



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/026

Judgment No.: UNDT/2013/080

Date: 22 May 2013

Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

AUSTIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Susan Maddox, ALS/OHRM, UN Secretariat
Sophie Parent, ALS/OHRM, UN Secretariat

Introduction

1. By an application filed with the Registry of the United Nations Dispute Tribunal on 7 April 2011, the Applicant contests the decision to impose on him the disciplinary sanction of a written censure, a loss of two steps in grade, and a deferral for two years of his eligibility for salary increment following conduct that was determined to not be in accordance with the provisions of ST/SGB/2004/15 (Use of information and communication technology resources and data).

Relevant background

2. The Applicant joined the United Nations on 1 July 1991. He currently holds a fixed-term appointment at the S-4 level, as a Security Sergeant at the United Nations Headquarters in New York.

3. In 2007 and 2008, the Applicant received, from other official United Nations email accounts, at his official United Nations Lotus Notes email account (“UN Email Account”) at least 50 emails that contained images and videos that were sexual and pornographic in nature. The Applicant sent at least 26 such emails from his UN Email Account to other staff members in the United Nations, mostly forwarding the messages he had received and, at times, adding some text to the messages. One such email included a video depicting an act of bestiality by a woman. The Applicant did not report receiving such emails from other staff members.

4. On 7 May 2008, the Investigations Division, Office of Internal Oversight Services (“OIOS”), initiated an investigation into the Applicant’s use of his UN Email Account. On 5 September 2008, the Applicant received an email from OIOS inviting him to attend a fact-finding interview on 17 September 2008. At the start of the interview, the Applicant was informed that he was the subject of the allegations under review and of his rights with regard to the interview and OIOS’s investigation process.

5. As part of the interview, during which the Applicant was not represented by counsel, OIOS stated the allegations of which he was the subject and asked him to clarify the facts and comment on documents pertaining to the alleged communications. At the end of the interview, the Applicant was asked whether there was anything that had not been discussed that he thought was relevant to the matter. The Applicant responded “I do not think so”. Upon reviewing the accuracy of the interview record, the Applicant affirmed its content and signed the interview record.

6. On 12 January 2009, the Applicant received a memorandum from the Office of Human Resources Management (“OHRM”) informing him that “[o]n the basis of the [24 October 2008 OIOS] investigation report and supporting documents, [he was] charged with the improper use of the property of the United Nations, in that [he] knowingly and willfully received and distributed pornographic materials on the United Nations computer system”. The Applicant was also charged with failing “to promptly report those violations of [ST/SGB/2004/15] of which [he was] aware”. He was asked to provide OHRM with any written statement or explanation in response to the allegations filed against him. Furthermore, he was informed of his right to seek the assistance of counsel in formulating his comments.

7. On 29 January 2009, the Applicant provided his responses regarding the charges of improper use of property of the United Nations and the failure to report violations of ST/SGB/2004/15. In his comments, the Applicant recognized the alleged facts and accepted that his conduct was not in accordance with the provisions of ST/SGB/2004/15. However, in addition to apologizing for his actions, the Applicant stated that the Organization had “seriously and repeatedly violated [his] right to due process”. He also put forward a number of mitigating circumstances including that at the time of the events he was not aware of ST/SGB/2004/15 and that “his failure to report colleagues could not amount to misconduct”.

8. From mid-2009 to the end of 2010, representatives of the Office of Staff Legal Assistance (“OSLA”) and the Respondent met and discussed the appropriate sanction to be applied in cases involving the misuse of Information and Communications Technology (“ICT”) resources by staff members that were pending resolution by OHRM.

9. On 10 January 2011, the Applicant received a letter dated 3 December 2010, informing him that, “after a thorough review of the Investigation Report, supporting documentation and your comments on the charges”, the Respondent had decided to impose on him the disciplinary measure of a censure, a loss of two steps in grade and a deferral for two years of eligibility for salary increment.

10. On 7 April 2011, the Applicant filed the present application and the Respondent submitted his reply on 9 May 2011.

11. On 4 June 2012, the undersigned Judge was assigned to this matter.

12. On 5 December 2012, the Tribunal issued Order No. 253 (NY/2012) directing the parties to submit a joint statement identifying the agreed facts and legal issues, as well as whether a judgment could be rendered on the papers before the Tribunal. The parties filed their joint submission on 24 January 2013 and also informed the Tribunal that they did not require a hearing in the present case. On 24 January 2013, the Respondent filed a submission notifying the Tribunal of updated relevant jurisprudence to which the Applicant responded on 8 February 2013. The Respondent submitted a final response on 27 February 2013.

