



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/058

Judgment No.: UNDT/2012/193

Date: 6 December 2012

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

GAMBARI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Esther Shamash, OSLA

Counsel for the Respondent:

Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant joined the United Nations in June 1999 as a Personal Assistant at the United Nations Mission in Bosnia and Herzegovina (UNMIBH) and held that position until June 2003. Following a short break in service, she was recruited as a Facilities Management Assistant at the United Nations Mission in Liberia (UNMIL). She thereafter moved to the United Nations Operation in Cote d'Ivoire (UNOCI) on 1 September 2004 and still encumbers that post at the FS-4 level.

2. On 7 August 2007 the Applicant was charged with having made threats against another staff member and having improperly used United Nations information and communication technology resources for this purpose.

3. She responded to the charges on 17 September 2007.

4. The case was referred to a Joint Disciplinary Committee (JDC) on 30 November 2007. The JDC concluded that the evidence on the record was not sufficient to support the charges of misconduct against the Applicant.

5. On 8 March 2010, the Applicant was informed that the charges against her had been dismissed.

6. On 16 June 2010, the Applicant filed an Application with the Tribunal in which she challenged the decision on the part of the Administration to bring charges against her based on unsubstantiated evidence claiming that as a result, both substantive and procedural irregularities were committed in charging her with misconduct.

7. The Applicant claimed also that her career advancement was impeded in that in March 2007, following a competitive recruitment process, she was selected for a Facilities Management post at the FS5 level but the approval for her appointment to the said post was deferred pending the conclusion of the disciplinary proceedings against her.

8. The Respondent's Reply was filed on 12 July 2010. The Tribunal heard the case on 20 September 2011. At the conclusion of the hearing, the parties agreed at the suggestion of the Tribunal, to look into the possibility of pursuing this matter further through mediation and to report back to the Tribunal by 4 November 2011. The matter was then referred for mediation but mediation attempts were unsuccessful.

Facts

9. On 28 December 2005, an envelope containing a letter threatening the life of an UNMIL staff member was received at the Office of the Under-Secretary-General for Internal Oversight (OIOS) in New York. The said envelope also contained a poster showing the said UNMIL staff member naked and the threat letter further alleged that the UNMIL staff member had been engaged in the sexual exploitation and trafficking of Liberian women. Copies of the same letter were sent to other officials at United Nations Headquarters (UNHQ) and similar correspondence was forwarded to officials at UNMIL Headquarters in February 2006.

10. The threat letter stated that if the staff member was not removed from the mission area by 7 January 2006, he would be killed and copies of the poster showing him naked placed on walls around Liberia and circulated to other United Nations (UN) agencies and missions in Africa, as well as to embassies and senior Liberian Government officials. The staff member referred to in the letter and shown in the poster was a Regional Administration Officer in UNMIL who will be referred to in this judgment as FC.

11. FC had told the OIOS that he suspected that the Applicant had written the letter and made the threats. An OIOS investigation was thereafter initiated to inquire into the origin of the letter and an Investigation Report was issued on 31 May 2007.

12. The OIOS Investigation Report found and concluded that:

- a. The Applicant was the author of the threatening letter and poster, copies of which were sent to various UN officials in December 2005 and February 2006.
- b. The Applicant delivered or caused to be delivered the envelopes containing the threat letter and poster to UN officials at New York Headquarters and at UNMIL Headquarters.
- c. The Applicant's assertion that she had assisted a person named "Chad" in writing the letter sent to the UN officials and that she believed that FC was sexually exploiting Liberian women was not credible.
- d. The Applicant was most probably motivated by a desire to have FC removed from the mission area and thereby frustrate his relationship with another woman herein referred to as Ms. U.

13. Following the release of the OIOS investigation report, by a memorandum dated 21 June 2007, the then Director, Department of Field Support (DFS), Mr. Philip Cooper, referred the case to the Office of Human Resource Management (OHRM) for appropriate action.

14. In a memorandum dated 7 August 2007, Ms. Georgette Miller, then Director, Division for Organizational Development, Office for Human Resources Management (OHRM), charged the Applicant with having made threats against a staff member and having improperly used United Nations information and communication technology resources for this purpose.

