Case No.: UNDT/NY/2009/070/ JAB/2009/020

Judgment No.: UNDT/2010/069/ Corr.2

Date: 26 April 2010

Introduction

1. This case concerns the placement, after his separation from the Organization, of a note adverse to the applicant on his personnel file. The applicant, under former staff rule 111.2(a) requested an administrative review of the decision to place the note (described by him as "inappropriate and nebulous") on his file, and sought the evidence justifying the note, in particular the ultimate findings of the investigation, to provide him an effective opportunity to address the note. The reply on behalf of the Secretary-General, referred briefly to the history of the investigation leading to the note and stated that he had been informed of the findings in a draft report, invited to provide comments on them and further documentation was later provided. The position of the Administration was that this material provided the applicant with sufficient information to enable him to comment on the note.

2. The applicant appealed to the Joint Appeals Board (JAB) requesting findings that the note had been had been unlawfully placed on his file since he had not been notified in writing of the allegations and given a reasonable opportunity to respond to them or informed of the right to seek counsel, and the applicant maintained that the allegations against him were without merit, with a consequential recommendation that the note be removed from his file.

3. In a previous decision of the 31 December 2009 (confidential Order 190 (NY/2009) – may not be publicized without further order of the Tribunal) I dealt with several preliminary questions concerning the scope of the hearing necessary to determine the questions raised by the application. In that decision, I summarised salient facts, discussed certain legal issues and determined that, contrary to the submission of the respondent, the note in question was adverse in the relevant sense (vide ST/AI/292) but that the note itself was misleading. Following certain directions, I ordered that the applications be set down for trial on the merits. That trial has now taken place.

4. This judgment repeats some but not all of the earlier discussion for the purpose of placing the legal and factual questions in context.

Applicant's submissions

5. The note implies that the applicant may have committed misconduct, and he is therefore entitled to require the Secretary-General to consider whether he had in fact misconducted himself, in effect to charge him with misconduct or not and, in the former event, complete the disciplinary process prescribed by the rules or, in the latter event, to regard the matter as closed and remove the note. This obligation derives from the contractual entitlement of the applicant that the Secretary-General act in accordance with the requirements of good faith and fair dealing, so that the applicant has an opportunity to clear his name and vindicate his good reputation.

Respondent's submissions

6. The Secretary-General does not, at present, intend to continue any investigative process, whether disciplinary or not, against the applicant. Consideration may be given to such a possibility if the applicant seeks to or rejoins the Organization. The note does not itself make any allegations and the applicant's file does not contain any. No issue of clearing the applicant's name therefore arises. Nor, even if the file did contain a note of the investigators' allegations, is there a right to anything more than to make a comment in accordance with sec 2 of ST/AI/292.

7. At all events, a staff member, *a fortiori* a former staff member, has no contractual right to require the Secretary-General to undertake disciplinary proceedings although the Secretary-General may do so, even if the staff member has been separated, if it is in the interests of the Organization to do so: *Mason* (1995) UNAT 742.

Facts

8. In substance, these are not in dispute. The applicant, then a senior official with International Civil Service Commission (ICSC), retired in October 2005. In January 2006 he returned to work as a consultant for the ICSC. In 2006 the Procurement Task Force of the Office of Internal Oversight Services (PTF/OIOS) commenced an investigation into procurement at the ICSC. The applicant was notified in April 2007 of the proposed adverse findings, reviewed the documents in June 2007, and met with investigators in July 2007. In October 2008 a note was posted on the official status file of the applicant as follows –

> [The applicant] was separated from service with the Organization effective 1 October 2005. A matter was pending which had not been resolved due to his separation.
>
> In the event that [the applicant] should seek further employment within the United Nations Common System, this matter should be further reviewed by the Office of Human Resources Management. For information please contact the Administrative Law Unit, OHRM, at United Nations Headquarters.

9. It is agreed that disciplinary proceedings had not in fact been commenced against the applicant, though he was the subject of an investigation report, which had made adverse findings. On 11 March 2008 PTF/OIOS transmitted a copy of its report to the Office of Human Resources Management (HRM). It appears that, since disciplinary proceedings had not commenced and the applicant was no longer a staff member, OHRM took the position that it was not possible to commence such proceedings. The purpose of the note on his file (which contains no further information about the investigation) was to bring to the attention of any person having the right to consult the file the existence of the pending matter and inform them that the Administrative Law Unit could be approached for information.

