



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/30/
UNAT/1688
Judgment No.: UNDT/2011/086
Date: 20 May 2011
Original: English

Before: Judge Nkemdilim Izuako
Registry: Nairobi
Registrar: Jean-Pelé Fomété

SOW

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Bart Willemsen, OSLA

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

Applicant was charged with failing to file a financial disclosure statement for 2005 and, in particular, violating Staff Regulations 1.2(b), 1.2(n), sec. 10.1 of ST/SGB/2006/6 (Financial disclosure and declaration of interest statements) (implementing staff regulation 1.2(n) and staff rule 101.2(b)). The Applicant submitted a response to the charges on 3 November 2007.

8. In his response to the charge letter, Applicant stated that he did not meet the requirements due to the pressure of work and technical difficulties in submitting the financial disclosure form online and that he had submitted a complete financial disclosure for 2005 as well as disclosures for 2006 and 2007. By a memorandum dated 25 March 2008, the Officer-in-Charge for OHRM referred the case to the *hoc* JDC.

JDC Review

9. The JDC Panel was established on 10 July 2008 and held its hearing on 6 August 2008. The Panel transmitted its Report to the Secretary-General on 3 October 2008. The Panel unanimously found that Applicant failed to comply with his obligations under the Staff Regulations in that he failed to present convincing evidence of his good faith efforts to comply with his obligations. Taking into account the fact that the Applicant accepted responsibility for this failure and that he worked in one of the most hazardous fields, the Panel unanimously recommended that the Applicant: receive a written censure from the Secretary-General for his failure to fulfil his obligations under the Staff Rules; that the Administration instruct him to file his 2005 disclosure statement by any available means within one week of his documented receipt of the letter notifying him of the decision of the Secretary-General; and should the Applicant fail to fulfil the above-mentioned requirements, that his employment with the Organization be terminated.

10. On 30 January 2009, the Deputy Secretary-General informed the Applicant that the Secretary-General had examined his case in light of the JDC's findings, conclusions and recommendations, as well as the entire record and the totality of the

JDC suggesting separation should the Applicant fail to submit the financial disclosure statement within one week of receipt of the Secretary-General's decision.

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21. The disciplinary measure imposed in this case does not correspond to the wrong done. From the outset of the disciplinary proceedings, the Applicant took full responsibility for the situation; he admitted his failure to submit the financial disclosure form and expressed regret for having done so. In turn, the JDC found that he had failed to present convincing evidence of his good faith efforts to comply with his obligations, a finding which he does not accept as accurate as he did in fact make good faith efforts but failed to secure direct evidence of the same. His compliance with the financial disclosure obligations for the reporting periods of 2006 and 2007 adds considerable weight to the veracity of his claim that he did in fact make good faith efforts to submit the required disclosure statement for the reporting period of 2005.

22. The purpose of staff regulation 1.2 is to certify that the assets and

conditions of the staff member (to) (6) (7) (8) (9) (10) (11) (12) (13) (14) (15) (16) (17) (18) (19) (20) (21) (22) (23) (24) (25) (26) (27) (28) (29) (30) (31) (32) (33) (34) (35) (36) (37) (38) (39) (40) (41) (42) (43) (44) (45) (46) (47) (48) (49) (50) (51) (52) (53) (54) (55) (56) (57) (58) (59) (60) (61) (62) (63) (64) (65) (66) (67) (68) (69) (70) (71) (72) (73) (74) (75) (76) (77) (78) (79) (80) (81) (82) (83) (84) (85) (86) (87) (88) (89) (90) (91) (92) (93) (94) (95) (96) (97) (98) (99) (100)

This failure does not correspond to the disciplinary sanction imposed. A lesser sanction or even an administrative reprimand would have been appropriate and proportionate considering the mitigating circ

ST/SGB/2006/6 for two consecutive periods. He repeated reminders, that the said staff member be reprimanded. The Applicant further claims that within a week from the date of the decision that he be reprimanded, the staff member was promoted to the level of Assistant Secretary-General. Considering this decision, the Applicant does not consider that the position taken by the Respondent in respect to his case was entirely correct and wholly proportionate.

28. In Judgment No. UNDT/2010/171 of 24 September 2010, Meerauh held that in exercising judgment on the proportionality of a disciplinary sanction, it would be necessary to ensure that the principle of consistency is applied and that where staff members commit the same or broadly similar offences, in general, the penalty should be the same, not necessarily identical but with a very narrow range of appropriateness.

29. The Applicant requests the Tribunal to find that the Secretary-General erred in law and in exercising his discretionary authority in imposing a fine of two months' net base salary for his failure to submit a financial disclosure statement for the reporting period of 2005 and rescind the impugned decision.

Respondent's Case

30. The Respondent's submissions are summarized as follows:

31. The Secretary-General has broad discretion with regard to disciplinary matters and this includes determining his salary. [(1.685 23u8TJ 17.Tw i n.0097lint'sud)w raequ fin

33. Regarding the Applicant's arguments that the Secretary-General's decision erred in law, the Respondent submits that the Applicant has put forward a wholly inaccurate representation of the Secretary-General's decision and that the decision states in relevant part as follows:

the Secretary-General considers that you should receive an appropriate sanction and considers a censure recommended by the JDC is not sufficient but that in view of the existence of a number of mitigating factors in this case, separation from service would be disproportionate.

