



UNITED NATIONS DISPUTE TRIBUNAL

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Anne Coutin, Officer-in-Charge

RASOOL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Salim Shaikh

Counsel for Respondent:
Tamara Shockley, UNICEF

Introduction

1.

6. In late March or early April 2007, two OEC representatives met the Applicant in Battagram to discuss the installation of the generator. In the course of the discussion, the Applicant asked the OEC representatives if they could provide the Office with a quotation for the installation of earthing cables for prefabricated containers. The OEC representatives confirmed that they could provide a quotation, as well as quotations from competitors. Questioned by the Applicant, the OEC representatives admitted that, concerning the installation of the generator, their company had drafted the two quotations from its competitors using their letterheads.

7. On 5 April 2007, the Applicant received from the Abbottabad Office the three quotations for installation of the generator.

8. The following day, he contacted a local electrician in order to obtain a fourth quotation. At a meeting attended by the Applicant, his new Administrative Assistant and the local electrician, the latter had the opportunity to learn the amounts of the other three quotations before the Applicant asked him to prepare his own.

9. The Applicant then asked his Administrative Assistant to prepare a comparative analysis of the four quotations, which she submitted to the Applicant on 12 April 2007. He returned the analysis to her on 17 April 2007 and asked her to submit it directly to their supervisor, the Chief of the Battagram Zone Office.

10. On 25 April 2007, the Chief of the Battagram Zone Office requested the Administrative Assistant to report to the Abbottabad Zone Office to discuss the comparative analysis with the Operations Manager at Abbottabad.

11. Also on 25 April 2007, the Applicant informed his Administrative Assistant that he had learned from the OEC representatives that the three quotations for the installation of the generator had all been prepared by their company. That same day, the Administrative Assistant shared this information with their supervisor, the Chief of the Battagram Zone Office.

12. On 26 April, during a visit to OEC, the Operations Manager at Abbottabad and the Administrative Assistant in Battagram were told by a representative of the

25. On 3 July 2008, the Joint Disciplinary Committee issued its recommendation to uphold the sanction of summary dismissal.

26. In a letter dated 19 September 2008 and received by the Applicant on 11 October 2008, the Deputy Executive Director of UNICEF informed the Applicant of his decision to accept the opinion of the Joint Disciplinary Committee and maintain the sanction.

27. On 7 January 2009, the Applicant informed the former Administrative Tribunal that he had sent it his appeal by diplomatic pouch. The appeal, dated 26 December 2008, was received by the Administrative Tribunal on 29 January 2009 and transmitted to the Respondent on 2 February 2009.

28. On 3 August 2009, after requesting and receiving two extensions of time, the Respondent submitted his answer. The Applicant submitted observations on 14 September 2009.

29. As the case could not be decided by the Administrative Tribunal before its abolition on 31 December 2009, it was transferred to the United Nations Dispute Tribunal on 1 January 2010 and registered by the New York Registry under the number UNDT/NY/2010/030/UNAT 1668.

30. By Order No. 130 (NY/2010) of 25 May 2010, the Tribunal took several measures, ordering the Respondent to submit a copy of the investigation report prepared by the Office of Internal Audit and the parties to submit a joint statement addressing various factual and legal issues and the need for an oral hearing.

31. On 2 June 2010, the Respondent transmitted to the Tribunal and the Applicant a copy of the investigation report.

32. On 23 June 2010, the parties submitted to the Tribunal the joint statement requested of them. With regard to the holding of an oral hearing, the Respondent did not believe that one was needed as the case stood; for his part, the Applicant did not think it was possible to organize an oral hearing owing to logistical reasons but would be willing to participate if appropriate measures were taken.

33. On 18 July 2010, the Applicant submitted his comments on the investigation report.

34. By Order No. 237 (NY/2011) of 11 October 2011, the Tribunal asked the parties whether they had any objection to the case being transferred from the New York Registry to the Geneva Registry, given the significant backlog of cases from the former internal justice system that remained pending in the New York Registry.

35. Neither party having raised any objection, by Order No. 258 (NY/2011) of 31 October 2011, the Tribunal ordered the transfer of the case from the New York Registry to the Geneva Registry.

