



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-511

Bastet

(Respondent/Appellant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT



Counsel for Mr. Bastet:

François Lorient

Counsel for Secretary-General:

Stéphanie Cartier

JUDGE LUIS MARÍA SIMÓN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it two appeals, by Mr. Bruno Bastet and the Secretary-General of the United Nations, against Judgment No. UNDT/2013/172, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 16 December 2013. On 18 February 2014, the Secretary-General filed his appeal, and Mr. Bastet answered on 18 April 2014. On 4 April 2014, after being exceptionally granted an extension of time,¹ Mr. Bastet filed his own appeal, and the Secretary-General filed his answer on 10 June 2014.

Facts and Procedure

2. Mr. Bastet joined the Organization on 6 March 2000 and in February 2005, he was transferred to the Department of Economic and Social Affairs in New York.

3. Between 3 August 2005 and 6 August 2008,² Mr. Bastet submitted four rental subsidy claims on an annual basis to the Office of Human Resources Management (OHRM) for himself, his domestic partner and her daughter, as well as for their common son, as the tenants of an apartment in Manhattan. On each occasion he submitted a copy of the signed lease entered into with Euro Consulting S.A., as well as proof of payment of rent to support his claim.

4. On 27 August 2009, the Office of Internal Oversight Services (OIOS) was informed of a press article that reported, inter alia, that Mr. Bastet had falsified his address in order to illegally obtain a housing allowance in France, and that he was receiving rental subsidies from the United Nations even though he owned an apartment in Manhattan.

5. OIOS conducted its investigation, and in December 2009 presented Mr. Bastet with its preliminary report, on which Mr. Bastet commented. The report was finalised on 31 December 2009 and submitted to the Programme Manager.

6. On 22 February 2010, the Officer-in-Charge (OIC) of the Administrative Law Unit recommended to the OIC, OHRM, to institute disciplinary proceedings against Mr. Bastet under Section 5 of Administrative Instruction ST/AI/371 (Revised Disciplinary Measures and Procedures). The same day, the OIC, OHRM, informed Mr. Bastet that he faced misconduct

¹ Order No. 179 (2014) of 2 April 2014.

² 3 August 2005, 3 August 2006, 19 July 2007 and 6 August 2008.

charges for knowingly submitting inaccurate claims for rental subsidy allowance and certifying the accuracy of such claims, and for receiving rent

14. On 16 December 2013, the Dispute Tribunal rendered its Judgment. The UNDT found that neither the USG for Management, nor the OIC designated to act on behalf the USG for Management during her absence, had the proper authority to take the decision to dismiss Mr. Bastet, as the purported delegation upon which the Secretary-General relied had not been officially published. As such the dismissal decision was unlawful and should be rescinded. Noting also that all the individuals involved in the decision-making concerning Mr. Bastet's dismissal were OICs, and not the officials expressly stipulated in Administrative Instruction ST/AI/371 to partake in a disciplinary process, and that the designation of OICs was current "practice" in the Organization, the UNDT observed that "highly important decisions are not actually being taken by the individuals authorized to take them". Notwithstanding this procedural irregularity, the UNDT found that the facts constituted serious misconduct by Mr. Bastet such that the dismissal decision was justified on its merits. Accordingly, the UNDT did not deem it necessary to consider the other acts of misconduct that were also grounds for the disciplinary measure (namely, falsifying lease agreements, submitting inaccurate declarations about the number of persons for whom he claimed a rental subsidy allowance, and that rather than residing at the Manhattan apartment, he had leased it).

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By: [redacted] (UNDT) and [redacted] (UNDT) on 16 December 2013. The UNDT found that the USG for Management (the USG) did not have the proper authority to take the decision to dismiss Mr. Bastet, as the purported delegation upon which the Secretary-General relied had not been officially published. As such the dismissal decision was unlawful and should be rescinded. Noting also that all the individuals involved in the decision-making concerning Mr. Bastet's dismissal were OICs, and not the officials expressly stipulated in Administrative Instruction ST/AI/371 to partake in a disciplinary process, and that the designation of OICs was current "practice" in the Organization, the UNDT observed that "highly important decisions are not actually being taken by the individuals authorized to take them". Notwithstanding this procedural irregularity, the UNDT found that the facts constituted serious misconduct by Mr. Bastet such that the dismissal decision was justified on its merits. Accordingly, the UNDT did not deem it necessary to consider the other acts of misconduct that were also grounds for the disciplinary measure (namely, falsifying lease agreements, submitting inaccurate declarations about the number of persons for whom he claimed a rental subsidy allowance, and that rather than residing at the Manhattan apartment, he had leased it).

double jeopardy. Furthermore, the UNDT concluded unilaterally, in the absence of established evidence and without due process, that Mr. Bastet had committed “serious misconduct”.

