

Introduction

1. The applicant was interviewed for a position as a P-5 in the Department for General Assembly and Conference Management (DGACM) by an interview panel, but complained to the Under-Secretary-General of the Department about the conduct of one of the panelists, namely his Special Assistant (SA). Section 2 of ST/AI/371 of 2 August 1991 (“Revised Disciplinary Measures and Procedures”) required the USG/DGACM to undertake an initial inquiry to determine whether there was “reason to believe” that the SA had “engaged in an unsatisfactory conduct for which a disciplinary measure may be imposed”. (The term “initial inquiry to distinguish this stage of the process from the “preliminary investigation”.) The USG/DGACM obtained certain limited information and decided that a preliminary investigation was not called for. It is this decision which the applicant has appealed.

2. In this case the important questions appear to be: first, whether there is reason to believe that the allegations about the SA’s conduct made by the applicant are true and, if so, whether they might amount to misconduct, secondly, whether the USG/DGACM made adequate enquiries to ascertain these matters; and thirdly, whether the USG/DGACM brought a fair and unbiased mind to these questions.

The nature of an initial inquiry and the issues in this case

3. By an earlier motion in these proceedings, the respondent sought summary dismissal of the application under art 9 of the Rules of Procedure. In dismissing the motion I discussed the requirements of sec 2 of ST/AI/371, the relevant administrative instruction dealing with disciplinary measures and procedures. I will not repeat what I set out in that judgment but it might be useful to clarify some possible obscurities.

4. As per sec 2 of ST/AI/371, the crucial question for the USG/DGACM to determine was whether “there is reason to believe...[that the SA] has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed”. The

“reason to believe” must be more than mere speculation or suspicion: it must be reasonable and based on facts sufficiently well founded – though of course not necessarily proved – to rationally inculcate in the mind of an objective and reasonable decision-maker to the belief that the first member has engaged in the relevant conduct. This is a question of fact and degree. It is a question of judgment, however, and not of discretion. Whether there is “reason to believe” the relevant matter is an objective question of judgment and, if there is, the official has no residual discretion to refuse to conduct a preliminary investigation. The official does not ask, “Do I have reason to believe?”, let alone, “Do I believe?” He or she must ask, “Is there material that would give an objective and reasonable decision-maker reason to believe?” It is not necessary that the official actually believes that the particular impugned conduct occurred or that it amounts to misconduct. The necessary and sufficient criterion is simply whether there is reason to believe that conduct amounting to misconduct occurred. Indeed, there might well be reason to believe that the relevant facts had occurred even if the official was personally convinced that they had not. Whether in fact improper conduct has taken place is a matter for later determination and, essentially, the task of the official is to determine whether, in substance, there are circumstances which give rise to a reason to believe (or expect) that a succeeding “formal” investigation might not necessarily will, disclose relevant misconduct.

5. The official must make adequate enquiries for the purpose of ascertaining whether there is reason to believe the relevant facts occurred. What is adequate will vary according to the circumstances and is a matter of objective judgment and not managerial discretion. However, the usual requirements affecting managerial discretion apply, in particular, the requirement that the official must bring a fair and unbiased mind to the question, consider relevant matters and disregard irrelevant ones, and make no mistake of significance. Both the person making the complaint and the person who is subject of the complaint must be given a reasonable opportunity to influence the decision. The official is not conducting a trial and is not obliged to follow any particular procedure. The mere fact that otherwise apparently

reliable witnesses give completely contradictory accounts about the relevant facts will not mean that there is no reason to believe that the impugned conduct did not occur. To the contrary, if there is an apparently reliable witness who says that it did occur, there will almost invariably be reason to believe that it did, even though, because he or she is contradicted, there is also reason to believe that it did not occur. The resolution of this contradiction would be a matter for the preliminary investigation and it may be for the Tribunal to determine if there is an adverse decision by the Administration and the staff member has appealed. Of course, the necessity that the material forming the basis for the belief should be sufficiently reliable to rationally justify the relevant inclination of mind will require at least some enquiries of potentially contradictory material (or contradictory witnesses) as a test of reliability or credibility. Finally, it is necessary for the official to record his or her decision in a way that indicates the factual matters on which he considered sufficient to provide reason to believe that the relevant conduct occurred.

6. Whether this procedure still applies in light of ST/SB/2009/7 is uncertain. I refer to this issue in the conclusion to this judgment.

