Judgment

The application is dismissed.

Note

1. At the conclusion of the argument on the Motion, I gave an *ex tempore* judgment. The following is an edited version of that judgment, in which I have corrected various grammatical solecisms and tidied up other editorial slips. On further reflection, I consider that my initial view, as expressed in the *ex tempore* judgment, that the expression "reason to believe" is tantamount to a "reasonable suspicion" was wrong and I have corrected my judgment in that respect, inserting references to the speech of Lord Devlin in *Hussein v Chong Fook Kam* (1970) AC 942 and the judgment of the High Court of Australia in *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104 which, in part, explain my change of opinion. This change is immaterial to and does not affect the outcome of the Motion.

Introduction

2. This matter arises from an appeal by the Applicant to the Joint Appeals Board concerning a decision made on 15 July 2008 by the relevant Under Secretary-General (USG) not to undertake a preliminary investigation into allegations of improper behaviour and abuse of authority made by the Applicant against another staff member. The alleged misconduct was said by the Applicant to have occurred during an interview conducted by a panel, which included the staff member, convened for the purpose of evaluating the Applicant's suitability for promotion.

3. Following the Applicant's complaint about this conduct, the USG made certain enquiries about what transpired at the interview. He decided that there was no reason to believe that the other staff member had engaged in unsatisfactory conduct warranting a preliminary investigation, declined to conduct one and informed the Applicant accordingly on 30 July 2008. On 27 August 2008 the Applicant submitted a request for the review of this decision and, on 29 September 2008, was informed that the decision was upheld. Hence his appeal.

The legal issues: "reason to believe"

4. On 4 March 2009 the Administrative Law Unit, on behalf of the Secretary-General, responded to the appeal. Although the preliminary point was taken that the appeal was time barred, the Tribunal was informed at a directions hearing on 16 July 2009, that this was not pressed. The substantive response to the appeal relied on the provisions of ST/AI/371 prescribing the procedure for the AE(f)8(or)]TJ 070.0Tria

is treated for the purposes of judicial review in the same way as the exercise of a discretion reposed in a decision maker.

9. It may also be worth noting that there might well be "reason to believe" that a certain fact occurred without there being any actual belief that it did. Moreover, there might be "reason to believe" the fact occurred even if the decision maker was subjectively of the positive belief that it had not occurred, *a fortiori* if he or she had no belief one way or the other. The question is not whether the decision maker has a subjective belief one way or another; the question is whether there is, objectively, reason for the belief that the relevant conduct occurred. It is not for the decision maker to determine the facts and his or her personal belief about whether the posited misconduct occurred is completely irrelevant: his or her sole task is to ascertain whether there is a "reason to believe" that the misconduct occurred and then to initiate a preliminary investigation, whatever his or her opinion might be about whether it had occurred.

10. Of course, it is necessary for the decision maker to make sufficient preliminary enquiries to allow him or her to make the relevant decision and, in this respect, there is accorded a substantial degree of administrative discretion. What is sufficient will depend on the circumstances. A failure to make enquiries that, objectively speaking, were reasonably required in order to determine whether or not there was a reason to believe that the relevant misconduct occurred will, for obvious reasons, mean that the administrative discretion has miscarried.

The issues in the case

11. Here, the Applicant wishes to contend that any reasonable enquiries undertaken by the USG would have persuaded any objective and reasonable decision maker that, indeed, there was reason to believe the occurrence of the requisite conduct and therefore, the decision not to conduct or initiate a preliminary investigation was wrong. Essentially, this case depends, in an evidentiary sense, upon what was said by the Applicant about what happened at the interview, what the members of the panel disclosed and the inferences that reasonably follow from that material.

12. The case to be made by the Secretary-General is, as I understand it, that the decision not to initiate an investigation was within the discretion of the USG and that, absent some mistake of fact or some vitiating impropriety, his decision cannot be gainsaid.

The motion for summary judgment

13. The Respondent moves for dismissal of the Application under Art 9 of the Rules of Procedure of the Tribunal. It is submitted in substance by Ms Maddox, counsel for the Respondent, that accepting for the sake of the present application the facts alleged by the Applicant concerning the staff member's conduct at the interview are true, they could not warrant any disciplinary measure being taken against him. The basis for this submission is the language used by the Applicant himself to describe what occurred. It

18. If this submission were wrong, then many trials (subject to the use that might be made of Art 19 of the Rules of Procedure) would be a complete waste of time, where the outcome of the case is inevitable for legal reasons, even if the allegations made by the

22. The USG sent these complaints to the other members of the panel. It is sufficient to say for present purposes that, broadly speaking, they supported (to a greater or lesser extent of particularity) most, if not all, of the allegations made by the Applicant. Their answers, however, were not [illegible] and it is clear that

feelings mandated withdrawal from the panel. In this case, there is, of course, except for the allegations of the conduct itself, no evidence of the staff member's motive but it is reasonable to believe that his actions did have a motive as distinct from merely being the expression of an unpleasant personality. Since the conduct was adverse to the Applicant, it is reasonable to infer that it expressed an inappropriate attitude towards him since, by and large, persons intend the natural consequences of their acts.

26. It is important to note that I do not need to make and refrain from making any findings on, firstly, whether the conduct actually occurred and secondly, what motivated it; I am concerned only with the allegations and the inferences that may fairly and reasonably be drawn from them.

27. It is evident from what I have already said that, if the USG failed to enquire about the motives for the staff member's alleged actions, then his enquiries were insufficient to establish whether it was "reasonable to believe" that misconduct occurred. In order for him to have obtained sufficient information for the purpose of making the relevant administrative decision, namely whether to initiate a preliminary decision, it is at least arguable that he needed to enquire more of the panel members to ascertain in greater detail, while memories were fresh, how it was that the staff member conducted himself and what he said and to enquire about the staff member's reasons for acting as he did. An off-hand sarcastic remark might have been harmless and the adverse questioning of the Applicant might have been trivial, but they might well not have been. Moreover, if the USG failed to consider what motivated the staff member to act as he did, he failed to consider a material fact and his decision cannot stand for that reason.

28. It is important to bear in mind that this conduct did not occur in the course of idle conversation or even an official meeting. It was alleged to have occurred during a promotion process in which equality of treatment of the applicants is rigorously to be maintained and is not only a fundamental part of the propriety of the entire procedure but self-evidently so, and the surmise that a member of the panel might not have known the importance of equal treatment can be dismissed out of hand.

29. In my view, there is sufficient merit in the Applicant's case to warrant a full hearing. Put otherwise, the acts alleged by the Applicant, if accepted, do not lead to the conclusion that as a matter of law the Respondent is entitled to judgment.

(*Signed*)

Judge Michael Adams

Dated this 31st day of August 2009

Entered in the Register on this 16th day of September 2009

(*Signed*)

Hafida Lahiouel, Registrar, UNDT, New York