17. Mr. Bastet submits that, in reaching its misconduct finding, the UNDT erred on a number of facts (specified at appeal brief, Annex 5), and requests that they be struck from the UNDT Judgment. The UNDT’s misconduct finding also fails to take into account mitigating circumstances, namely that Mr. Bastet was wholly unaware that the 1991 deed erroneously stated his name, and not his father’s, until the OIOS investigation. The UNDT also erred in considering that Mr. Dinkelmeyer was Mr. Bastet’s legal representative in the absence of any evidence. Furthermore, insofar as the UNDT Judgment purported to cite “Facts”, it merely duplicated the findings of the OIOS report, which Mr Bastet submits is deficient and contested, having never been signed by him.

18. The UNDT also erred in law insofar as it

“unwilling to attend” the oral hearing, as his Counsel had indicated to the trial judge that Mr. Bastet could attend a subsequent hearing.

21. The UNDT also failed to exercise its jurisdiction to grant appropriate remedies. Mr. Bastet claims pecuniary losses in the amount of 48 months of lost revenue, as well as emoluments and entitlements which have been frozen since his dismissal (specified at appeal brief, Annex 10). He claims an additional USD 50,000 in moral damages as a result of the exceptional damages suffered from the adverse publicity generated by the Secretary-General’s office, and the “public disgrace” he experienced when he was escorted from his office in front of media as evidenced by Annex 7 to his brief, as well as violation of his due process rights. He also requests payment of USD 40,000 in legal costs for abuse of proceedings and obfuscation by the Secretary-General.

The Secretary-General’s Answer

22. The UNDT correctly concluded that Mr. Bastet’s misconduct, namely claiming rental subsidies for an apartment registered in his own name, was established by clear and convincing evidence. The record of the September 2009 interview with OIOS showed Mr. Bastet was aware that the 1991 deed listed him as the official owner of the apartment. The UNDT did not err on a question of fact leading to a manifestly unreasonable result when it found that Mr. Bastet was aware of the alleged “error” in the 1991 deed.

23. Insofar as Mr. Bastet contested his signature on the OIOS report, the burden of proving impropriety lies with the staff member contesting the decision. Mr. Bastet did not bring forward any evidence of coercion on the part of OIOS.

24. The UNDT correctly concluded that the established facts legally amounted to serious misconduct and that the sanction of dismissal was proportionate. The Appeals Tribunal has upheld decisions to dismiss staff members for lapses in integrity in several cases.

25. Further, the UNDT correctly concluded that the damages claimed by Mr. Bastet were caused solely by his own serious misconduct and did not warrant any award of compensation. The Appeals Tribunal’s jurisprudence has held that there may not be grounds for compensation in the absence of actual prejudice.

considered such delegation had not been officially published, staff were expressly advised by virtue of Secretary-General's Bulletin ST/SGB/151 that the Secretary-General's authority over, inter alia, disciplinary matters "may be delegated from time to time" to the USG for Management.⁹ As the Staff Rules do not otherwise prescribe the manner or form that such delegation of authority should take, a clearly evinced delegation of authority by memorandum could be sufficient, as was found to be the case in *Malmström et al.*,

has decided to impose on you the disciplinary measure of dismissal from service” and the letter was signed by the OIC for Management acting for the USG for Management.

35. The UNDT also erred in rescinding the decision to dismiss Mr. Bastet for serious misconduct given that the UNDT had confirmed that the irregularity it identified did not affect the substance of the dismissal decision, i.e., that Mr. Bastet’s conduct in fact constituted serious misconduct warranting dismissal.

Mr. Bastet’s Answer

36. Concerning the authority to delegate, Mr. Bastet submits that the Secretary-General conflates high level substantive decisions of a discretionary nature belonging to the Secretary-General, which include disciplinary powers, with routine and mechanical administrative decisions, such as the recruitment process for lower level staff or certification of

dismissal process was a “rubber-stamping justice system controlled by junior legal staff at OHRM” and that the Organization refused to call any of those involved in the decision-making process as witnesses before the UNDT, stating that the “whole OHRM operation appears as a secret trial, a phantom exercise” and far from a professional, transparent justice system.