15. On 17 September 2007, the Applicant responded to and denied all the charges. The case was referred thereafter to a Joint Disciplinary Committee (JDC) on 30 November 2007 for advice as to what disciplinary measures, if any, should be taken against the Applicant. The JDC concluded that the evidence on the record was not sufficient to support the charges of misconduct against the Applicant.

16. By letter dated 8 March 2010 from Ms. Catherine Pollard, Assistant Secretary-General, OHRM, Department of Management, the Applicant was informed that the charges against her had been dismissed.

Applicant's Case

17. The Applicant's case is summarized as follows:

18. It was an abuse of discretion on the part of the Administration to bring charges against her based on unsubstantiated evidence and as a result, both substantive and procedural irregularities were committed in charging her with misconduct.

19. The charges leveled against her were based on an investigation that was not thoroughly or properly carried out and as a consequence essential facts were not taken into account and erroneous conclusions were drawn from the available facts, specifically:

a. She had informed the Administration in her response to the charges that on the day and at the time the threat letter was delivered to the United Nations officials in New York, she had an appointment with her doctor in preparation for surgery scheduled for 17 January 2006;

b. On the day that the letter was delivered to UNMIL the Applicant was travelling from New York to Abidjan and there was no evidence in the OIOS Investigation Report that showed that the Applicant had delivered or caused to be delivered the threat letter to UNMIL;

c. She had an obligation under Section 3 (e) of ST/SGB/2003/13 (Special Measures for Protection from Sexual Exploitation and Sexual Abuse) to report concerns or suspicions regarding sexual exploitation or sexual abuse; and

d. If certain telephone calls she had made to FC's wife had been made for the purpose of threatening either FC or his wife, they would not likely have lasted as long as 35 and 54 minutes.

20. It is the Applicant's contention that had all the foregoing essential facts been taken into account and the totality of the circumstances been thoroughly investigated and reasonably and properly assessed, she would not have been charged with the acts of misconduct.

21. The Applicant submitted that it was for the head of office or the responsible officer to decide whether evidence revealed by the investigation appeared to indicate that the report of misconduct was well founded. The head of office or responsible officer is vested with a wide discretion at this initial stage. That discretion, however, is to be exercised judiciously in the light of what the investigation has revealed. The discretion cannot and should not be used capriciously. It is incumbent on the person vested with that discretion to scrutinize the evidence carefully before deciding whether any act of misconduct as defined has been committed. A judicious exercise of the discretion requires a proper analysis of the meaning of the words "appears to indicate that the report of misconduct is well founded in regard to the evidence" as contained in the relevant rules.

22. The reliance by the Administration on the findings of the procedurally defective OIOS investigation was not a proper exercise of discretion and denied the Applicant due process. As a result of the substantive and procedural irregularities committed by the Administration in relying upon the flawed findings and conclusions contained in the OIOS Investigation Report, the Applicant suffered material, professional and moral damage.

23. The Applicant's career advancement was impeded in that in March 2007 two Facilities Management posts were advertised and following a competitive recruitment process she was selected for one of the posts at the FS5 level (Vacancy Announcement No. 407978) following an interview held in March 2007. A recommendation for her recruitment, along with that of the person selected for the second post, was sent to New York. However, a short while later the Applicant was informed that her promotion would be deferred until the pending disciplinary proceedings against her had been concluded. Another

colleague who had been selected for the second post that had been advertised was promoted with effect from 1 July 2007.

24. The Applicant submitted that although she was not promoted, she had since then performed the functions of the post for which she was selected. Additionally, had she been promoted in 2007, she would have been eligible for two more promotions between 2007 and 2009 as well as had the opportunity to apply for other posts both at UNOCI and other missions. All the Applicant's colleagues who were at the grade level of FS3 of FS4 are now at the FS6 and P3 levels at various other missions.

