



JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal by Mr. John Paul Muindi against the decision of the Secretary-General of the International Maritime Organization (IMO) dated 4 April 2016 to summarily dismiss him from service for serious misconduct. Mr. Muindi filed his appeal on 8 February 2017 and the Secretary-General of the IMO answered on 12 April 2017.

Facts and Procedure

2. Mr. Muindi was appointed to the post of Regional Coordinator in IMO's Regional Presence Office for Technical Co-operation in the Eastern and Southern Sub-region of Africa (RPO) in Nairobi, Kenya, on 1 March 1999, as a locally recruited National Officer. He worked in this position until his summary dismissal on 4 April 2016, following a fact-finding investigation into fraudulent activities allegedly committed by him, which was conducted by the Internal Oversight Services (IOS), IMO's Internal Oversight and Ethics Office, from 1 to 5 February 2016.

3. In 2011, IOS carried out an audit of RPO. It recommended inter alia that personal phone calls should be identified on a regular basis and clearly marked on the schedule or list showing the details of the calls, and to indicate the total cost to be refunded for personal calls on the same bill. However, a follow-up audit carried out by IOS, in February 2015, revealed that Mr. Muindi had not complied with the audit recommendation and that his personal phone calls from 2011 to 2014 had amounted to 644,408 Kenyan Schillings (KES).¹

4. By memorandum dated 28 January 2016, the IMO Secretary-General placed Mr. Muindi on suspension from duty with full pay with immediate effect, pending the outcome of "a fact-finding investigation into allegations that [Mr. Muindi] committed fraud by giving instructions for the electronic signature of a colleague to be appended in an official IMO communication that materially misrepresent[ed his] contractual status with the Organization".² The fact-finding investigation report of 23 February 2016 confirmed the allegations and

¹ As of 6 February 2015, the exchange rate of US Dollar (USD) v. KES stood at 1:91.45. KES 644,408 was equal to USD 7,046.56. Mr. Muindi started reimbursing his personal phone calls in 10 monthly installments (KES 64,440 per installment) beginning in June 2015. As of 5 February 2016, Mr. Muindi had paid eight monthly installments and owed IMO KES 128,880.

² For details of this case, see paragraph 6 below.

recommended that the IMO Secretary-General take disciplinary measures against Mr. Muindi for fraud.

5. The IMO Secretary-General then referred that case (hereinafter the accreditation letter case), together with the earlier case of telephone charges to a Joint Disciplinary Committee (JDC) for consideration and advice. On 21 March 2016, the JDC submitted its report to the IMO Secretary-General. The JDC made the following considerations and findings with regard to the telephone charges case:

... Mr. Muindi extensively used his work mobile phone for personal calls during the period from 2011 to 2014, which accounted for 75% of total number of phone calls and 71% of the total cost. The calls were made while in Kenya and roaming to and from the Republic of Korea, China, Malaysia, Turkey, Thailand, Australia, USA, Japan and the UK. Mr. Muindi failed to mark those personal calls clearly and to refund the Organization the correct amount of money. Mr. Muindi did not comply with the

... Mr. Muindi verbally instructed Mr. Moseti to append the signature of Mr. Micheni to a letter of accreditation for Mr. Muindi, without the authorization or instructions from Mr. Micheni. Mr.

the JDC recommends that disciplinary measures should be taken against Mr. J-P. Muindi in accordance with Appendix F, paragraphs 6.1 and 6.2, of the SRSRs and that the adequate disciplinary me

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21. The SAB erred in finding that the documentation made available to it showed that Mr. Muindi had been engaged in three cases of fraudulent activities, (a) the unauthorised use of his official car; (b) the use of the official mobile phone for private purposes and non-payment of the charges; and the (c) accreditation letter issue. The first two allegations were not determined as fraudulent by any fact-finding report. Also the SAB correctly acknowledged that the two matters did not form part of the reasons for his summary dismissal. The telephone charges matter was raised by the IMO after the summary dismissal. It formed part of the JDC report, but the IMO Secretary-General's summary dismissal was not based on it.

22. Mr. Muindi alleges serious procedural irregularities. The SAB failed to make any determination on the irregularity of the "disciplinary process" before the JDC. No formal charge of misconduct was made against him. The JDC did not hear him, his defense or his accusers/witnesses. It was only after the decision had already been taken to summarily dismiss him that Mr. Muindi was informed that his case had been considered by the JDC. Moreover, the witnesses' testimony should have been "tested" ~~181~~ cross-exa1.17 tarilb

there was no attempt to mislead UNDP vis-à-vis his contractual status. In any event, Mr. Muindi's conduct cannot be considered as misconduct.

25. Mr. Muindi requests that the Appeals Tribunal order “[r]escission of the refusal to disclose exhibits, appendi[c]es or annexes attached to the [IOS] investigation report”; “[r]escission of the decision of [s]ummary dismissal”; “reinstatement to his post of IMO Regional Coordinator for eastern and southern Africa or another post equivalent in status and compensation amounting to the salary, emoluments and entitlements lost from separation from service to the date of his reinstatement”; “[c]ompensation for the violations of his rights to due process and fairness and for the harm suffered with regard to his long standing good career and reputation, and the psychological stress suffered as a result of the harassment”; and “[l]egal costs”.