34. The Secretary-General's decision does not reflect the presumption that all forms of misconduct lead to dismissal unless mitigating circumstances can be identified. It simply sets out the parameters used by the Secretary-General in the present case only, in determining the appropriate disciplinary measure to be imposed for the misconduct found - specifically that, in the Applicant's case, a censure was not sufficient and separation from service was too severe in view of the mitigating factors. Accordingly, the Respondent submits that the Secretary-General's decision was not an error in law but a fully valid exercise of his discretionary authority.

35. The Applicant failed to submit a 2005 financial disclosure form (with an initial submission deadline of 30 June 2006) until April 2008, after referral of his case to the JDC. This is a time lapse of just two years. Such failure was despite repeated reminders from the Ethics Office, the Applicant being under threat of disciplinary action for a year and a half, by the Applicant's own admission that the form would have taken five to ten minutes to produce. Such failure by the Applicant to comply with his obligations demonstrates a blatant, conscious and repeated violation of the Staff Regulations and Rules. Accordingly, the Respondent submits that the Secretary-General's decision to impose on the Applicant a fine of two months' net base salary, rather than the written censure recommended by the JDC, was entirely correct, wholly proportional to the Applicant's offence and a fully valid exercise of his discretionary authority.

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again very close to the idea of 'rationally connected'. In *Aqel*⁴, the Appeals Tribunal held that having established misconduct and the seriousness of the incident, it could not review the level of the sanction imposed. Such a decision falls within the remit of the Commissioner General and can only be reviewed by the Appeals Tribunal in cases of obvious absurdity or flagrant arbitrariness.

44. The Respondent's submission is that two months' net base salary is a decision that was within the power of the Secretary-General to impose and there was no obvious absurdity or flagrant arbitrariness. It was in keeping with the only case in existence at the time of the sanctioning of the Applicant and where the Applicant received a sanction of demotion and two months' net base salary fine. In January 2009, future cases were not relevant for comparison so the Applicant's submission of a sanction that was imposed on another staff member in July or August 2009 should not be taken into account by the Tribunal.

45. The Respondent, therefore, requests the Tribunal to dismiss all of the Applicant's pleas and to dismiss the Application in its entirety.

Consideration

46. The issues arising for determination in this case are:

- a. Whether the sanction imposed on the Applicant for failing to file his financial disclosure on time was proportionate;
- b. Whether there were any mitigating factors in existence that prevented the Applicant from filing his financial disclosure on time;
- c. What the practice of the Secretary-General is or has been in cases of non-compliance with the financial disclosure rules; and

⁴ 2010-UNAT-040.

57. The Tribunal finds that the conduct established in former UN Administrative Tribunal Judgment No. 1490 was much graver than in the present case. The facts in the two cases are neither analogous nor comparable. The said case is not a proper comparator to the present case. The Tribunal further finds that, in the present case, the Secretary-General failed to take into account the various mitigating factors in favour of the Applicant when determining the sanction against him. The disciplinary sanction imposed on the Applicant was much more excessive than was necessary for obtaining the desired purposes of the financial disclosure program in this case.

Equality of Treatment of all United Nations Staff Members

58. In *Sanwidi*⁵, the Tribunal recalled the principle of equality of treatment which should be applied to all UN employees in conformity with the Staff Regulations and Rules, with previous decisions of the Appeals Tribunal and the fact that equality of treatment in the workplace is a core principle recognized and promoted by the United Nations. Simply presented, the principle of equality requires that those in like cases should be treated alike. In UNDT Judgment No. 171 of 2010, it was held that the proportionality of a disciplinary penalty is a matter of judgment. In exercising such judgment, it would be necessary to ensure, amongst other matters, the principle of consistency is applied. This means that where staff members commit the same or broadly similar offences, in general, the penalty should be the same; not necessarily identical but within a very narrow range of appropriateness.

59. In the present case, the Tribunal finds that the disciplinary measure that would fall within a “very narrow range of appropriateness” would be a reprimand.

Findings

60. In view of the foregoing, a summary of the Tribunal’s findings are as follows:

⁵ UNDT/2010/036.

- a. The Applicant made good faith efforts to comply with his financial disclosure obligations for 2005.
- b. The Secretary-General failed to take into account the various mitigating factors in favour of the Applicant when determining the sanction against him.
- c. The disciplinary sanction imposed on the Applicant was far more excessive than was necessary for attaining the desired purposes of the financial disclosure program.
- d. The appropriate disciplinary measure in the present case should be a reprimand.

Conclusion

61 In view of its findings, the Tribunal:

- a. Rescinds the impugned decision.
- b. Awards the Applicant two months' net base salary at the rate applicable at the date when the impugned decision was taken.

(Signed)

Judge Nkemdilim Izuako

Dated this 20th day of May 2010

Entered in the Register on this th20~~th~~ day of May 2010

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi