



Case No.: UNDT/NBI/2010/001  
UNAT/1581  
Judgment No.: UNDT/2011/21  
Date: 29 December 2011

## **Introduction**

1. The Applicant, a national of Cameroon, was employed as a Security Officer with the United Nations Mission for the Referendum in Western Sahara (“MINURSO”). His duty station was Laayoune, Morocco. On 14 March 2007 the Secretary-General dismissed the Applicant from service following findings by the

the Officer-in-Charge (OIC) of MINURSO, Mr. Philippe Elghouayel, as well as the Office of Internal Oversight Services (OIOS), which undertook an investigation.

7. On 2 August 2005 the Applicant was called to a meeting by Mr. Aghadjanian. Also present were Ms. J. Redl, Chief Civilian Personnel Officer (CCPO), and Mr. Elghouayel. The alleged misconduct was discussed. According to the Applicant, pressure was put on him to resign and he did tender his resignation. However, on 10 August 2005, the Applicant sent a memorandum to Mr. Elghouayel declaring his intent to withdraw his resignation. Even so, Mr.

## **OIOS Investigation**

10. OIOS produced a report dated 17 November 2005 (“the OIOS Report”). In the course of the investigation, the Applicant was interviewed twice. OIOS examined his office computer and found approximately 58,000 images. Some of these images were said to be photographs taken by the Applicant himself and others were allegedly downloaded from the internet. In the OIOS Report, it is stated that a significant portion of the photographs found depicted naked women displaying their sexual organs in graphic detail. The photographs from the CD depicted naked women in sexually graphic poses.

11. According to the OIOS Report, wh



recommends that OHRM initiate swift disciplinary action against Mr. Massah. DPKO contends that Mr. Massah, the Officer-in-Charge of Security, has admitted to engaging in acts which not only amount to serious misconduct but have potentially placed the physical security of MINURSO personnel, himself and the victims depicted in his photos at risk. DPKO firmly maintains that the alleged acts, if true, constitute a substantial dereliction in duty in that as a security officer, Mr. Massah knew or should have known the impact of his actions on the security of the mission. Consequently, the allegations, if true, would require Mr. Massah's summary dismissal in order to protect the best interests and integrity of the Organization.

19. On 31 March 2006 the Applicant was again placed on SLWFP. On 5 April 2006 he received a letter from the Director, Division for Organizational Development, Office of Human Resources Management (OHRM), presenting him with allegations of misconduct.

### **Charges**

20. The Applicant was charged with sexual exploitation by taking pornographic nude photographs of local women in Laayoune, in breach of ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse). He was further charged with violating sections 4.1 and 5.1 of ST/SGB/2004/15 (Use of Information and Communication Technology Resources and Data) based on the discovery of the 58,000-odd images on the hard disk of the Applicant's UN office computer as well as a number of emails containing erotic and pornographic images in the Applicant's UN Lotus Notes email account.

21. The Applicant submitted a formal response to the charges by letter dated 16 April 2006, in which he stated:

...OHRM is fully aware of the criminal acts (burglary of personal property and extortion), willful none [sic] compliance with United Nations policies (mission directives) and coercion (frustrated

via teleconference. In its report, which is undated, the JDC concluded that the conduct of the Applicant constituted “sexual abuse” which supported the first charge against him.

23. Regarding the second allegation, the JDC considered first whether or not the relevant photographs amounted to “pornography”. The JDC concluded on this issue:

Having examined the photographs, the Panel decided that at least several of the photographs—such as those depicting female sexual organs with foreign objects inserted, or the one showing, at a very close range, Mr. Massah’s hand touching the woman’s vagina—were unquestionably of a pornographic nature...

24. In view of the Applicant’s admissions about receiving, forwarding and showing other staff members erotic and pornographic images and video files, the JDC concluded that the Applicant was in breach of ST/SGB/2004/15 and that he had “failed to observe the high standard of conduct and acted in a manner unbecoming an international civil servant and thus discredited the United Nations.” The JDC therefore recommended that the Applicant be separated from service.

25. On 14 March 2007, having considered the conclusions of the JDC, the Under-Secretary-General for Management, Alicia Bárcena, wrote to the Applicant advising that he would be separated from service without notice or compensation in lieu thereof.

26. The Applicant appealed this decision.

### **The Application before the Dispute Tribunal**

27. Hearings in this matter took place on 5, 6 and 26 July 2011. Due to technical difficulties, the Applicant’s Counsel was not able to participate in the hearing on 26 July. A further hearing took place on 29 November 2011 to enable him to do so.





### **The Applicant's submissions**

32. The Applicant contends that the evidence used by the Respondent was stolen. It is therefore illegally obtained and is tainted and inadmissible. When issued with a parking violation by a Security Officer in July 2005, in an attempt to coerce the Applicant into dropping the charge, Mr. Labbi threatened the Applicant with exposure of the photographs. When this attempted coercion failed, he turned the photographs over to Mr. Aghadjanian.

33. Mr. Labbi's explanation to OIOS as to how he came to have the CD was not even believed by OIOS. He told them that he had been given the CD by a woman he met on the streets of Laayoune. She told him she had taken the CD from the Applicant's home. Such a story was clearly fiction. Rather, it was Mr. Labbi who broke into the Applicant's apartment to steal the photographs, and the CD is therefore inadmissible as illegally obtained.

34. The Applicant further contends that the investigation was partial and unfair and that there is no evidence that the Applicant distributed pornographic images, or that the content of the photographs amounts to pornography. The Applicant states that none of the images portrays sexual activity of any kind or is even titillating, referring to a dictionary definition of pornography as "the explicit description or exhibition of sexual activity...intended to stimulate erotic rather than aesthetic or emotional feelings".

### **The Respondent's submissions**

35. The former JDC correctly determined that the Applicant's conduct in taking photographs of local women constituted "sexual exploitation and abuse" within the meaning of ST/SGB/2003/13. Even if the women consented to their photographs being taken by the Applicant, the fact that he stored these on his UN computer, which later became public, is a violation of trust. ST/SGB/2003/13 does not require specific intent for sexual exploitation to take place. In this case, the record shows that the Applicant acted in an exploitative manner, taking into account the very large number of nude photographs taken by the Applicant.

36. The evidence shows that the facts were properly established before the JDC. The witness Mr. Dzuro provided a full explanation of the procedural steps taken to collect the evidence in this case. He confirmed that around 58,000 pornographic images were retrieved from the hard drive of the Applicant's official computer, and that the Applicant admitted to have taken at least some of these photographs himself.

37. The Applicant's actions constituted serious misconduct and it was quite proportional to impose the sanction of summary dismissal in all the circumstances of the case.

### **Consideration**

38. The role of the Tribunal in reviewing disciplinary cases is to examine the following:<sup>2</sup>

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than proof beyond a reasonable doubt—it means that the truth of the

been gathered, the investigators and those responsible for developing the charges should ensure that these are not mere shots in the dark. Nor should such an exercise be of a speculative nature.

***Violation of ST/SGB/2004/15***

43. The second charge against the Applicant is that he had made use of his official UN computer to store, download and share pornographic materials, in violation of Sections 4.1 and 5.1 of ST/SGB/2004/15. The relevant part of Section 4.1. reads as follows:

Section 4 – Limited personal use

4.1 Authorized users shall be permitted limited personal use of ICT resources, provided such use:

(a) Is consistent with the highest standard of conduct for international civil servants (among the uses which would clearly not meet this standard are use of ICT resources for purposes of obtaining or distributing pornography, engaging in gambling, or downloading audio or video files to which a staff member is not legally entitled to have access)

The relevant part of Section 5.1 reads as follows:

Section 5 – Prohibited activities

5.1 Users of ICT resources and ICT data shall not engage in any of the following actions:

[...]

(c) Knowingly, or through gross negligence, using ICT resource or ICT data in a manner contrary to the rights and obligations of staff members

44. It has never been easy to define what pornography is. “Pornography” is not defined in the Bulletin, or in the Commentary annexed thereto. It is not defined in any of the existing Staff Rules and Regulations or Secretary-General’s Bulletins or Administrative Instructions or Information Circulars. The Tribunal must therefore resort to the ordinary dictionary meaning of the word, which is given as:

The explicit description or exhibition of sexual subjects or activity in literature, painting, films, etc., in a manner intended to stimulate erotic rather than aesthetic feelings; literature etc. containing this.<sup>5</sup>

45. At times pornography is confused with, or not differentiated from, obscenity. A distinction must also be made between materials which may be artistic in nature and value, and those which may be considered pornographic. In the case of *Miller v. California*, 413 U.S. 15 (1973), Chief Justice Warren Burger of the United States Supreme Court laid down a test for obscene or pornographic materials as follows:

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin*, supra, at 230, quoting *Roth v. United States*, supra, at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

46.

itself mean that staff members should conduct themselves in such a way as to respect their own dignity and that of their colleagues. To that end many bulletins and directives have been issued by the Secretary-General on prohibited conduct. And one prohibited conduct is the use of information technology for the purposes of obtaining pornography, viewing, or distributing it. The Organization as an international entity has established the necessity for a restriction on the use of information technology not only to protect morals within the Organization but also the dignity of the staff members. To that end it is appropriate to refer to what the European Court of Human Rights stated in *Handyside v United Kingdom* (1976) 1 EHRR 737:

There is no uniform conception of morals. State authorities were better placed than the international judge to assess the necessity for a restriction designed to perfect morals.

49. Having concluded that the material discovered on the Applicant's official computer contained hardcore pornographic images (even if not all of it was pornography), the Applicant cannot escape liability for misconduct. After all, he admitted to having stored the material on his official computer. Whether or not the photographs on the CD were taken by the Applicant, the simple fact remains that by putting photographs containing images which this Tribunal considers to be pornographic onto his official UN computer, the Applicant is in violation of ST/SGB/2004/15. Whatever his motives, this simple fact is inescapable.