The IMO Secretary-General's Answer

26. The facts upon which the IMO Secretary-General's decision to summarily dismiss Mr. Muindi were based have been established; the established facts legally amount to serious misconduct under IMO's Staff Regulations and Rules; and the disciplinary measure applied is proportionate to the offense.

27. The IOS investigation and the JDC both concluded that Mr. Muindi had attempted to commit fraud by knowingly misrepresenting his status claiming to be an internationally recruited officer and by giving instructions for the electronic signature of Mr. Micheni to be appended to the accreditation letter without Mr. Micheni's approval, seeking accreditation with the Kenyan government in order to gain diplomatic privileges and immunities to which Mr. Muindi was not entitled.

28. The key component of the definition of fraud is to knowingly make a false representation with the intention that it be acted or relied upon. In the accreditation letter, Mr. Muindi knowingly made a false representation as to his status with IMO, i.e. that he was internationally recruited, and appended Mr. Micheni's electronic signature to give the impression that his office had authorized this initiative. He did so with the intention that the letter be acted or relied upon in order to gain accreditation, i.e. to obtain undue financial benefits and entitlements. These facts were established by IOS with clear and convincing evidence and were accepted as such by

the SAB. The fact that Mr. Muindi did not transmit the letter is irrelevant. Attempted fraud is still serious misconduct under IMO's Staff Regulations and Rules and equally punishable.

29. The reliance of the IMO Secretary-General on the facts that were established by clear and convincing evidence is in line with the standard of proof required by the Appeals Tribunal for cases of termination. Mr. Muindi has failed to provide a credible explanation or contrary evidence sufficient to rebut the outcome of the investigations. The established facts, therefore, legally qualify as attempted fraud consistent with the definition contained in paragraph 2 of appendix F of IMO's Staff Regulations and Rules, and the conclusion of the SAB that Mr. Muindi's acts constituted serious misconduct was appropriate.

30. Turning to the case concerning the excessive usage of the phone during office hours for private purposes and the non-payment of the related charges, Mr. Muindi does not contest the facts established by another investigation that he disregarded an audit recommendation to identify all personal phone calls, so that costs could be repaid to IMO. Instead, a follow-up audit also noted excessive usage of the phone by Mr. Muindi during office hours for private purposes and the non-payment of the related charges. The fact that Mr. Muindi paid the charges at a later stage is irrelevant. Payment of charges does not preclude the imposition of discipline for the rules violation. The established facts legally qualify as misuse of funds.

31. Claiming that the disciplinary measure was not proportionate to the offence, Mr. Muindi fails to recognize the IMO Secretary-General's broad discretion in disciplinary matters. The IMO Secretary-General may take various disciplinary measures, taking into account any advice that may be provided by the JDC. At all stages of the disciplinary process, both JDC and SAB concluded that the facts amount to serious misconduct. JDC recommended summary dismissal. While the SAB may have concluded that summary dismissal was not proportionate to the offence committed, at the same time it concluded that in view of Mr. Muindi's history with regard to other fraudulent activities, the SAB was not of the view that reinstatement to his former post should be an option.

32. Mr. Muindi's claim that the disciplinary process was flawed is not correct. In both cases, the disciplinary process was conducted in line with IMO's Staff Regulations and Rules "without any significant procedural irregularities". Mr. Muindi was notified of the allegations against him before the investigation was initiated. As soon as the investigation team arrived in Nairobi, he was notified that he was suspended from duty with pay during the investigation and pending

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by a treaty and participating in the common system of conditions of service, where a special agreement has been concluded between the agency, organization or entity concerned and the Secretary-General of the Un

43. The relationship between IMO and the Appeals Tribunal is comparable to that between the International Civil Aviation Organization (ICAO) and the Appeals Tribunal, which has been explained by this Tribunal in *Ortiz*:⁴

... As a result of the foregoing, an appeal has been referred to the Appeals Tribunal, not directly against the original administrative decision, but against the final decision taken by the Secretary-General [of ICAO] upon completion of the first-instance procedure. It is the Tribunal's business to deliberate upon [the Advisory Joint Appeals Board (AJAB)'s] conclusions and recommendations and the reasons for which, as it turned out, the Secretary-General [of ICAO] departed from them. There should normally be no need for any other evidence than that submitted to AJAB.

... Nevertheless, it should be borne in mind that, even in a case like this, in which AJAB carried out its task carefully and impartially, the appeal is directed against an administrative decision, taken by an executive authority, and not against a judgment delivered by a professional, independent court of first instance deciding on the issue itself.

... Therefore, the Appeals Tribunal's Statute is only applicable to such an appeal insofar as, and on condition that, its provisions are compatible with the judgment of an appeal directed against a decision taken by an executive authority.

Preliminary issues

44. Mr. Muindi requests an oral hearing. Under Article 18(1) of our Rules of Procedure, this Tribunal may hold oral hearings if doing so would assist the expeditious and fair disposal of the case. In Mr. Muindi's case, the relevant factual and legal issues are straightforward and have been fully ventilated on the papers. For those reasons, the request for an oral hearing is denied.