13. Taking into consideration that the parties stated that, even though this was a disciplinary case, they did not require an oral hearing, the Tribunal will decide the case on the papers before it.

Legal issues

14. The following legal issues, which were agreed upon by the parties as part of their joint statement, will be assessed by the Tribunal:

- a. Did the Applicant's failure to report the receipt of emails containing pornographic material that were sent by other staff members amount to misconduct?
- b. Were the Applicant's due process rights respected?
- c. If the Tribunal finds a breach with respect to any of the above, should compensation be awarded?

15. The Tribunal finds that the Applicant no longer challenges the Respondent's decision on the grounds that the impugned decision was *ultra vires*. This aspect of the application is formally withdrawn.

Applicant's submissions

16. The Applicant's principal contentions may be summarized as follows:

- a. Section 2(b) of ST/SGB/2004/15 which provides that "[a]uthorized users shall promptly report to the appropriate United Nations authority any violation of the provisions of this bulletin of which they become aware" is ambiguous. More importantly, the Applicant was unaware of any reporting obligations contained therein and there is no evidence that the Administration adequately notified staff members of the promulgation of ST/SGB/2004/15;
- b. The Applicant's due process rights were breached as a result of the fact that the Applicant was not provided with the opportunity to have counsel present during the investigative stage of the proceedings. Furthermore, the decision was made after 24 months and the Organization failed to take into account any of the mitigating circumstances put forward by

the Applicant when determining the level of sanctions to be imposed against him;

c. The Applicant initially submitted that the impugned decision was *ultra vires*. However, as part of the parties' joint submission, the parties agreed that "[t]hese aspects of the application are formally withdrawn".

Respondent's submissions

17. The Respondent's principal contentions may be summarized as follows:

a. The facts in the present case are not in dispute and the Applicant "does not contest the proportionality of the sanction";

b. The reporting of misconduct is a basic obligation of staff members and ignorance of the law is not an excuse;

c. The Applicant's due process rights were respected during the OIOS investigation as well as during the ensuing disciplinary process. The Applicant does not put forward any evidence that would indicate that the mitigating circumstances that he put forward were not taken into account when determining the applicable sanction;

d. The sanctions imposed on the Applicant were a valid exercise of the Respondent's discretionary authority. The record of the investigation indicates that the Applicant was fully aware of all the claims held against him and the allegations were sufficiently particularized.

Consideration

Applicable law

18. Staff regulation 1.2(b) of ST/SGB/2008/4, dated 1 January 2008, states:

Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

19. Staff rule 110.1, ST/SGB/2006/1, dated 1 January 2006, states in part:

Misconduct

Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant, may amount to unsatisfactory conduct within the meaning of staff regulation 10.2, leading to the institution of disciplinary proceedings and the imposition of disciplinary measures for misconduct.

20. ST/SGB/2004/15 states in part:

Section 2

Conditions applicable to use of ICT resources and ICT data

(a) Use of ICT resources and ICT data shall in all cases be in accordance with the provisions set out in this bulletin and such other administrative issuances as may apply to them;

(b) Authorized users shall promptly report to the appropriate United Nations authority any violation of the provisions of this bulletin of which they become aware.

...

Section 4

Limited personal use

4.1 Authorized users shall be permitted limited personal use of ICT resources, provided such use:

(a) Is consistent with the highest standard of conduct for international civil servants (among the uses which would clearly not meet this standard are use of ICT resources for purposes of obtaining

or distributing pornography, engaging in gambling, or downloading audio or video files to which a staff member is not legally entitled to have access);

(b) Would not reasonably be expected to compromise the interests or the reputation of the Organization;

...

(f) Does not interfere with the activities or operations of the Organization or adversely affect the performance of ICT resources.

...

Section 5

Prohibited activities

5.1 Users of ICT resources and ICT data shall not engage in any of the following actions:

...

(c) Knowingly, or through gross negligence, using ICT resource or ICT data in a manner contrary to the rights and obligations of staff members.

Receivability

21. The present case meets all of the receivability requirements identified in art. 8 of the Tribunal's Statute.

Misconduct

22. Section 4.1(a) of ST/SGB/2004/15 states that activities that do not meet the standard of an international civil servant, and which would therefore result in a breach of the staff rules, include the "use of ICT resources for purposes of obtaining or distributing pornography". Similarly, staff rule 110.1 states that a staff member's failure to comply with his obligations, including the United Nations Staff Regulations and Rules, may amount to unsatisfactory conduct and result in the imposition of disciplinary measures for misconduct.