Parties' submissions

36. The Applicant's contentions are:

a. He bore no responsibility for the invitation to bid, the assessment of the bids or the selection of the supplier. The Logistics Assistant in Abbottabad was the sole person responsible for the invitation to bid; he was also the one who received the three quotations, which all bore the same date, and who contacted the suppliers to provide the quotations. The Logistics Assistant in Abbottabad had not complied with Chapter 7 of the UNICEF Supply Manual in his invitation to bid;

b. The Abbottabad Operations Manager had assumed responsibility for installing the generator, and it was the Logistics Assistant in Abbottabad who contacted the three suppliers after receiving quotations through means that did not comply with the UNICEF Supply Manual. There was collusion between the Abbottabad Zone Office, the Logistics Assistant in Abbottabad and OEC; the means by which the quotations were requested must be disclosed. It should be determined whether the Logistics Assistant in Abbottabad requested the quotations from the three companies, as he should have been suspicious when all three quotations

were submitted on the same day. The Logistics Assistant in Abbottabad should have rejected the quotations since they were all submitted solely by OEC. The three quotations were received by the Abbottabad Office before the two OEC representatives visited Battagram, which is proof of collusion between the Abbottabad Office and OEC;

c. The OEC representative stated that it was the Logistics Assistant in Abbottabad, who reported to the Operations Manager in Abbottabad, who had asked him to prepare the quotations from competitors using their letterheads;

d. He did not approve the quotations since his functions as Senior Administrative and Finance Assistant did not include responsibility for accepting or rejecting quotations. He did not sign any document to that effect;

e. He was made a scapegoat to keep other staff members from being found guilty of fraud. He met the OEC representatives only once and it is impossible to establish any sort of collusion between himself and OEC;

f. He made no attempt to obtain approval of the quotation submitted by OEC. On the contrary, during the period from 5 to 25 April 2007, he attempted to find proof of the collusion between the Logistics Assistant in Abbottabad and OEC, but without success;

g. It was not he but his Administrative Assistant who showed the

composition of the investigation team was irregular since his supervisor and the Operations Manager at Abbottabad had been involved in the matter and the Finance Officer had been appointed by the Administration. Furthermore, the three members of the team were all from the Administration, in violation of staff regulation 10.1 and staff rule 108.1(d), which provide that a staff representative must be present. Chapter 15 of the UNICEF Human Resources Manual, on “Disciplinary Measures and Procedures”, does not provide for the constitution of an investigation team by the Office of Internal Audit;

j. Furthermore, he was not given the opportunity to confront or cross-examine the witnesses during the investigation;

k. Lastly, before imposing the sanction, the Respondent did not share with the Applicant the investigation report, despite the latter’s requests, or the records of the interviews conducted during the investigation. Thus, as the sanction of summary dismissal was imposed on the basis of the report, the Applicant’s rights were not respected;

l. The Applicant received the investigation report after the Tribunal ordered that he should be given a copy; he then noticed that it contained many errors. Instead of pursuing the mandate set out by the UNICEF Representative in Pakistan, the investigators delved into past issues that had been settled without dispute. He had not been the subject of any investigation while working for the World Food Programme;

m. The Joint Disciplinary Committee did not carefully examine the facts in order to determine whether the rules of the UNICEF Supply Manual had been followed by those responsible for the invitation to bid. Its report is extremely short and superficial;

n. The sanction imposed is disproportionate to his alleged misconduct. In the letter informing him of the charges against him, he was accused of fraud, an allegation that is not supported by the facts. In fact,

the Administration suffered no damages and the Applicant himself sought no gain. The Respondent made no distinction between unsatisfactory performance and serious misconduct;

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that the Applicant should have been consulted concerning the composition of the investigation team. It is incumbent upon the Applicant to prove that

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46. The documents that were provided to the Applicant only upon the Tribunal's order are the preliminary investigation report of 1 May 2007 by the Operations Manager in Abbottabad; the interview record, which appears not to have been formalized, of the Applicant with the investigation team; the investigation team's report of 30 May 2007; and the Office of Internal Audit report of 17 July 2007.

47. Chapter 15, section 4, of the UNICEF Human Resources Manual, on disciplinary measures and procedures, reads:

15.4.5 If the investigation indicates that misconduct has occurred, the Head of Office/Division or responsible official should immediately report the matter to the Director, DHR giving a full account of the facts and attaching documentary evidence, such as cheques, invoices, administrative forms, signed written statements or any other document or record relevant to the alleged misconduct.

15.4.6 On the basis of the evidence presented, the Director, DHR on behalf of the Executive Director, will decide whether the matter should be pursued.

15.4.7 If the matter is pursued, the Head of Office/Division will:

- a) inform the staff member of the following:
 - i) the allegations of misconduct, including all the reported facts and any evidence obtained (e.g. signed written statements from persons/witnesses having knowledge of the matter) and copies of pertinent documents, etc.;
 - ii) the right to seek assistance of counsel in his/her defence at his/her own expense at his/her duty station; *and*
 - iii) that he/she has two weeks to respond to the allegations of misconduct, during which time the staff member and/or the staff member's counsel may request the Head of Office/Division to provide official records relevant to the case; *and*
- b) give the staff member a copy of this Chapter of the Manual.