The facts and evaluation

7. On 8 July 2008 the applicant was interviewed by a five-member panel for a P-5 post in DGACM. In addition to SA the panel also included a Program Case Officer (PCO) and three other panel members (1 PPM2 and PM3). On 9 July 2008 the applicant submitted a written complaint to the Assistant Secretary-General for Human Resources Management (ASG/OHRM) requesting an investigation into the conduct of the SA. On 10 July 2008 the applicant was informed that the matter should be referred to his Head of Department (SG) which the applicant immediately did.

8. In his complaint to the USG/DGACM the applicant alleged that during the interview, and in a way that was not repeated by the other panel members, the SA's behaviour had been "unprofessional, unbecoming and inappropriate" for the following nine reasons:

- 1 use of inappropriate language
- 2 making sarcastic observations about my answers
- 3 questioning my answers
- 4 questioning OHRM rationale of including specific competencies in the VA and their relevancy
- 5 arguing with other members of the panel
- 6 showing an intimidating posture
- 7 creating a tense and unsettling atmosphere
- 8 asking hypothetical questions
- 9 asking investigation-like questions about issues that have already been answered on

Describing this conduct as “flagrant and blatant indifference and disregard ... towards the most basic principles and guidelines of conducting interviews in the United Nations Secretariat”, the applicant questioned whether the SA was a suitable person to sit on an interview panel, whether he behaved in the same way to other candidates and “whether he had a hidden agenda in undermining [the applicant’s] performance in the interview”.

9. On the face of it, if the SA had indeed conducted himself as described by the

technology. On the same day, shortly after the meeting, the USG/DGACM sent the following e-mail to the PCO—

Further to our discussion this morning, and in the light of the reply of OHRM [advising the applicant that he should refer his complaints to USG/DGACM]...and as PCO for this case, please provide me with your comments on the 8 [sic] allegations [against the SA] cited in the note sent to [ASG/OHRM], as well as whether [the SA] showed the same behaviour and attitude, asked the same questions with the rest of the candidates.

In the light of your comments, and in conformity with ST/AI/371, I will decide whether to initiate a preliminary investigation “if there are reasons to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed”

The PCO replied on the same day—

Per your instruction, the following are my comments:

Use of inappropriate language On the sense of choice of words, I did not notice abusive or insulting language.

Making sarcastic observations about my answers Occasionally [the SA] repeated or summarized [the applicant]’s answer. In a follow up question (such as “So, you would”)

pursuing hypothetical questions but just to illustrate. (not in these words).

Asking investigation-like questions about issues that have already been answered on Same as points two and three.

With regard to the question "whether [SA] showed the same behaviour and attitude, asked the same questions to the rest of the candidates I report that:

1. The interview did not strictly adhere to a fixed set of questions. The follow up questions in particular were more often that not based on the candidates' foregoing answers.
2. [The applicant] was the first to be interviewed. In the middle of that interview I urged the meeting to keep to the Q & A format and not to engage in a discussion, but [PM1] reminded us not to ask hypothetical questions. [SA] didn't do either afterward.
3. During the panel discussion after the interview, one panel member remarked that [SA] asked the gender question of [the applicant] but not of the other candidates. [SA] responded that the same issue was implicit in his questions with the other candidates; and that [PM2], for example, did not always ask the same follow up questions, either. [PM2] said he had asked additional questions if the candidate omitted what he wanted to know, but hadn't repeated the questions if the candidate had already addressed the points (my recollection, not exact words).

Since [the applicant] did not cite specific examples as to exactly what made him feel as he did on each point, my comments are very tentative and I'm not sure if I'm not amiss. Other panel members may or may not agree with my observations; for the sake of discretion, I'm not discussing with anyone any issues related to this interview.

Sorry for the lengthy report. Please let me know if I can be of further assistance.

11. On the morning of 11 July 2008 the USG/DGACM e-mailed PM1 to provide her with comments on the "8" (a miscount for one) allegations made by the applicant and also whether SA conducted himself the same way towards the other candidates. He indicated that in the light of her comments he would decide whether to initiate a preliminary investigation. The USG/DGACM also expressed some sensitivity about the fact that the applicant had addressed her directly as the Head of Department although, of course, this was done pursuant to the direction of the ASG/OHRM.

characterise the request to transfer the process as an “outrageous slur against DGACM since it implies that, if the investigation is conducted by DGACM, it will be neither objective nor impartial”. Certainly, the request suggested the highest objectivity and impartiality would be served by transfer but this was not a slur, nor was it outrageous. He then referred to (irrelevant, but apparently regarded as adverse) fact that the trial complaint made by the applicant was wrongly addressed to OHRM and earlier assistance given by the USG/DGACM to the applicant in respect of consideration by OHRM of the applicant’s past experience. Then, returning to the matter under consideration, the USG/DGACM mentioned that he asked the PCO and a member of the interview panel to send him their comments on the allegations. Why he did not ask all members of the panel for their views was not explained. The memorandum goes on to say —

In light of their responses, and in accordance with Section II, paragraph 2 of ST/AI/371, I have found NO reason to believe that [the SA] has engaged in unsatisfactory conduct, and thus has [sic] decided NOT to undertake a preliminary investigation.

