ensure that his attendance records reflected his absence on that day.

Unauthorized absences from the mission area Travel dates
Friday, 14 April 2006 – Monday, 17 April 2006 <i>(17 April was a holiday)</i>
Friday, 20 October 2006 – Monday, 23 October 2006 <i>(23 October was a holiday)</i>
Thursday, 15 February 2007 – Friday, 16 February 2007

43. Furthermore, the family circumstances mentioned by the applicant in his defence, while not excusing him, do constitute extenuating circumstances in the Tribunal's opinion.

44. In its judgment 2010-UNAT-022, *Abu Hamda v. UNRWA*, the UN Appeals Tribunal found that the disciplinary measure imposed by the Administration was disproportionate to the offence and, rather than remanding the case, substituted it with a less severe measure. The Tribunal notes that the provisions of its statute in this respect are identical to those of the Appeals Tribunal.

45. In view of the foregoing, the Tribunal considers that a written censure would be an appropriate measure for the applicant's unauthorized absences from the mission area.

Whether the investigation and disciplinary processes were tainted by procedural irregularities

46. The applicant further claims that procedural irregularities tainted the investigation and disciplinary proceedings. The Tribunal finds, to the contrary, that the applicant's due process rights were respected throughout the proceedings.

47. Under the former Staff Rules and ST/AI/371, it was only when a staff member was charged with misconduct that he or she became entitled to specifically enumerated due process rights, i.e. the right to be informed in writing of the charges, the right to receive a copy of the documentary evidence and the right to seek the assistance of counsel in his or her defence. No such rights existed during the investigation. However, OIOS did give the applicant a fair and reasonable opportunity to put forward his version of the facts and to present

evidence or witnesses, prior to the issuance of its investigation report. Therefore, the applicant's claims that his rights were breached because OIOS did not share with him his own interview records and the interview records of other material witnesses, and did not give him the opportunity to have counsel or a neutral third-party present during his interview with OIOS are unfounded.

48. As regards the applicant's contentions that he should have been interviewed by the CDU and given an opportunity to review or comment on the CDU "investigation report", the Tribunal rejects them as without merits since the CDU enquiries did not lead to any findings of misconduct against the applicant.

Remedies

49. Article 10.5 of the statute of the Tribunal outlines the remedies which the Tribunal may order, i.e. rescission of the contested decision, specific performance and compensation. While article 10.5 does not stipulate how compensation may be calculated, subparagraph (b) stipulates that compensation should not, but in exceptional cases, exceed the equivalent of two years' net base salary of the applicant, and article 10.7 prohibits the award of exemplary and punitive damages.

50. As previously indicated, the Tribunal concluded that the evidence in this case does not sufficiently support the charge that the applicant did not pay for three tickets issued to him by MCM. As regards the applicant's unauthorized absences from the mission area, the Tribunal concluded that a sanction of dismissal was disproportionate to the established offence and that a written censure would be an appropriate measure. Accordingly, the Tribunal orders the respondent to rescind the applicant's dismissal, to reinstate him in service with retroactive effect and to issue him a written censure to be placed in his personnel file.

51. Since the applicant's dismissal is a termination within the meaning of article 10.5 (a), the Tribunal must, pursuant to that article, set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the applicant's dismissal. The Tribunal considers an appropriate compensation to be the amount of salary the applicant would have received until

the expiration of his last fixed-term appointment had he not been dismissed, i.e. eight months' net base salary.

52. Irrespective of whether the respondent elects to reinstate the applicant or to pay him the above amount as an alternative, the applicant also deserves compensation under article 10.5 (b) of the UNDT statute for the moral damage the wrongful decision has caused him. In view of the stigma of being imposed the most severe disciplinary measure and the resulting difficulties in finding further employment, the Tribunal sets the appropriate amount at USD 60,000.00, which corresponds approximately to 12 months of the applicant's net base salary.

53. The applicant also requested that his personnel file be cleared of any adverse material relating to this matter. The Tribunal orders that all material relating to the applicant's dismissal be removed from his official status file, with the exception of this judgment and any subsequent action taken by the Administration to implement it.

Conclusion

54. In view of the foregoing, the Tribunal DECIDES:

- 1) The applicant's dismissal is rescinded and the respondent is ordered to reinstate him in service with retroactive effect and to issue him a written censure to be placed in his personnel file;
- 2) As an alternative to the rescission of the contested decision and specific performance, the respondent may elect to pay to the applicant eight months of his net base salary at the time of his separation. This amount is to be paid within 60 days from the date of issuance of this judgment, with interest thereafter at eight percent per annum until payment;
- 3) The respondent is to pay to the applicant USD 60,000.00 as compensation for moral injury. This amount is to be paid within 60 days from the date of issuance of this judgment, with interest thereafter at eight percent per annum until payment;

4) The Tribunal orders that all material relating to the applicant's dismissal be removed from his official status file, with the exception of this judgment and any subsequent action taken by the Administration to implement it.

(Signed)

Judge Thomas Laker

Dated this 12th day of July 2010

Entered in the Register on this 12th day of July 2010

(Signed)

Víctor Rodríguez, Registrar, UNDT, Geneva