The correctness of the note

10. For reasons that were explained in the earlier decision, no matter was actually *pending* so far as the applicant was concerned. The investigation that had been

completed was a “preliminary investigation” within the meaning of sec 3 of

circumstances permit, but some level of inaccuracy must be accepted since it will not always be either necessary or useful to inquire into the true facts or chase every rabbit into every burrow. On the other hand, the records ought not to be misleading. In my view, it is also essential that each page of each document should be numbered in order to enable the integrity of the file not only to be maintained but demonstrated. These considerations are all self-evident. The records necessarily include everything significant that is done by or affects its employees or agents in the course of their responsibilities, though of course this does not need to be collected in the one file. Where necessary or convenient, the files might need to be cross-referenced in some way. The fact that, in this case, a significant inquiry was undertaken, in relation to

measures that can be imposed following an adverse decision resulting from a disciplinary process assume subsisting employment (though it might be terminated). Although the recovery of monies owed to the Organization does not assume continued employment, nor does it assume misconduct and, hence, disciplinary proceedings – the Organization can identify debts and proceed to recovery by conventional procedures. The only possible exception to the requirement that the person against whom disciplinary proceedings are instituted must be a staff member at the time of institution is where there has been a separation and monies are owing by the Organization to the staff member that may be mulcted to reimburse losses incurred by his or her misconduct. Even here, however, since the financial loss incurred must result from wilful, reckless or grossly negligent actions, the finding that an act or omission in breach of contract has occurred leading to the loss is sufficient to found liability and it is unnecessary, in point of law, to characterize it as misconduct in order to obtain recovery. Where there are good reasons for characterizing conduct as amounting to misconduct, no doubt disciplinary procedures are necessary, but if it is merely desired to obtain recompense, it is not necessary to prove more than a breach of the contractual obligation to comply with the applicable legal instruments and act with due care and attention. I am inclined, therefore, to the view that the mere objective of obtaining recompense is not an exception to the general rule that misconduct proceedings must at least be commenced before the staff member is separated. Reference should be made to secs 1 and 2 of ST/AI/2004/3, which limit recovery to "gross negligence" which in almost every case would at all events amount to misconduct, cf sec 10.1(b), Chapter X of the new staff rules. This is but the logical consequence of identifying the conditions in the contract that either expressly or implicitly survive its termination.

13. It would, for obvious reasons, be desirable to promulgate a specific rule specifying survival (or otherwise) in these circumstances.

14. By virtue of his or her position as Chief Administrative Officer of the Organization, the Secretary-General clearly has all necessary powers to conduct such investigations and enquiries as might be thought necessary or desirable to administer

the Organization, and the mere fact that a staff member has separated cannot hinder, let alone prevent, any such action even if that staff member's conduct is in question. In this respect it matters not whether the focus of the inquiry is on proper or improper conduct; the administration is entitled to know what its staff has or has not done. It is simply that such investigations or inquiries cannot be disciplinary proceedings under Chapter X, because these depend entirely upon the subsistence of the contractual entitlement to subject a staff member to them, on the one hand, and the contractual obligation of the staff member to suffer them in accordance with the relevant instruments, on the other. In principle, it cannot follow, of course, that they could not take the same form if, for some (unlikely) reason it was decided that this should be done but the proceedings would still be undertaken under the general powers of management and would not, in point of law, be disciplinary proceedings.

15. I think it is also clear that a staff member has no right to require the Secretary-General to institute any disciplinary proceedings. The relevant instruments repose of the decision to institute such proceedings in the Secretary-General. No doubt that decision must be made properly, in compliance with the obligations of good faith and fair dealing, but I cannot see any basis for any entitlement in the staff member to require that disciplinary proceedings be taken against him or her. I should note, however, that whether a staff member is entitled to require disciplinary proceedings to be taken against another staff member is by no means so easy to decide: it seems to me that there are good arguments to be made on both sides of this question and, although the UN Administrative Tribunal has decided on a number of occasions that there is no such entitlement, the reasons given are less than persuasive. However, this difficult question is not before me and I say no more about it. I mention it only because I did not want my view about the lack of entitlement of a staff member to require disciplinary proceedings be taken against him or her to be thought to encompass the situation in which a staff member seeks to require disciplinary proceedings to be taken against another staff member.

inevitably to be the case) to an investigation report and by extension the findings and recommendations of the investigators. Any other conclusion would be so unrealistic as to be fanciful. Accordingly, the applicant is entitled to see the investigators report, together with any conclusion or decision that may have been made under ST/AI/371 in respect of it.

Conclusion

21. The applicant is not entitled to have the note removed simply because no disciplinary proceedings were undertaken in respect of the investigation report. However, the note in its present form is inaccurate and must be removed. Its replacement, if any, must be accurate and first shown to the applicant, who must be given a copy of the investigation report to enable him to place such comment on the file as he wishes, providing it is reasonably connected to the investigation. In the event of any dispute about these questions, it may be decided by another judge of the Tribunal.

22. In all other respects the application is dismissed.

(*Signed*)

Judge Adams

Dated this 26th day of April 2010

Entered in the Register on this 26th day of April 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York