The USG/DGACM, in his evidence, accepted that he had indeed made the decision but asserted that, before making his decision, he had considered more than the

16. It is clear that the USG/DGACM's request that the applicant's "case be closed" was based upon two considerations: the first was that, as he had already decided that the prerequisites for a preliminary investigation had not been satisfied, there was nothing to be transferred for consideration (which, as mentioned below, was designed to preempt any transfer); and the second was that the request was based on what the USG/DGACM characterized as "unjustified slander". That the "allegations" mentioned in the first of the above paragraphs are those made by the applicant in respect of the conduct of the SA made very clear by the use of that very term in the first sentence of the memorandum concerning that matter, which is as following: "With reference to Staff Member [the applicant]'s e-mail dated 09/07/2008 to ASG/OHRM in which he makes allegations about the professional conduct of a member of the interview panel, [SA]".

17. The applicant's e-mail of 14 July 2008 to USG/DM was cast in language that was both reasonable and respectful. The response of the USG/DGACM of 15 July to the USG/DM demonstrated not only unseemly arrogance and insensitivity but gross exaggeration and lack of judgment. The concluding request that action be taken against the applicant was absurd and retaliatory, demonstrating, together with the comments to which I have already brought attention, that the USG/DGACM was incapable of dealing with the applicant's claims objectively and rationally. It was weakly suggested by counsel for the respondent that the last sentence quoted above was not aimed at the applicant but was a request that the ASGs and USGs against whom the applicant had made implied accusations, together with him as the DGACM, should be the subjects of an initial inquiry under the disciplinary procedures rather than the applicant. I reject this interpretation but observe that had it been correct, this would demonstrate an equally irrational overreaction.

18. It was also submitted on behalf of the respondent that, although purportedly sent in the USG/DGACM's name, he may not have been responsible for the language of the memorandum and it may not have been on the date it bears. I reject the former submission because of the USG/DGACM's answers which repeatedly both explicitly and implicitly accepted authorship. The USG/DGACM also several times

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played any part at all, let alone a significant part, in the US/DGACM's decision-making, with no reason for omitting it unless it had not in fact been considered.

21. In his testimony, the USG/DGACM also pointed out that the applicant's total score (134.5) was the highest (the others were 127 and 122.5). He said that this showed that SA had not attempted to cause the applicant's candidacy to fail. He claimed to have relied on this overall score as evidence that the behaviour of SA had not adversely affected the outcome of the interview and was not motivated by ill-will towards the applicant. I leave aside the obvious illogicality in what the USG/DGACM claimed was his reasoning to point to the individual scores given by SA on the one hand and the other panel members on the other. In that respect the matrix is indeed revealing. So far as each of the categories of professionalism, teamwork, technical, leadership, management performance and communication were concerned, the SA gave the applicant the best score of all the panel members. For the remaining subject (planning) he gave the same score as the other panel members. The total score given by SA to the applicant was about 20% less than the average of the other scores. In respect of the other applicants, however, SA gave them significantly *higher* scores on every category than

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22. The suggestion in the USG/DGACM's evidence that the ultimate total scores showed that the applicant's complaints were unjustified or that SA was unbiased is a plain *non sequitur*, demonstrating that he either did not give any genuine consideration to the matrix, in which event he should not have relied on it, or, if he did, that he refused to consider the inevitable logic of the numbers, in which event he was dishonest. The relevance of the matrix to the decision was raised for the first time in the USG/DGACM's testimony and, as the document was not in court at the time (it was supplied after the hearing), he could not be cross-examined on it. In fairness, I decline to conclude that he was dishonest.

