

Introduction

1. On 9 September 2008, the Secretary-General imposed a disciplinary measure against the Applicant that consisted of a written censure and demotion by one grade from P5 to P4, without a possibility of promotion for two years. These measures were based on charges of “fraudulent use of United Nations Mission in Ethiopia and Eritrea (UNMEE) funds, in particular training funds in the amount of USD 8,210, with the intent of defrauding the Organization”.
- 2.

exceptional compensation representing three years salary for the damage to his career and professional reputation.

The facts

5. The Applicant joined the Organization in 1992, serving in the field of human rights and humanitarian issues in Geneva and across various peacekeeping missions in Cambodia, Bosnia and Herzegovina, Croatia, Democratic Republic of Congo, United Nations Mission in the Central African Republic (MINURCA) and the United Nations Peace-building Office in the Central African Republic (BONUCA) and the UNMEE. The Applicant's contract with UNMEE/the Organization expired in January 2009.
6. In July 2005, while visiting the OHCHR at Headquarters (HQ) in Geneva, the Applicant was informed about the Human Rights Training of Trainers (TOT) session initially planned in August 2005.
7. On 10 October 2005, the Applicant expressed interest in participating in the TOT session. On the same day, OHCHR Training Unit in Geneva queried the Applicant whether his Office would be in a position to fund his travel to and from Geneva, including the Daily Subsistence Allowance (DSA). This information was needed before a decision could be made on the final list of participants. The Applicant replied by email on the same day that he "ha[d] already been planning to be in Geneva during the same period and the trip and DSA w[ould] be funded via UNMEE".
8. By memorandum dated 12 October 2005, the Applicant wrote to the Special Representative of the Secretary-General (SRSG) in UNMEE to seek authorization to attend the Human Rights TOT session in Geneva, scheduled from 13 to 21 December 2005. The memorandum was copied to the Deputy Special Representative of the Secretary-General (SRSG) and the Chief

Administrative Officer (CAO). At the bottom of the memo there is a undated handwritten note that reads “OK, SRSG”.

9. Administrative procedures for the Applicant’s travel were initiated by the Training Unit of UNMEE, which is the competent authority to ascertain the availability of training funds. On 15 October 2005, the Applicant submitted a “Nomination Form” to the Training Unit Coordinator

13. On 22 November 2005, the Applicant received a letter from a Non-Governmental Organization (NGO) named “Solidarité sans Frontières” confirming his acceptance to participate, in his private capacity, in their Annual Review Session from 20 to 23 December and 27 and 29 December 2005.
14. On 1 December 2005, based on the SRS²’s approval of the Nomination Form for the TOT, a PT⁸ numbered 06-06-MEE-00376 was issued and the Applicant received a travel advance of USD 2,715.00. On 1 December 2005, the Applicant through his Office collected the advance travel funds representing a portion of the DSA for the trip.
15. On 11 December 2005, the Under Secretary-General for Peacekeeping Operations (USG/DPKO) arrived at the Mission in Asmara.
16. On 18 December 2005, the Applicant flew out of the mission area in Asmara to Geneva and returned to the Mission area on 16 January 2006.
17. On 17 January 2006, the Applicant submitted a leave report covering the period of 30 December 2005 to 15 January 2006.
18. On 20 January 2006, the Applicant also submitted an F-10³ form indicating in the description of expenses as follows: “Original PT8, Boarding Passes, Ticket stub, DSA for the period of 19 to 31 December 2005 for the total of USD 3289 and 01 to 15 January 2006 for an amount of USD 2205 [representing the remaining portion of the DSA and reimbursement of his travel costs]”. He attached the original P9969(g)16.8429()-3051w88(d)-3.71568()-68.678(a0.180

USG/DPKO to the mission area and that he was on annual leave from 30 December 2005 to 15 January 2006. The PT8 form also indicated that there was a claim for DSA for the period 19 December 2005 to 15 January 2006, inclusive of the period during which the Applicant was on annual leave.

19. On 27 January 2006, the UNMEE Personnel Officer requested the Applicant to submit a new Leave Request Form.

20. On 29 January 2006, the Applicant received a letter from the NGO “Solidarité sans Frontières” thanking him for his participation in the Annual Review Session held in Geneva from 20 to 29 December 2005.

21. In a report dated 31 January 2006, the Applicant stated that he was on mission in Geneva from 19 to 29 December 2005 to conduct meetings with five colleagues at the Headquarters in Geneva as well as to attend a review session of an NGO. The Applicant did not specify the dates on which he met his colleagues.