23. The Applicant contends that the "impugned decision is premised on the erroneous conclusion that not reporting other staff members amounts to

misconduct”. A review of the 3 December 2010 letter by which the Applicant was informed of the charge of misconduct states that he was “charged with the improper use of the property of the United Nations, whereby [he] received and distributed pornographic materials...[and] failing to fulfill [his] obligation ... to promptly report those violations of the bulletin of which you became aware...”.

24. The Applicant submits that in addition to not being aware of ST/SGB/2004/15, it was the Organization’s “duty to regularly inform its employees concerning the various rules and regulations” and that he therefore can not be held responsible for not following some of the provisions contained in ST/SGB/2004/15. The Applicant further states that “it cannot reasonably be accepted that a failure of a staff member to report potential misconduct of a colleagues will, in itself, amount to misconduct for which disciplinary measures may be imposed”.

25. During the course of the investigation conducted by OIOS, and as part of his submissions, the Applicant recognized that he received “at least 50 emails that contained images and videos, some with pornographic content and some with sexual content”, and that he also “sent at least 26 such emails from his UN Email Account to others in the UN” and that he distributed “a video depicting an act of bestiality by a woman”.

26. The Applicant, by his own recognition, sent and received the contested emails thereby breaching the applicable rules governing the use of ICT resources, as well as staff rule 110.1, resulting in the determination that the Applicant’s actions amounted to misconduct. The Applicant does not contest the Organization’s finding of misconduct based on his receipt and distribution of the contested emails, but rather only that not reporting the actions of a fellow staff member can not reasonably amount to misconduct.

27. The duty to report misconduct is reflected in specific administrative issuances, including, for example, sec. 2(b) of ST/SGB/2004/15 which imposes a clear and specific obligation on staff members to report any violation of that bulletin of which

they become aware. In *Ishak* UNDT/2009/072, the Tribunal held that “[i]t is clear that the applicant has a right and a duty to report to his management any misconduct that comes to his notice”.

28. More importantly, in *Diagne et al.* 2010-UNAT-067, the Appeals Tribunal, in affirming the judgment of the Dispute Tribunal, stated that “the ignorance of the law is no excuse and every staff member is deemed to be aware of the provisions of the Staff Rules”. Consequently, the Applicant’s submission that he was not aware of some of the applicable regulations and rules bears no relevance as to whether he could be charged as having breached the said regulations and rules and cannot be considered a mitigating circumstance.

29. Upon a staff member’s misconduct having been established, the Respondent has a broad discretion in deciding on the appropriate and most proportionate disciplinary measure(s) to apply even though this discretion is not without limit. In *Mahdi* 2010-UNAT-018, the Appeals Tribunal stated that in reviewing disciplinary cases it has to examine:

- i. Whether the facts on which the disciplinary measure was based have been established;
- ii. Whether the established facts legally amount to misconduct under the Regulations and Rules; and
- iii. Whether the disciplinary measure applied is proportionate to the offence.

30. Item no. (i) is not contested by either party. With regard to item no. (ii), while the Applicant contests the basis on which part of the disciplinary measures were imposed, he does not contest that his actions breached the applicable rules and amounted to misconduct. Additionally, the Respondent has also established the fact that the Applicant had a duty to report any act of misconduct of which he became aware.

Proportionality of sanctions

31. As part of his application, the Applicant stated that he did “not contest the proportionality of the sanction(s) imposed”. Rather, the Applicant submitted that the application was “directed at the *ultra vires* nature of the accessory sanction of deferment, for two years, of his eligibility for salary increments, which was not one of the sanctions foreseen in former Staff Rule 110.3”. However, as part of the parties’ joint submission in response to Order No. 253, the Applicant stated that he was “no longer challeng[ing] the respondent’s decision on the grounds ... that the impugned decision was *ultra vires*. These aspects of the application are formally withdrawn”. The proportionality of the sanction is therefore not an issue in the present case.

Due process rights

32. The Applicant submits that his due process rights were breached during the OIOS investigative process due to him not having counsel present during the interview as well as a result of the over one-and-a-half year delay between the date on which he was charged with misconduct and the date upon which he was notified of the applicable sanctions. The Tribunal therefore needs to consider whether there were any procedural irregularities leading to the application of the contested disciplinary sanctions.

33. In considering whether the Applicant’s due process rights were respected there are two separate aspects of the case that the Tribunal needs to take into consideration: the investigative phase conducted by OIOS and the disciplinary process undertaken by OHRM upon receiving OIOS’s investigation report.