23. The USG/DGACM said in evidence that he had interviewed the SA on 15 July 2008 and that, in part, he had relied on his explanations of what occurred in concluding that there should be no preliminary investigation. Whether indeed the USG/DGACM did speak to the SA on 15 July is uncertain, but he certainly responded in writing by e-mail addressed to the USG/DGACM on 16 July. It is not necessary for present purposes to analyse the SA's response but it is fair to say that, if accepted, it appears that the SA acted reasonably. At the same time, the SA was not an objective observer and was placed in the position of justifying his conduct. This was a factor which the USG/DGACM should have taken into account. Of more immediate significance is that, as will be recalled, no reference is made by the USG/DGACM in his memorandum to having interviewed the SA. Not only is no such reference made but its omission is consistent with the necessary implication of his expressly stated basis for his decision, namely that the information he had obtained from the PCO and, implicitly, PM1, was the information he had relied on. The USG/DGACM explained his omitting any reference to the SA as a desire to keep the memorandum brief. This is simply not credible: first, the mention of the name and an interview would add only a few words; secondly, he had every reason to mention the interview in justification of his decision; and, thirdly, as mentioned, the clear implication derived from referring to the other panel members. It is not reasonable to accept the truthfulness of the USG/DGACM's evidence that he

interviewed the SA before he made the decision to refuse the preliminary investigation.

24. On the afternoon of 15 July 2008 the USG/DGACM sent emails to PM2 and PM3, asking them to provide comments by 16 July on the allegations made by the applicant about the conduct of the SA. It could be inferred that these e-mails were sent before the memorandum of 15 July was drafted but it is clear that the USG/DGACM had decided to reject the applicant's complaint before he had obtained the responses, although it is obvious that a possible decision could be made without obtaining information from all the panel members. The PCO's report, whilst not asserting any misconduct on the SA's part, is in guarded language and in some respects mildly critical and certainly gave SA's behaviour less than unqualified

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establishing its correct place in the chronology of events. In his evidence the USG/DGACM said that the conversation with the SA occurred on 16 July but I prefer the contemporaneous document and find that it occurred on 15 July.

30. It is evident from the e-mails of PM1, PM2 and PM3 that they were in a position to give further information about SA's behaviour and every reason to believe that the information was likely to be factual rather than supportive. The USG/DGACM, of course, should have sought more specific information – certainly there was more than sufficient to raise a reasonable suspicion that SA's behaviour was not all that it should have been. If, (as he claimed in his evidence), he had decided to make further enquiries in order to assist OHRM, why did he stop at this point?

31. The USG/DGACM said that he made no further enquiries because on 17 July 2008 he signed the submission for filling a vacancy to be considered by the CRB and, as I understand his evidence, he was concerned that any investigation into the propriety of the selection interview might delay the recruitment process beyond the time agreed between him as USG and the Secretary-General, and thus reflect upon his performance. He said that, if it had not been for this time constraint, he would have made the further enquiries. Accordingly, he allowed his own interest to affect the adequacy of the enquiry.

32. The USG/DGACM was asked for his reasons for refusing the applicant's request for a preliminary investigation. He testified that he had three factors in mind when he decided that there was no room for a preliminary investigation: first, the marks given to the applicant during the interview; the second, the PCO's detailed comments; and the third was the SA's responses to the questions about his conduct. It will be seen at once that these differ in the first and last respects from his memorandum. Even accepting that the differences are simply a failure of recollection, it is obvious that the more reliable evidence is the contemporaneous written record and accordingly I reject his testimony. I point out also that it leaves out of account

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witness obliged to tell the truth, he could not enter into a self-justifying negotiation and state as fact what was no more than a mixture of surmise and self-serving argument. At the conclusion of his evidence, I informed counsel for the respondent, in substance, that I did not think the USG/ACM's honesty was in issue so much as his reliability. After having carefully reviewed the evidence in light of the submissions of both parties, reread the transcript several times and listened again to the way in which he gave evidence, I have reluctantly concluded that my initial inclination to explain away the unsatisfactory aspects of his testimony as mere if070 -1e]

handled but because of his personal pique, still evident at the trial, he did not do so. Indeed, in his evidence, he attempted to effect, to put the blame on USG/DM and complained that she had still not responded to his memorandum to her.

38. (It is unfortunate that US/DM did not ensure that the applicant was informed of her decision on his request to transfer consideration of his application to her Department but no evidence has been adduced before me as to what occurred from her point of view and it is therefore not appropriate that I should further comment on this aspect of the case. There may well be a perfectly proper and adequate explanation.)

The administrative review and appeal

39. On 21 July 2008 the applicant e-mailed the USG/DGACM, bringing to his attention his request for an investigation of the conduct of the SA and pointing out that he had received no information as to how far the case had proceeded. The USG/DGACM replied on the same day that the matter has been referred to

about the SA. The decision was confirmed and the applicant, on 30 November, appealed to the Joint Appeals Board.

Conclusion

41. The applicant's appeal must be upheld. The administrative decision by the USG/DGACM that there was no reason to believe that relevant conduct had occurred followed a seriously inadequate initial inquiry, was tainted by personal pique and the process of the appeal and the hearing itself marred by careless and misleading statements with recurring lack of candour. Accordingly, his decision is rescinded.