25. The Applicant submitted that owing to the stigma caused by being perceived as having threatened the life of a fellow colleague and disseminating such threats to senior officials of the Organization, she was subjected to a great deal of anxiety and stress as well as professional humiliation during the long period of time between the date she was charged and the time of the resolution of the disciplinary case. She had to undergo medical treatment for depression arising from the protracted disciplinary process and the humiliation associated therewith. She consulted with doctors in Abidjan in 2008, twice in New York in June 2009 and again in Dubai in December 2009. In June 2009 she was prescribed medication for the treatment of her depression and in December she was informed by a physician in Dubai that the significant rise in her level of cholesterol was most likely attributable to stress.

26. In view of the foregoing, the Applicant requested the Tribunal to order:

- a. That she be compensated retroactively for the actual pecuniary loss caused by her not having been promoted even though she was selected for a higher level post in 2007 and for the loss of chance for two more promotions that she would have been eligible for since 2007 had she been promoted in the first instance in 2007.

b. That she be compensated for the moral and professional injury and damage to her reputation caused by the charges being negligently and wrongfully leveled against her for such a protracted period of time as well as the emotional distress and impact on her health.

The Respondents Case

27. The Respondent's case is summarized below.

28. On the basis of the facts in this case, the investigation by OIOS into this matter, including the role, if any, of the Applicant, arising out of a letter containing threats against a UN staff member received on 28 December 2005 at the Office of the Under-Secretary-General for OIOS in New York, was justified and was in accordance with ST/AI/371 (Revised Disciplinary Measures and Procedures).

29. The findings in the OIOS Investigation Report gave rise to a grounded suspicion, reasonable suspicion or probable cause that the alleged misconduct occurred. In making this submission the Respondent relied on the following findings:

a. The relationship between FC and the Applicant had deteriorated to a point that the Applicant had bitten FC on the back drawing blood and requiring medical attention.

b. The Applicant took pictures of FC while he was standing naked in the hotel room.

c. Two phone calls on 15 August 2008 were made to FC's wife in London using the personal identification number (PIN) assigned to the Applicant for telephone calls.

d. The Applicant was on leave in New York when the letters containing the threats against FC were hand delivered to senior officials at UN Headquarters in New York.

e. The Applicant admitted having knowledge of the threatening letter after evidence from a forensic examination of her UN computer was presented to her.

30. Pursuant to paragraphs 3, 5 and 6 of ST/AI/371, a decision was made by the Assistant Secretary-General, OHRM, to commence disciplinary proceeding against the Applicant after reviewing the findings against the Applicant contained in the OIOS Investigation Report.

31. In addition, pursuant to paragraph 6 of ST/AI/371, the Applicant was provided with supporting documentary evidence and informed of her right to respond, which she did on 17 September 2007.

32. After reviewing the Applicant's comments contained in her memorandum dated 17 September 2007, the Assistant Secretary-General referred the case to the JDC pursuant to paragraph 9(b) of ST/AI/371. The JDC dismissed the charges.

33. The decisions to investigate the matter, as well as the Applicant's involvement in it and to subsequently commence disciplinary proceedings against the Applicant, were in accordance with the rules of the Organization and with due process and did not violate her rights despite the fact that at the end of the disciplinary proceedings, a decision to drop the charges against her was made.

34. Whilst the Respondent understood that staff members subject to investigation and disciplinary proceedings experience uncertainty, the Respondent was nevertheless required to protect the interests of the Organization by carrying out any investigations considered appropriate and, when warranted, charge staff members with misconduct. The fact that the charges against the Applicant were dropped did not mean that the investigation or the disciplinary proceedings were mishandled or flawed or that they were carried out in a careless manner that amounted to an abuse of discretion, as contended by the Applicant.

35. The Respondent conceded that the Applicant had been selected for an FS5 post under Vacancy Announcement No. 407978. The Department of Field Support, as evidenced by Personnel Action No. 1845321, approved the

Applicant's movement to the higher level of FS-5, Step VII, as a Facility Management Assistant, effective 1 July 2007. The modification to the Applicant's appointment was made retroactive to 1 July 2007.