34. The purpose of OIOS is to conduct a neutral fact-finding investigation into, in cases such as the present, allegations put forward against a staff member. While an investigation is considered to be part of the process that occurs prior to OHRM being seized of the matter, its findings, including any incriminating statements made by the staff member, become part of the record. Consequently, any such process must

still be conducted in accordance with the rules and regulations of the Organization and it must respect a staff member's rights to due process.

35. In *Ibrahim* UNDT/2011/115 and *Johnson* UNDT/2011/123, the Tribunal held that it is a fundamental principle of due process that once a staff member has become the target of an investigation he or she should be accorded certain basic due process rights.

36. The fundamental human right to defend oneself and present evidence in one own support is proclaimed by art. 14 of the International Covenant on Civil and Political Rights, a general legal instrument on human rights, and is also mirrored in the regional instrument of the European Convention on Human Rights (art. 6). The scope of this right, which has expanded from the realm of criminal law to that of civil law, including labor law, was respected in the present case.

37. The right of a staff member to defend himself or herself in person or to be assisted by a lawyer is a fundamental human right. Consequently, once a staff member becomes aware of the charges held against him or her, the staff member then has the right to defend himself or herself in person or to be assisted by a lawyer. A staff member who decides to defend himself or herself in person is required to do so diligently (with caution and care) and will not be able to complain of the fact that he or she did not defend himself or herself competently or that he or she was not assisted by counsel.

38. A review of the evidence indicates that the Applicant was made aware of the allegations that served as a basis for the investigation at the initiation of the interview. The Applicant was informed that he had a right to be treated fairly, the right to identify additional witnesses or evidence that will support his or her version of the events, his right to confidentiality and the protection afforded for good faith reporting of misconduct. Knowing and understanding his rights and the consequences of his actions, the Applicant fully cooperated with the investigation and answered all the questions put forward to him during the interview. Upon

the completion of the interview, the Applicant stated that that there were no other relevant issues that he wished to address and that he did not have any complaints as to the manner in which the interview was conducted or the way he was treated by the investigators. He proposed that other staff members who had sent and received contested emails be interviewed. He fully exercised his right to defend himself in person and at no point in time during the course of the interview did the Applicant state that he wanted a lawyer present nor was this right, as well as his right to defend himself, ever denied.

39. In addition to being able to defend himself in person during the investigation, at no time prior to being charged with misconduct by OHRM, did the Applicant raise the issue of his lack of legal representation during the OIOS investigation. There is no evidence before the Tribunal that the Applicant requested, and was denied, either access to counsel or further opportunities to defend himself during the investigation conducted by OIOS.

Delay and mitigating circumstances

40. As stated in *Mokbel* UNDT/2012/061, “[d]ecisions on disciplinary matters, particularly relating to allegations of serious misconduct, must be taken within a reasonable time”. It is the responsibility of the Organization to conduct disciplinary matters in a timely manner to avoid a breach of the staff member’s due process rights. Nevertheless, as stated in *Simmons* UNDT/2012/163, it is also “for the Applicant to substantiate any [injury] which [he] alleges to have suffered resulting from the excessive delay (*Sina* 2010-UNAT-094, *Antaki* 2010-UNAT-095)”.

41. In the present case, the parties agreed as part of their joint submission that the delay in applying the disciplinary sanction was due to the fact that for “a year and a half, from mid 2009 to the end of 2010, representatives of OSLA and the Respondent met and discussed the appropriate sanction in relation to pending cases before the Office for Human Resources Management, involving the misuse of ICT resources”.

42. Consequently, the Tribunal finds that there is no evidence before it that would suggest that the Respondent did not act reasonably and in a timely manner when determining the disciplinary sanction to be applied in the present case or that no consideration was given to any mitigating circumstances. To the contrary, the sanctions imposed on the Applicant indicate that the Respondent took into consideration the fact that the Applicant cooperated with the investigators, was sincere and that he recognized the impugned facts. Finally, the Applicant has not put forward any evidence that would suggest that he suffered any harm from the delay in finalizing the disciplinary charges against him.

43. Taking the above into consideration, the Tribunal finds that the Applicant's due process rights were respected and that the disciplinary measures that were applied against him were lawful, proportional and were taken in accordance with the regulations and rules.

Conclusion

In view of the foregoing, the Tribunal DECIDES:

44. The application is considered partially withdrawn in relation to the sanction of deferment for two years of the Applicant's eligibility for salary increments.

45. The remainder of the application is dismissed.

(Signed)

Judge Alessandra Greceanu

Dated this 22nd day of May 2013

Entered in the Register on this 22nd day of May 2013

(Signed)

Hafida Lahiouel, Registrar, New York