39. The UNDT was correct to find that the OIC was not competent to take the dismissal decision, as the OIC had no prior professional experience in either law or human resources management.

40. The Organization was also negligent in preparing and promulgating delegations of authority in line with the new Staff Rule 10.1(c) of 1 July 2009, and the delegation of authority by memorandum should have been officially published as it constituted a major change of “personnel policy” requiring “consultation with the appropriate staff representative bodies”, as per Section 5.3 of ST/SGB/1997/1.¹⁶

41. While a *potential* delegation of authority may have been issued in 1976 per ST/SGB/151,¹⁷ such delegation has been significantly modified over the years. Furthermore, the Secretary-General withdrew his delegation from the USG for Management between August 2007 and August 2009, and ST/SGB/2009/11 which came into effect on 24 June 2009,¹⁸ was silent as to any transfer of delegation of disciplinary measures to the USG for Management; it stated only that “[a]s of 1 July 2009, the Secretary-General will have the authority to impose disciplinary measures without the recommendation of a joint body”.

42. Mr. Bastet requests that the Appeals Tribunal reject the Secretary-General’s appeal and award him compensation in the sum of USD 50,000 for the violation of his due process and contractual rights during the OHRM procedures leading to his dismissal, and USD 20,000 in legal costs against the Secretary-General for abusive procedures and systematically concealing the OIC’s summary decision.

¹⁶ Secretary-General’s Bulletin ST/SGB/1997/1 (Procedures for the Promulgation of Administrative Issuances), 28 May 1997.

¹⁷ Secretary-General’s Bulletin ST/SGB/151 (Administration of the Staff Regulations and the Staff Rules), 7 January 1976, Section 3.

¹⁸ Secretary-General’s Bulletin ST/SGB/2009/11 (Transitional measures related to the introduction of the new system of administration of justice), 24 June 2009.

Considerations

Preliminary Matter

43. Mr. Bastet requests an oral hearing in order to testify before this Tribunal that he is neither a signatory nor a party to the 1991 deed, and that he was not represented by Mr. Dinkelmeyer at the time of the 1991 deed. He claims he was denied the right to be heard during the OIOS investigation as well as the subsequent UNDT hearing. The Tribunal did not

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54. Once established that the impugned disciplinary measure was adopted by an authority who was competent at the relevant time, this Tribunal finds no reason to depart from the conclusions of the thorough judicial review conducted by the Dispute Tribunal with respect to the merits of the disciplinary procedure.

55. As required by the Appeals Tribunal's jurisprudence, the Dispute Tribunal correctly sought to ascertain whether the facts on which the sanction was based had been established, whether the established facts qualified as misconduct, and whether the sanction was proportionate to the offence.¹⁹

56. The UNDT Judgment expressly specified that it preferred to base its findings on the principal and least questionable piece of evidence on file, being the 1991 deed of sale.²⁰ It concluded that the misconduct arose from the fact that Mr. Bastet could not ignore that he was officially the legal owner of the apartment and submitted a lease agreement to obtain rental subsidy without disclosing that fact.²¹ The UNDT's conclusion did not affirm whether Mr. Bastet was the *actual* owner of the apartment, in the sense of having responsibility for it on a day-to-day basis, which he claimed was his father's role, as distinct from being the "official" or formal owner as he alleged. The sole fact that he failed to disclose that the documents reflected that he was the official owner of the apartment was sufficient to constitute the misconduct.

57. As the Appeals Tribunal agrees with the UNDT's conclusion, all of Mr. Bastet's arguments relating to the "actual" ownership of the apartment are rendered immaterial. The fact that the staff member did not disclose the situation at the time of claiming a monetary benefit was enough to constitute the misconduct.

58. The Dispute Tribunal carefully reviewed the facts before it and we find it arrived at reasonable conclusions of fact. Mr. Bastet's appeal did not satisfy the burden arising from Article 2(e) of the Appeals Tribunal Statute as he failed to demonstrate that the impugned Judgment was based on an error of fact resulting in a manifestly unreasonable decision.

¹⁹ *Walden v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-436; *Koutang v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-374; *Nasrallah v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-310.

²⁰ Impugned Judgment, para. 79.

²¹ Impugned Judgment, para. 77.

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