36. In response to the Applicant's contention that had she been promoted in 2007 she would have been eligible for two more promotions between 2007 and 2009 as well as had the opportunity to apply for other posts both at UNOCI and other missions, the Respondent submitted that promotion to a higher level was not automatic but was subject to a competitive selection process. The Respondent submitted that it was therefore not possible to conclude that had the Applicant been promoted to the FS-5 level in the middle of 2007, she would have been promoted a second and third time in the intervening period. Accordingly, the Respondent submitted also that there were no grounds for payment of compensation under that head of claim.

37. For the reasons set out above, the Respondent requested that the Application be dismissed.

Considerations

38. Having reviewed the entire case record, the Tribunal finds that the following issues arise for determination in this case:

- a. Were the decisions to investigate the matter, as well as the Applicant's involvement in it and to subsequently commence disciplinary proceedings against the Applicant, in accordance with the rules of the Organization?
- b. Did the investigation impede the Applicant's career advancement? If so, is she entitled to compensation in that regard?
- c. Is the Applicant entitled to any compensation for emotional distress and its impact and injury to her health?

Were the decisions to investigate the matter, as well as the Applicant's involvement in it and to subsequently commence disciplinary proceedings against the Applicant, in accordance with the rules of the Organization?

39. The Applicant contended that it was an abuse of discretion on the part of the Administration to bring charges against her based on unsubstantiated evidence and that as a result, both substantive and procedural irregularities were committed in charging her with misconduct. She further argued that the charges leveled against her were based on an investigation that was not thoroughly or properly carried out and as a consequence essential facts were not taken into account and erroneous conclusions were drawn from the facts.

40. The Respondent submitted that the investigation by OIOS into this matter, including the role, if any, of the Applicant, arising out of a letter containing threats against a UN staff member received on 28 December 2005 at the Office of the Under-Secretary-General for OIOS in New York, was justified and was in accordance with ST/AI/371. The Respondent further submitted that the findings in the OIOS Investigation Report gave rise to a grounded suspicion, reasonable suspicion or probable cause that the alleged misconduct occurred.

41. The procedure for initiating an investigation for the purposes of disciplinary proceedings is set out in ST/AI/371. Paragraph 2 of ST/AI/371 provides that where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake a preliminary investigation.

42. Paragraph 3 of ST/AI/371 provides that if the preliminary investigation appears to indicate that the report of misconduct is *well founded*, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General, Office of Human Resources Management.

43. Paragraph 9 (b) of ST/AI/371 provides that should the facts appear to indicate misconduct has occurred, the Assistant Secretary-General, Office of Human Resources Management, shall refer the matter to a JDC for advice.

44. In *Lutta* UNDT/2010/052, the Tribunal noted that the discretion granted to the head of office to determine whether the investigation appears to indicate that a report of misconduct is well founded should be exercised judiciously in the light of what the investigation has revealed. The discretion cannot and should not be used capriciously. It is incumbent on the person vested with that discretion to scrutinize the evidence carefully before deciding whether any act of misconduct as defined has been committed. A judicious exercise of the discretion requires a proper analysis of the meaning of the words *appears to indicate that the report of misconduct is well founded* in regard to the evidence.

45. The Tribunal further noted in that case that the words *well founded* can be assimilated to “grounded suspicion, reasonable suspicion” or “probable cause”. The decision of the head of office or the responsible officer is not the end of the matter. When the ASG/OHRM receives the report, it is for him/her to decide whether the matter should be pursued on the basis of the evidence presented. The ASG/OHRM is also vested with a discretion that should be exercised judiciously. He/she cannot be seen to be rubber stamping the decision of the head of office or responsible officer.

46. In reviewing the applicable law and examining the elements that would need to be satisfied in order to substantiate the decision to investigate the matter, as well as the Applicant’s involvement in it and to subsequently commence disciplinary proceedings against the Applicant, this Tribunal formulated three questions thus:

- a. Was there reason to believe that the Applicant had engaged in unsatisfactory conduct for which a disciplinary measure may be imposed?
- b. Did the preliminary investigation appear to indicate that the report of misconduct against the Applicant was well founded?
- c. Did the ASG/OHRM scrutinize the evidence carefully before deciding whether any act of misconduct as defined had been committed?

Was there a reason to believe that the Applicant had engaged in unsatisfactory conduct for which a disciplinary measure may be imposed?