45. Mr. Muindi also filed a motion seeking leave to file additional pleadings to comment on the documents the IMO Secretary-General had attached to his answer to Mr. Muindi's appeal. We do not see any exceptional circumstances which would warrant the granting of leave to Mr. Muindi to comment on these documents. For this reason, we reject his motion.

⁴ *Ibid.*, paras. 33-35; see also *Mosupukwa v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2016-UNAT-625 and

Receivability of Mr. Muindi's appeal

46. We find that Mr. Muindi's appeal is receivable. He filed, within the prescribed time limits, not only his appeal against the IMO Secretary-General's 4 April 2016 decision to summarily dismiss him to the SAB, but also his appeal against the IMO Secretary-General's final decision of 5 January 2017 to uphold the summary dismissal to this Tribunal.

Merits of the case

47. The task of this Tribunal is to decide whether or not the 5 January 2017 summary dismissal by the IMO Secretary-General is lawful. If it is lawful, Mr. Muindi's appeal cannot succeed; if it is unlawful, Mr. Muindi's appeal must be granted.

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- (ii) in respect of summary dismissal imposed by the Secretary-General in cases where the seriousness of the misconduct warrants immediate separation from service.

(c) In cases of summary dismissal imposed without prior submission of the case to a Joint Disciplinary Committee in accordance with subparagraphs (b)(i) and (ii), the staff member or former staff member concerned may, within two months of having received written notification of the measure, request that the measure be reviewed by such a Committee. A request shall not have the effect of suspending the measure. After the advice of the Committee has been received, the Secretary-General shall decide as soon as possible what action to take in respect thereof. An appeal in respect of such a decision may not be submitted to the Joint Appeals Board.

APPENDIX F

Policy and Procedures on the Prevention and Detection of Fraud and Serious Misconduct

GUIDELINES FOR THE INVESTIGATION OF SERIOUS MISCONDUCT

2.5 IOS is not responsible for deciding whether to initiate disciplinary action under article X of the Staff Regulations or to institute corrective administrative action as a result of its reports and recommendations. That is the responsibility of the Secretary-General or his authorized officials. It follows that an IOS finding that a staff member appears to have engaged in misconduct and a resultant IOS recommendation that disciplinary action be taken are not charges of misconduct. The Secretary-General initiates the disciplinary process by bringing a formal written charge of misconduct against the staff member and providing to the staff member the material on which the charge of misconduct is based. The disciplinary process is governed by the rules set out in articles X and XI of the Staff Regulations and associated provisions of the Staff Regulations and Staff Rules.

50. The IMO Secretary-General, in his 5 January 2017 decision, stated that there were “multiple incidents of serious misconduct: the excessive use of the official phone for private purposes during office hours for which full reimbursement was not received; and the preparation of the [accreditation] letter”. The IMO Secretary-General went on to state that in “consideration of these repeated cases of serious misconduct ... [t]he disciplinary measure of summary dismissal is proportionate to the events and stands”.

51. With regard to the use of the telephone charges case (Case I), there were no disciplinary proceedings in accord with the above mentioned provisions. In this matter, the IMO Secretary-General never brought a formal written charge of misconduct against Mr. Muindi as expressly required in Rule 110.3(a)(iii) and Appendix F, Section 2.5 of the aforementioned

Guidelines. Such a formal charge was only brought against Mr. Muindi with regard to the preparation of the accreditation letter (Case II) by the IMO Secretary-General in his 28 January 2016 memorandum. The IMO Secretarhe IMearMOl in ase18 Tcm0984 Tw[(202reg9rdingt M2

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Relief

55. We reject Mr. Muindi's request to rescind the IMO's refusal to disclose exhibits, appendices or annexes attached to the IOS 23 February 2016 investigation report. Apart from the question as to whether IMO's whistle-blower policy would allow such a disclosure, this Tribunal finds that the requested documents are not necessary for the disposal of the present case.

56. As we find the 5 January 2017 decision of summary dismissal to be unlawful, we order rescission of that decision. As an alternative, the IMO Secretary-General may elect to pay as in-lieu compensation to Mr. Muindi the amount of one year's net base salary at the rate in effect for March 2016.

57. Mr. Muindi's request for compensation is rejected. He has presented no evidence to substantiate his claim of harm.⁶

58. Mr. Muindi's claim for legal costs must also fail. Article 9(2) of the Statute provides: "Where the Appeals Tribunal determines that a party has manifestly abused the appeals process, it may award costs against that party". We find that Mr. Muindi has failed to establish that the IMO Secretary-General has manifestly abused the appeals process in any way. The fact that Mr. Muindi's appeal is successful is not sufficient in this regard. There is, therefore, no justification for an award of costs against the IMO Secretary-General.

⁶ Kallon v. Secretary-General of the United Nations , Judgment No. 2017-UNAT-742.

Judgment

59. Mr. Muindi's appeal is partly granted. The 5 January 2017 decision of summary dismissal is rescinded; as an alternative, the IMO Secretary-General may choose to pay to Mr. Muindi one