22. On 9 May 2006, the UNMEE Personnel Officer advised the Applicant to re-submit a leave report for the period 27 to 29 December 2005 as it was missing from the M1858(9)6564243.doc

December 2005 would have proved fruitless due to the prevailing tense mission situation with the ongoing relocation of UNMEE staff from Eritrea to Ethiopia.

Therefore, I concur with your suggestions to undertake all necessary deductions and re-adjustments regarding the days from 18 December 2005 to 16 January 2006 in order to adjust any undue MSA payments.”

28. On 10 June 2006, the Applicant was requested to submit a new Leave Report to accurately reflect his absence from the Mission. On 16 June 2006, the Applicant submitted a new Leave Report indicating that he was on annual leave from 19 December 2005 to 15 January 2006. Recovery payments for undue MSA started to be deducted from the Applicant's salary in June 2006.
29. On 15 June 2006, the Secretary of the Human Rights Council wrote to the Applicant an email "To Whom it May Concern" stating that the Applicant was in Geneva for meetings at Headquarters from 19 to 20 December 2005.
30. On 18 August 2006, an investigation panel was constituted by the CAO following a request of the Administrative Law Unit (ALU), Office for Human Resources Management (OHRM). The panel consisted of three UNMEE officers. In its report of 28 August 2006, the investigation panel detailed its interview with the Applicant regarding the actions taken prior and subsequent to his trip to Geneva. The investigation panel found that the Applicant had travelled to Geneva on official business and received allowances associated with the travel but that he had not attended the Geneva training workshop. The panel also found that the Applicant did not advise UNMEE of the change in purpose of his trip to Geneva until June 2006.
31. On 29 September 2006, the Applicant was requested to submit a new Leave Report to accurately reflect his absence from the Mission. On 16 June 2006, the Applicant submitted a new Leave Report indicating that he was on annual leave from 19 December 2005 to 15 January 2006. Recovery payments for undue MSA started to be deducted from the Applicant's salary in June 2006.

40. On 28 August 2009, the Applicant requested an extension of time to file the matter before the UNDT. By an order dated 10 September 2009, the Applicant was granted an extension of time until 18 September 2009.
41. On 18 September 2009, the Applicant filed his application before the UNDT. The Respondent filed a reply on 21 October 2009 and raised the preliminary issue of receivability *ratione temporis*.
42. A status conference was held on 23 November 2009. The Respondent filed a second reply dated 8 December 2009 in which he addressed the case on its merits.
43. A hearing was held on 19 January 2010 with the parties participating from Nairobi and New York, via video-conference. Counsel for the Applicant called two witnesses, including the Applicant himself, and Counsel for the Respondent called one witness. Counsel for the Applicant submitted a bundle of additional documentary evidence at the beginning of the hearing to which reference was made during the examination of the witnesses.

Applicant's Submissions

44. In support of his Application, the Applicant challenges the discretionary authority of the Secretary-General in rejecting the JDC's recommendation to impose a less stringent disciplinary measure. He alleges that the Secretary-General relied on "confused and contradictory assumptions of facts concerning the Applicant's actions that appear to ignore the factual explanations put forward by the Applicant to justify what occurred".
45. The Applicant explains that he was unable to amend the PT8 due to an emergency situation in the Mission at the time. The misreporting on the number of annual leave days and the DSA claimed for the whole period,

inclusive of his annual leave, was due to a mistake on the part of other colleagues.

46. Furthermore, the Applicant avers that, once the trip to Geneva was already approved by the SRSG and his Principal Deputy/SRSG who was the Officer in Charge/UNMEE during the interim period in Asmara, there was no obligation for him to seek any other additional authorization in accordance with the Memorandum of Understanding (MOU) and the Applicant's Terms of Reference (TOR).

47. The Applicant claims that he verbally informed the Deputy SRSG/UNMEE who during the interim period of the SRSG's absence had become his immediate first supervisor.

48.

ALU. The limited interview record provided of the local investigation panel conducted in August 2006 is inaccurate and biased. The Applicant was not afforded an opportunity to object to the composition of the local investigation panel set up by UNMEE and was never asked to review or sign off on it.

52. Recalling UNAT Judgment No. 1026 *Kiwanuka* (1999), the Applicant stresses that the concept of poor judgment is quite different from misconduct. The JDC panel established that the Applicant's action did not involve falsifying documents or presenting a claim that was designed to defraud the organization by the use of false information.

53. The Applicant finally submits that, in judging intentions, some weight ought to be afforded to the Applicant's record of honesty and integrity over an extended period. It should also give due consideration to the mitigating circumstances as the Administration itself was negligent. In taking all these factors into consideration, the conclusions drawn by the Administration in this case appear unfounded and unduly harsh.