***Was the disciplinary measure proportionate to the offence?***

50. The investigation revealed that approximately 58,000 images were stored by the Applicant on his official computer. This Tribunal has not examined every photograph, but it is plain that a very large number if not all of the material is pornographic. As such, this is not a minor act of misconduct, and the Secretary-General has, of course, a broad discretion in imposing disciplinary mter77t-c -0.002 TtoT2-2.65

Secretary-General in disciplinary matters and possible criminal behaviour, 1 July 2006 to 30 June 2007”,<sup>6</sup> which time period includes the date of dismissal of the Applicant. It is clear that the Applicant’s case is referred to in paragraph 31 of this Report, which reads as follows:

A staff member used a United Nations computer to send and receive pornographic video clips and photographs. The staff member also solicited and paid for sexual favours from local women in a mission area. The staff member further took pornographic photographs of local women, which photographs later became public. *Disposition*: separation from service after the advice of a Joint Disciplinary Committee.

51. Paragraph 31 falls under section “D. Sexual exploitation and sexual abuse”. Given that this Tribunal has found that there is no evidence whatsoever to support a charge of sexual exploitation, the Applicant’s case would in fact appear better suited to section “E. Computer-related misconduct”. This section includes six other cases of pornography being stored, received and/or distributed on or via official computers. The relevant paragraphs read as follows:

A staff member received and widely distributed pornographic video clips and photographs using a United Nations computer. *Disposition*: demotion of one grade with no possibility of promotion for three years after waiver of referral to a Joint Disciplinary Committee.

A staff member received and distributed pornographic video clips and photographs using a United Nations computer. *Disposition*: loss of three steps in grade; three-year deferral for within-grade salary increment after waiver of referral to a Joint Disciplinary Committee.

A staff member received and distributed pornographic video clips and photographs using a United Nations computer. *Disposition*: loss of three steps in grade; three-year deferral for within-grade salary increment after waiver of referral to a Joint Disciplinary Committee.

A staff member received and stored pornographic video clips and photographs using a United Nations computer. *Disposition*: loss of two steps in grade; two-year deferral for within-grade salary

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<sup>6</sup> A/62/186.

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54. There is no doubt that there was a very disturbing failure on the part of the investigators not to ascertain fully the circumstances in which Mr. Labbi obtained the CD. His account was not, after all, believed by the investigator, Mr. Dzuro. Mr. Labbi was also a man suspected of being a spy within MINURSO, and who perhaps flouted parking rules and practised coercion. That no investigation was carried out on this aspect of the case shows that the investigators decided swiftly to go against the Applicant once the CD was given to Mr. Aghadjanian. Neither Mr. Aghadjanian nor any responsible officer thought it fit to query Mr. Labbi further.

55. This distinctive feature however cannot come to the rescue of the Applicant. Though the CD was illegally obtained it is not *per se* inadmissible. In criminal matters obtaining in the common law system, which is governed by exclusionary evidentiary rules, illegally or improperly obtained evidence is not inadmissible *ab initio*. The admissibility or otherwise depends on the discretion of the judge who should weigh in the balance the fairness of the proceedings and the need to admit relevant evidence. Does the probative value outweigh the prejudice caused to the Applicant? The Tribunal does not consider that the CD greatly prejudices the Applicant because the CD itself has not established any charge. The greater incriminating evidence was not that on the CD, but the 58,000-odd images found on the Applicant's official computer.

56. The CD did, however, trigger the investigation resulting in the charge of misusing information technology, which the Tribunal finds proven. In the case of *Jeffrey v. Black* (1978) QB 490, the accused was originally arrested for stealing a sandwich. Police officers then searched his home without his consent and without a search warrant, and found cannabis there. The court held that the improperly or irregularly obtained evidence was, nonetheless, admissible.

57. When dealing with disciplinary cases, the standard of proof to establish a particular charge is lower than the standard in a criminal case but higher than that obtaining in civil matters. In the case of *Liyanarachchige* 2010-UNAT-087, it would appear that the Appeals Tribunal placed the bar very high by ruling that no charge can be established against a staff member on the sole evidence of an

anonymous witness unless there is some other evidence to link the staff member to the charge. This is a rule that is applicable in criminal cases. Does that mean that a staff member who is suspected of misconduct has much lower rights than those of a suspect in a criminal case? The question is pertinent and relevant because of the obligation resting on a staff member to collaborate with investigations within the Organization. When such collaboration is forthcoming, or the staff member has not much choice, the latter is questioned and any evidence gathered from that staff member, whet

10.5 of the Statute of the Dispute Tribunal, the sum of four months' net base salary effective March 2007.

61. Under art. 10.5 of the Statute of the Dispute Tribunal, the total sum of compensation is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during wb.a(TTJ7lpsr)ent becomeis -6(com)889DT/iod( thaUS52e)5( t  
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