47. The Tribunal has reviewed the parties' submissions on this score and the entire documentary record of this case to ascertain factors that led the Respondent to form a belief that the Applicant had engaged in unsatisfactory conduct for which a disciplinary measure could be imposed. The following facts were established:

- a. The relationship between FC and the Applicant had deteriorated to a point that the Applicant had on one occasion bitten FC on the back drawing blood and requiring medical attention.
- b. Two phone calls on 15 August 2008 were made to FC's wife in London using the personal identification number assigned to the Applicant.
- c. The Applicant was on leave in New York when the letters containing the threats against FC were hand delivered to senior officials in UN Headquarters in New York.
- d. The Applicant admitted to the investigators that she had knowledge of threatening material after evidence from a forensic examination of her UN computer was presented to her.

48. After reviewing the entire dossier, by a Memorandum dated 21 June 2007, the Head of office who was the then Director, Department of Field Support, Mr. Philip Cooper, referred the case to OHRM for appropriate action. Ms. Georgette Miller, Director, Division of Organizational Development, OHRM believing that the allegations were well-founded, charged the Applicant with acts of misconduct.

49. The Tribunal finds and holds that the Administration, having reviewed the OIOS report, had reason to believe that the Applicant may have engaged in unsatisfactory conduct for which disciplinary measures may be imposed.

Did the preliminary investigation appear to indicate that the report of misconduct against the Applicant was well founded?

50. In *Lutta* UNDT/2010/052, it was held that having reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. It is the view of the Tribunal that the same approach should be adopted in the exercise of the discretion given to the head of office and responsible officer in determining whether the report of misconduct is well founded following the investigation.

51. The Tribunal finds that the investigation report had established that the Applicant had been in communication with a person she referred to as “Chad” who according to her expressed an intention to threaten and harm FC. Also forensic examination of the Applicant’s computer and her own admission to investigators showed amply that she was privy to a threat letter which had been written by the said “Chad” against FC. The Tribunal accordingly holds that discretion was exercised judiciously by the responsible officers after review of the OIOS Investigation Report.

Did the ASG/OHRM scrutinize the evidence carefully before deciding whether any act of misconduct as defined had been committed?

52. The Applicant submitted that the reliance by the Administration upon the findings of the OIOS investigation was not a proper exercise of discretion and had denied her due process. The Applicant contended also that had the Respondent considered the essential facts taken into account by the JDC, she would not have been charged with the acts of misconduct she was charged with.

53. The Respondent on his part argued that a decision was made by the ASG/OHRM to commence disciplinary proceedings against the Applicant after reviewing the findings against the Applicant contained in the OIOS Investigation Report. This decision was conveyed to the Applicant in the charge letter.

54. After reviewing the Applicants comments contained in her memorandum dated 17 September 2007, the ASG/OHRM referred the case to the JDC pursuant

to paragraph 9(b) of ST/AI/371. The Tribunal is satisfied that the findings of the ASG/OHRM were those of an objective observer who had scrutinized the entire dossier and made conclusions on the basis of the evidence before him. There was no procedural irregularity on the part of the Organization as there was full compliance with ST/AI/371.

Did the investigation impede the Applicant's career advancement? If so, is she entitled to compensation in that regard?

55. The Applicant submitted that her career advancement was impeded in that in March 2007 two Facilities Management posts were advertised and following a competitive recruitment process she was selected for one of the posts at the FS5 level (Vacancy Announcement No. 407978) following an interview held in March 2007. A recommendation for her recruitment, along with that of the person selected for the second post, was sent to New York. However, a short while later the Applicant was informed that her promotion would be deferred until the pending disciplinary proceedings against her had been concluded. Another colleague who had been selected for the second post that had been advertised was promoted with effect from 1 July 2007.

56. The Applicant prayed the Tribunal to order in this respect that compensation be awarded her retroactively for the actual pecuniary loss caused by not having been promoted even though she was selected for a higher level post in 2007 and for the loss of chance for two more promotions that she would have been eligible for since 2007 had she been promoted in the first instance in 2007.