54. The Applicant seeks full exoneraticanpe827,-4.835(c)1.96299843(a)1.963893173(k)6.562968()-6.

60. Based on the evidence on the record, the Respondent considered the Applicant's actions to be a serious violation of the standards of conduct and integrity expected of staff members.
61. The disciplinary measures imposed on the Applicant were proportionate and did not constitute an abuse of authority.
62. The Applicant's due process rights were respected throughout the disciplinary

65. The role of the Tribunal is to consider the facts of the investigation, the nature of the charges, the response of the staff member, oral testimony if available, and draw its own conclusions. The Tribunal is in no way bound by the findings of the JDC or the Secretary- General on the facts disclosed.

66. The Tribunal notes that the current case was governed by the provisions of ST/AI/371 on the *Revised Disciplinary Measures and Procedures* and that, in accordance with paragraph 9(c) of this administrative instruction, OHRM referred the Applicant's case to the JDC for recommendation.

67. When, as in the current case, the Tribunal is in possession of the report of the JDC, which includes its findings and recommendations, its task is to review the facts and determine whether the facts give rise to misconduct and to evaluate the seriousness of that misconduct. If the Tribunal concludes that

69. The next issue for determination is the standard or degree of proof required in a disciplinary case. In a number of cases decided by the former UNAT terminologies like “supported by cogent evidence” or “ample evidence” (Judgment No. 529); “conclusions supported by evidence” (Judgment No. 756); “allegations are well founded” (Judgment No. 797); “ample evidence to conclude” (Judgment No. 897); “whether the findings of fact are reasonably justifiable and supported by the evidence (Judgment No. 616) have been used to explain and lay down the principle relating to the degree of proof required to prove an act of misconduct. In Judgment No. 1428, the UNAT held that the Respondent “need not establish beyond reasonable doubt a patent intent to commit the alleged irregularities”.

70. It is the view of the Tribunal that the use of terminologies in the abstract without any explanation belong more to the realm of academics. What is required in practice is the formulation of a rule that clearly denotes what the task of the Tribunal is in determining if allegations of the

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knowledge of his non selection for the TOT session in Geneva, the issuance of

aware that he was proceeding there to meet with an NGO or to have consultations with colleagues at HQ. As the purpose of his travel had changed he used funds earmarked for training for a different purpose without obtaining prior written authorisation. The Applicant stated that the deputy SRSG who was OIC in the absence of the incumbent had verbally authorised him to proceed to Geneva on a changed purpose. On that issue, the CAO stated during the hearing held on 19 January 2010 that the Deputy SRSG had no power to give such an authorization verbally and that the standard administrative practice is to give such authorisation in writing. Such evidence coming from the CAO, as the Head of Administration in the Mission in Asmara, should be given due weight.

81. Further, on his return from annual leave, after attending meetings with colleagues at the OHCHR and a session with a NGO in Geneva, the Applicant did not amend the PT8 form to reflect the true nature of his travel to Geneva. Additionally, the Tribunal notes that there was a claim for DSA for the period January 2006 when he was on annual leave. Admittedly there was a note on the PT8 that, during January, the Applicant was on leave but this is not sufficient to absolve him. He received the DSA for the period he was away from the mission, including the period when he was on annual leave. He stated that his assistant went to get the DSA and that there was no mistake on his part and that the finance section was to be blamed for the payment of the DSA.

82. It is the Tribunal's view that the Applicant should never have taken that DSA either directly or vicariously as he was simply not entitled to it, especially since no amendment had been made, as it should have been, to the PT8. Even after he had received that money he kept silent for about six months until an investigation was initiated in the case in June 2006. He could not give a satisfactory explanation as to why he kept silent for so long. When questioned by the Tribunal, 98(i)0.441715(n)-3.71568(a)1.96262(n)-3.71693(c)1.9626568(e)12.441715(t)-8(a)

Nor was there any cogent evidence from which such adverse findings could be reached and inferences could be drawn against the Respondent.

Was the sanction proportionate to the act of misconduct?

91. The Tribunal notes that the Applicant was a senior official in a peace-keeping mission. He did not follow the appropriate procedure to travel. He used funds earmarked for purposes other than attending the TOT session in Geneva. He alleged that the future of the mission in Asmara depended on consultations he should have or had in Geneva. There was no evidence of this fact. He claimed and was paid DSA to which he was not entitled. He kept silent about that fact for about six months. Had not an investigation started in that case he would, given the sequence of events and his attitude, have kept that money.

92. It is a fact that the Applicant has an unblemished record with the Organisation. But an unblemished record is not in itself a gateway to breaching the rules of the Organisation. Nor does an unblemished record



Judge Vinod Boolell

Dated this 8th day of February 2010

Entered in the Register on this 8th day of February 2010.



For **ARENA KWAKYE-BEKU**