48. It follows from these provisions that when the Exthes2k 5a6d5.33.8(of cou)-1.6472771 Ttnal

misconduct against him, but also provided him with all documentary evidence of those charges. The obligation to ensure due process required the Administration to provide the Applicant with the investigation report, along with all the documents and witness statements gathered; it precluded providing him with only some of the annexes to the report, allowing the Administration to decide which documents warranted provision and which did not.

49. In this instance, the fact that the complete investigation report was not provided to the Applicant until this Tribunal so requested is not in dispute. The Applicant did not have the complete case file in his possession when responding to the allegations of misconduct made by UNICEF or, later, when appearing before the Joint Disciplinary Committee. It follows that the Applicant's due process rights were violated during the disciplinary proceedings and before the Joint Disciplinary Committee.

50. The Tribunal must now consider the implications of the procedural irregularity described above. The Tribunal cannot rescind a disciplinary measure of summary dismissal on the grounds of a procedural error if it believes that in any event, had the due process rights been respected, the disciplinary measure would have been the same.

51. Therefore, the Tribunal must consider whether the sanction of summary dismissal imposed on the Applicant would have been the same even if he had been provided with the complete investigation report. The purpose of the investigation conducted fa3u1x5(t)6.48(pp1(h).5(e)--sg(h)-5.6(-6.8istrati(d)-5.6wase, t)6.tio)-5. ve pre 1r ei legnver noe nt(le)7(6(s)-5.ted,en)-5.3(Th)-5.3(fgula)7.e w

57. Similarly, the fact that the Applicant requested a local supplier to submit a quotation for the same installation after giving him the opportunity to learn the amounts of the quotations already submitted also constitutes misconduct since this action is a breach of the competition rules, of which the Applicant could not have been unaware.

Proportionality of the sanction

58. While the Secretary-General has broad discretionary authority in determining the sanction to be imposed on a staff member for misconduct, the Tribunal must consider whether the disciplinary measure of summary dismissal, which, at the time of the events, was the most severe disciplinary measure available, is entirely proportionate to the two acts of misconduct in this case.

59. Therefore, the severity of the Applicant's acts must be carefully considered, focusing solely on the allegations against him.

60. First, he was accused of not having informed his supervisors that two of the quotations submitted for the installation of a generator in Battagram had been falsified. At the time of the events, the Applicant had been Senior Administrative and Finance Assistant at the GS-7 level at the Battagram Zone Office for about eight months and, as stated above, was responsible for certifying to his supervisor the authenticity of competing quotations submitted by suppliers. He happened to discover that two of the quotations submitted to the Administration were falsified.

He did not in012 Tc8ch 7 enticolly lt.40809]TJ-u8644eo2(ied)-86 0 TDt7(o)-5(727)5.3 vr,3(a)tir

OEC. Therefore, the Applicant was not sanctioned for dishonesty, but solely for failure to report.

61. The second instance of misconduct was to have asked a local supplier to submit his own quotation for the installation of the generator and informing him of the amounts of the three quotations already submitted. It is clear that, in light of his functions, the Applicant engaged in misconduct by letting a supplier know the amounts of the quotations provided by his competitors. Nonetheless, since the Applicant is not accused of having sought to gain financially from this action, the Tribunal finds it plausible that in so doing, the Applicant was attempting to obtain a better price for the installation of the generator on behalf of the Administration.

62. It follows from the above that the facts held against the Applicant clearly show inconsistency and errors of judgment on his part. Nonetheless, considering that he had never been the object of a disciplinary measure in the past and that, in the present instance, he was not accused of dishonesty, the Tribunal considers that imposition of the most severe sanction—summary dismissal—is entirely disproportionate to the acts committed.

63. Thus, the imposed sanction must be rescinded and replaced, in accordance with the judgments of the United Nations Appeals Tribunal in *Abu Hamda* 2010-UNAT-022 and *Doleh* 2010-UNAT-025. The Tribunal considers that in the present instance, the summary dismissal should be replaced by the sanction of demotion from the level of GS-7 to that of GS-6.

64. Since the rescinded decision concerns termination, the Tribunal, under article 10.5(a) of its Statute, must also set the amount of compensation that the Respondent may elect to pay as an alternative to rescission of the contested administrative decision. Since, at the time of his summary dismissal on 4 October 2007, the Applicant was employed on a fixed-term contract ending on 30 April 2008, the Tribunal considers that in view of the misconduct, there is virtually no chance that his contract would have been renewed upon its expiration. Therefore, if the Respondent elects not to reinstate the Applicant retroactively as

from 4 October 2007, he must pay him compensation equal to the net base salary