57. The Respondent conceded that the Applicant had been selected for an FS5 post under Vacancy Announcement No. 407978. The Department of Field Support, as evidenced by Personnel Action No. 1845321, approved the Applicant's movement to the higher level of FS-5, Step VII, as a Facility Management Assistant, effective 1 July 2007. The modification to the Applicant's appointment had been made retroactive to 1 July 2007.

58. The Respondent further submitted that promotion to a higher level is not automatic but is subject to a competitive selection process. It is, therefore, not

possible to conclude that had the Applicant been promoted to the FS-5 level in the middle of 2007, she would have been promoted a second and third time in the intervening period. Accordingly, the Respondent submitted that there are no grounds for payment of compensation under that head of claim.

59. On the issue of actual pecuniary loss suffered by the Applicant arising from a delay in effecting her promotion when it was due as a result of the on-going investigations and disciplinary proceedings against her, there is evidence that she was retroactively promoted when the case was closed by the Organization with all outstanding payments dating from 1 July 2007 duly made to her. This piece of evidence is not challenged by the Applicant.

60. The Tribunal finds and holds that since the appointment of the Applicant's colleague had been advertised with effect from 1 July 2007 and the Respondent retroactively effected the Applicant's promotion to 1 July 2007 and paid her accordingly, she had suffered no pecuniary loss and is therefore not entitled to compensation in this instance.

Is the Applicant entitled to compensation for moral and professional injury, damage to reputation and emotional distress and its impact and injury to her health?

61. The Applicant sought to be compensated for moral and professional injury and damage to her reputation caused by the charges being negligently and wrongfully leveled against her for such a protracted period of time as well as the emotional distress and impact on her health.

62. Where an Applicant alleges that the conduct of investigations and disciplinary proceedings have wrought damage to his or her reputation, the burden lies on him or her as it does on the plaintiff in defamation cases, to convince the Court or Tribunal that such is the situation. UN Rules require that investigations and disciplinary proceedings be carried out with a high degree of confidentiality. Where the staff member's reputation is injured because the responsible officials have breached the required confidentiality, compensation might be considered.

The Applicant in this case has not gone beyond merely making this assertion and this claim must fail.

63. With regards to her claim for emotional distress and its impact on her health as a result of the actions of the Organization in investigating her and putting her through a disciplinary process, there is also no effort made to discharge the burden of proof. Many references were made by the Applicant in her pleadings and other documents to the emotional suffering and depression she underwent and how she was treated for depression in New York, Dubai and Abidjan. No medical records were tendered to support this claim.

64. At paragraph 55 of the ID/OIOS investigation report, it is recorded that the Applicant told the investigators that the difficulties she was experiencing in her relationship with FC combined with the fact that she had arrived in a new mission (UNOCI) where she had no friends resulted in her becoming ill. By February 2005, she suffered from depression and had a nervous breakdown that required hospitalization.

65. This part of the investigation report was not challenged by the Applicant. Rather in paragraph 19 of her 17 September 2007 response to the charges of misconduct, she wrote that FC had promised to pay her hospital expenses when she was hospitalized in Abidjan with depression. According to the Applicant, he promised to do so because he felt responsible for causing her condition. Also at paragraph 67, she referred to the humiliation and mental torture she had already suffered in the hands of FC since 2003. Still at paragraph 9 of the said response, the Applicant stated that the investigation failed to take into account the trauma she had been subjected to for the past four years.

66. The Applicant's references to her mental torture and depression evidently pre-dated the investigations and disciplinary proceedings having, by her own documentary evidence, started as early as 2003, four years before the Organization's actions she complained about. Even the Applicant's medical treatment in New York for health issues including gynecological problems for which she underwent surgery pre-dated the involvement of the Organization. It is the finding of the Tribunal on this score that a case has not been made out by the

Applicant to warrant the award of compensation for any injury to her health. The Applicant is therefore not entitled to compensation on this ground.

Conclusion

67. In view of the foregoing the Application is dismissed in its entirety.

(Signed)

Judge Nkemdilim Izuako

Dated this 6th day of December 2012

Entered in the Register on this 6th day of December 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi