UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/077/ JAB/2009/035
Judgment No.: UNDT/2010/044
Date: 19 March 2010
Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

D'HOOGE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Bart Willemsen, OSLA

Counsel for respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Notice: This judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. The applicant contests the decision of the Officer-in-Charge (OIC) of the

Administration's response. The investigation report was also considered, but only for the purpose of understanding the respondent's submissions on the nature of the misrepresentations relied on. In accordance with the agreement of counsel on the liability issues, it was unnecessary to determine the adequacy or otherwise of the report and the truth of the conclusions it expressed. I also took into account, again only for the purpose of evaluating the respondent's submissions and not as evidence of the truth of the assertions made, the outline dated 20 November 2009 of proposed evidence of one of the investigators. These documents will be marked as exhibits in the appropriate way in due course.

Legal instruments

3. ST/SGB/2008/4 (former staff regulations), which applied at the relevant time, provides as follows:

> **Article IX**
>
> **Separation from service**
>
> **Regulation 9.1**
>
> (a) The Secretary-General may terminate the appointment of a staff member who holds a permanent appointment and whose probationary period has been completed, if the necessities of the service require abolition of the post or reduction of the staff, if the services of the individual concerned prove unsatisfactory, or if he or she is, for reasons of health, incapacitated for further service.
>
> The Secretary-General may also, giving his reasons therefor, terminate the appointment of a staff member who holds a permanent appointment:
>
> (i) If the conduct of the staff member indicates that the staff member does not meet the highest standards of integrity required by Article 101, paragraph 3, of the Charter;
>
> (ii) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter, have precluded his or her appointment.

No termination under subparagraphs (i) and (ii) shall take place until the matter has been considered and reported on by a special advisory board appointed for that purpose by the Secretary-General.

Finally, the Secretary-General may terminate the appointment of a staff member who holds a permanent appointment, if such action would be in the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned.

(b) The Secretary-General may terminate the appointment of a staff member with a fixed-term appointment prior to the expiration date for any of the reasons specified in subparagraph (a) above, or for such other reason as may be specified in the letter of appointment.

…

4. ST/SGB/2002/1 (former staff rules), as amended by subsequent issuances (including ST/SGB/2006/1) and applicable at the relevant time, provides as follows:

Rule 105.2

Special leave

(a) (i) Special leave may be granted at the request of a staff member for advanced study or research in the interest of the United Nations, in cases of extended illness, for child care or for other important reasons for such period as the Secretary-General may prescribe. In exceptional cases, the Secretary-General may, at his or her initiative, place a staff member on special leave with full pay if he considers such leave to be in the interest of th

retirement at the age of sixty years or more or summary dismissal for serious misconduct.

…

Chapter X

DISCIPLINARY MEASURES AND PROCEDURES

Rule 110.1

Misconduct

Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant, may amount to unsatisfactory conduct within the meaning of staff regulation 10.2, leading to the institution of disciplinary proceedings and the imposition of disciplinary measures for misconduct.

…

Rule 110.3

Disciplinary measures

(a) Disciplinary measures may take one or more of the following forms:

(i) Written censure by the Secretary-General;

(ii) Loss of one or more steps in grade;

(iii) Deferment, for a specified period, of eligibility for within-grade increment;

(iv) Suspension without pay;

(v) Fine;

(vi) Demotion;

(vii) Separation from service, with or without notice or compensation in lieu thereof, notwithstanding rule 109.3;

(viii) Summary dismissal.

…

Rule 110.4

Due process

5. Matters within the authority of

10. On 6 September 2007 the Office of the Under-Secretary-General, DSS, received an anonymous letter alleging that the applicant was unsuitable for the post due to serious violations and unprofessional behaviour in previous employment, and that he also "overstates his academic qualifications, some of which he does not have". On 12 September 2007 the Under-Secretary-General, DSS, directed the Internal Affairs Unit (IAU) of DSS to conduct a preliminary investigation.

11. On 14 September 2007 the applicant was notified in writing by the OIC/OHRM that he was being placed on special leave with full pay pending the outcome of the investigation. On 17 September 2007 the Deputy to the Under-Secretary-General of DSS sent a memorandum to a Human Resources Officer, Executive Office of DSS, and Security Coordination Officer, IAU, requesting them to conduct an investigation into the allegations against the applicant. The applicant was interviewed by IAU on 30 and 31 October 2007 and 28 January 2008.

12. On 20 February 2008 IAU submitted its investigation report in which certain findings and conclusions were expressed. On 28 April 2008 the applicant was sent the following letter of termination, signed by the OIC/OHRM –

> Dear [applicant],
>
> On 13 March 2008 … Deputy to the Under-Secretary-General for Security and Safety (DSS), informed the Office of Human Resources Management (OHRM) that DSS had completed its review of your case and that this review found that facts anterior to your appointment that are relevant to your suitability for the post of Chief, Protection Coordination Unit, DSS, came to light after your appointment.
>
> DSS's review of your case indicates that DSS has now learned that you were reprimanded on 22 April 1997 by the ICTY for improper behaviour and that your fixed-term appointment at the ICTY was not renewed beyond 31 August 1997 because ICTY had found that you were "no longer able to investigate crimes which have been allegedly committed by Croatian perpetrators, as [you had] become compromised by [your] actions during investigations in Croatia".

page Personal History Profile you completed in September 2005 is not a university degree and cannot be considered as equivalent to a university degree, as confirmed by [the Ministry of Justice] in a letter to DSS dated 13 December 2007.

The record establishes that, at the time of your selection, DSS was unaware of the reasons for your leaving the posts you had held prior to 2001. In the absence of this information, DSS was misled into selecting you as Chief, Protection Coordination Unit, DSS, which entails the functions of overseeing and coordinating the deployment of close protection assets throughout the United Nations and liaising with the law enforcement agencies of Member States in order to ensure effective security arrangements for the movement of senior United Nations officials. According to DSS, these functions require access to very detailed and sensitive information and therefore require that the person carrying out these functions possess the highest degree of personal integrity and competence. Had DSS been aware of the reasons for your leaving the ICTY and the OSCE, it would have deemed you unsuitable for employment in DSS.

Based on the foregoing, the Secretary-General has decided that your appointment be terminated in accordance with staff regulation 9.1(b) and Annex III of the Staff Regulations. Please be advised that the Secretary-General has authorized compensation in lieu of the notice period in your case, in accordance with staff rule l09.3(c) and that the termeffupoeriod iof the
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attachments. Redacted copies of the attachments were supplied, at my direction, on 2 March 2010.

Applicant's submissions

14. The applicant's rights were violated during the investigation because he was not informed of the allegations and was not advised at any of his interviews that he had the right to be assisted by a legal representative. IAU acted outside its terms of reference with regard to its findings regarding an incident that occurred twelve years ago at the ICTY. It is a violation of due process for the respondent to base its decision to terminate the applicant on documents with which the applicant had not been provided.

15. Having regard to the reduced scope of the case as indicated above (and my conclusions in respect of it), it is not necessary to set out the applicant's extensive submissions on the alleged weaknesses of the investigation, or the denial of due process. Accordingly, the following summary is confined to the lawfulness of the decision to place him on special leave and to terminate his contract.

16. The decision to terminate the applicant's appointment was *ultra vires* as the ASG/OHRM does not have the delegated authority to terminate appointments except for specific instances listed in Annex II of ST/AI/234/Rev.1. The authority to terminate the applicant's appointment was solely with the Secretary-General.

17. The respondent has failed to state a legal basis for an authority to cancel employment contracts. Even if the Secretary-General had authority to cancel appointments, there is no evidence that the Secretary-General delegated it to the ASG/OHRM. The *ex post facto* claim that the applicant's appointment was cancelled

the investigation concerned conduct of the applicant prior to his service with the Organization, the matter was more appropriately dealt with as a termination for anterior facts under staff regulations 9.l(b) and 9.1 (a)(ii).

22. The anterior facts relied upon in the contested decision were reliable and probative of the applicant's suitability for the post. The decision to terminate or cancel the applicant's contract was not based on the entire DSS report but on two categories of facts: the anterior facts comprising his being reprimanded at the ICTY, the non-renewal of his contract because of his becoming "compromised" in respect of a significant part of his investigative duties and his demonstration of "poor judgment" whilst with OSCE; together with the misrepresentation of his academic qualifications and the non disclosure of his prior employment with the ICTY.

23. Misrepresentations give rise to legal consequences independent of the possibility that the Secretary-General may elect to terminate the appointment pursuant to staff regulation 9.1(b). Specifically, where a staff member procures an appointment by misrepresentation, the appointment may be considered void from the outset or may be cancelled, as stated in the certification statement the applicant agreed to in the Galaxy system.

24. There was no enforceable contract in this case: (i) there was no meeting of the minds due to the applicant's misrepresentations, (ii) the applicant cannot procure rights by misrepresentation or fraud, (iii) a contract procured by misrepresentation or fraud may be cancelled by notice to the other party of the facts that give rise to the cancellation of the contract, which happened in this case, (iv) the ASG/OHRM, within her general powers, had the authority to cancel the appointment and recognize that the contract was void from the outset.

25. It is a well-established principle of contract law that a contract induced by fraud, mistake, or duress is voidable by the party who would not have otherwise

26. The policy and practice of the Organization regarding fact-finding investigations is that a staff member is not entitled to be informed in writing of any allegations made against him or of his or her right to respond to them, nor does he or she have a right prior to initiation of a disciplinary process to be provided with a copy of documents evidence of alleged misconduct. The applicant also does not have a right to be informed of the nature and scope of the investigation. These rights attach during formal disciplinary proceedings, that is, after a formal charge of misconduct is made against the staff member pursuant to sec 6 of ST/AI/371 (Revised Disciplinary Measures and Procedures). During the preliminary investigation stage, a staff member who is interviewed has a right to be given an opportunity to put forward his or her version of the facts and has a right to be given a reasonable opportunity to present evidence or witnesses. The applicant was given an opportunity to put forward his version of the facts and to present evidence or witnesses; therefore, the applicant's due process rights were observed during the preliminary investigative stage.

27. The Administration was under no obligation to provide the applicant with documents from DSS because no disciplinary proceeding was initiated pursuant to sec 6(b) of ST/AI/371. The applicant would only have been entitled to this documentation pursuant to sec 6(b) and only if he had been charged with misconduct. Upon receiving the results of the investigation, the ASG/OHRM proceeded to cancel and/or terminate the applicant's contract. Accordingly, no further steps were taken under ST/AI/371 and disciplinary proceedings were not initiated. In these circumstances the various additional due process rights contemplated under sec 6 of ST/AI/371, where a charge of misconduct is made against the staff member, do not apply.

28. The decision to place the applicant on special leave was taken pursuant to staff rule 105.2(a). The decision was taken by the Officer-in-Charge, OHRM, acting in the capacity of the ASG/OHRM. Therefore, authority to take the decision was vested in the OIC/OHRM pursuant to ST/AI/234/Rev.1, Annex II, rule 105.2(a). The decisions of 7 December 2007 and 10 March 2008 to extend the applicant's special

leave were notified to the applicant by the

"due regard" was had to his "due process' rights can only be interpreted to mean that, as he had none, "due regard" entailed little or nothing. It is not necessary – in light of my conclusions on other aspects of this sorry case – to finally conclude that there was a substantial breach of the Organization's obligations of good faith and fair dealing to the applicant but it is clear that there is a very strong argument to be made to this effect. The fact that there was no attempt to explain why "due process" had been satisfied when the applicant had raised the unsatisfactory way in which he was treated where the failure to give him any particulars, let alone an opportunity to be heard, was so patent is also troubling.

30. It was, furthermore, unreasonable to determine the request for administrative review in circumstances where, as was obviously true, the applicant required further information in order to make his case. Not only was further information denied him, but the substantive factual matters he relied on were disregarded. The response stated blandly the "allegations were properly investigated ... and you were given an opportunity to give your comments and version of events". It is true that the applicant was interviewed in the course of the investigation but the interviews did not deal with a number of significant parts of the evidence upon which, it appears, the investigators later relied for their conclusions that the applicant had not been candid and concerning the very matters upon which the termination of the applicant's contract was apparently based. (I say "apparently" because it is not possible to be sure what these matters were, having regard to the obscurity, presumably deliberate, of the letter of termination.) The report is replete with innuendo and hearsay as to significant matters with little real analysis of important facts or significant evidence. The point is that the so-called "opportunity" for the applicant to give his version of events could not realistically be evaluated without analyzing the material upon which the investigators relied and the way in which they dealt with it. The proposed evidence to be adduced from one of the investigators by the respondent in the trial states that the applicant was "specifically … informed that it had been alleged that he had omitted facts in his PHP and that his judgment and his integrity were being

Particular factual matters were raised with him during interviews, but these were not comprehensive and it appears that many of the applicant's responses were not

based on sound reasoning and warrant application. Accordingly, I accept the implicit submission of counsel for the respondent (which was not opposed on behalf of the applicant) that the common law principles relating to mistake and misrepresentation, should inform, if they do not determine, the legal questions here.

37. As I have said, misrepresentation does not make the contract void; it merely gives the contractor the option to avoid it. Nor, where the contract has been partly performed, can it be rescinded *ab initio*

the assumption, however, that it does form part of the contract, it must be interpreted in the context of, and consistently with, all the legal instruments which form part of the contract between the Organization and the staff member. The use of the term cancellation does not suggest that the contract will be regarded as void, especially since both it and the term "termination" clearly relate to the *appointment* and do not refer to the *contract*. In my view, there is no difference of substance, at all events, between the terms "cancellation" and "termination", a view that is confirmed by the striking circumstance that the regulations provide an elaborate scheme concerning termination but do not mention cancellation at all. Accordingly, the prerequisites for termination are those contained in regulation 9.1 and the matters as to which certification is given must be understood in the sense of those prerequisites and do not provide an independent or significantly different basis for termination. For completeness sake I mention here that, even assuming that cancellation is an available alternative, it cannot be done except by a process that recognizes the obligations of good faith and fair dealing. (I deal with this issue following a discussion of the material facts relating to the alleged misrepresentation.)

39. Alternatively (apart from the application of regulation 9.1), the reference to "immediate" may indicate that the cancellation or termination can be done before the recruit commences service, so that the cancellation is not available once the employment has actually commenced. In that event, the contract will not have been part performed and a bar to treating a contract as void will not have been created (a matter discussed later).

40. The Administration is in any event barred from arguing that there was no contract because it affirmed both its existence and currency after concluding that the applicant had made misrepresentations about his past employment and education, that is to say, when it was in full possession (from its point of view) of the relevant facts. The letter to the applicant, sent on 28 April 2008, explicitly referred to the termination of his appointment under staff regulation 9.1, thereby affirming that he

the Organization and the applicant were in a contractual relationship of which staff regulations were an integral part. The applicant was also paid termination indemnity pursuant to Annex III to the staff regulations, which further supports this point.

41. Although contract law envisages that in certain instances contracts may be voidable for misrepresentation and gives rights to rescind or cancel, this is not so in respect of every misrepresentation. Counsel's reference to *Shaw's Supermarkets* and *Devine* is, regrettably, misleading. The former case concerned a claim for worker's compensation by an employee who had misrepresented that he had no prior injuries in order to get the job. The statement of principle in the judgment is as follows (*Shaw's Supermarkets*, at 842–843, omitting references) –

> A contract induced by fraudulent misrepresentations is voidable, not void. … The rule applies in the employment context as well. … Delgiacco was Shaw's employee at the time of the injury, although his misrepresentation would have justified a rescission of the employment contract. … Generally, this issue is not analyzed on the ground that the contract was void ab initio. We thus consider whether, despite that misrepresentation, Delgiacco is entitled to receive benefits.

The court applied the following rules –

> … In order for … a misrepresentation to bar benefits, the following factors must be found: "(1) The employee must have knowingly and wilfully made a false representation as to his physical condition. (2) The employer must have relied upon

verification of his submitted information about his background. It was established that the employee had innocently omitted to mention details of previous employment but had deliberately omitted reference to prior criminal convictions. It was accepted that, had these been known, he would not have been employed, let alone reassigned. On the other hand, he had more than adequately performed his duties with undoubted integrity. The matter went to an arbitrator who declined to dismiss the employee but imposed other disciplinary measures. The employer appealed, contending *inter alia*, that as the contract had been procured by misrepresentation, he had not been validly appointed and his contract was a nullity. Accordingly, the employee was not entitled to the protections otherwise applying to adverse decisions under the relevant regulations, including in particular the right to a review of his dismissal. The United States Court of Appeals rejected this argument. Certainly, it held that removal of an employee whose appointment was obtained through fraud or misrepresentation was lawful, but it clearly meant *wilful* and not innocent material misrepresentation. The Court categorically rejected as without merit the submission that an appointment obtained through material misrepresentation is void or voidable *as such*, without undertaking the same procedural safeguards and review as any other employee subject to an adverse action. The Court based its conclusion, in part, on the existence of a procedure in the regulations that dealt specifically with removal for suitability disqualifications, including intentional false statements, and the absence of any mention in these regulations of the "voiding" of an invalid appointment (see *Devine*, 724 F.2d 1558 at 15). This case can be regarded, therefore, as providing by analogy useful insight where there is a structure in place for dealing with removal for suitability disqualifications such as is the case here.

43. It is obvious, though perhaps worth stating, that a misrepresentation by concealment is nonetheless a misrepresentation and may imply a representation that the concealed fact does not exist. Implying positives from a negative is, however, fraught with both logical and practical difficulties.

The misrepresentations relied on in this case

44. The respondent has submitted generally that the facts relied on to terminate were accurate. Having regard to the focus on the issue of formal legality of the decisions to place the applicant on special leave and terminate his contract, it is not necessary to consider the actual reliability of the investigation report but, in light of this submission, some observations – albeit tentative – are necessary. As discussed below, these observations militate against the report being accepted as reliable in relation to controversial facts and strongly suggest that it should not have been so regarded by the decision-maker in this case, at least without independently evaluating this material. The only areas that need to be mentioned are those that were apparently used to justify the termination. Although the letter of termination mentions that DSS "was misled into selecting" the applicant because it was unaware of the reasons for his leaving the posts he held prior to 2001, it does not suggest that this was the fault of the applicant or that he had intentionally concealed what he should have known were material facts (though this was the inference drawn by the investigators) or that this omission was a material factor in his termination.

45. Here, the two relevant alleged misrepresentations relied on for the termination concern the applicant's education and non-disclosure of his prior employment with the ICTY. In respect of the first, it is not possible to accept that it was a material factor in his selection and no reasonable decision-maker could have supposed otherwise. Nor is there any worthwhile evidence that any reliance was placed upon this qualification as a university degree as distinct from being a lesser tertiary qualification. It is fair to observe also that the finding of the investigation that the applicant's description of this qualification as a degree was dishonest is not explained by any reasonable process of reasoning; rather, the facts strongly support the opposite conclusion. Amongst other things, the applicant informed the investigators that the phrase "Superior Police Degree" was translated into English by the Ministry of Foreign Affairs, information which the investigators, it appears, did not bother to check. This was also the description used by an official of the applicant's home

pub, that his list of employments was truncated. In the circumstances, the suggestion that the PHP implied that he had not been previously employed by the United Nations is without foundation and I do not see how any decision-maker could reasonably have so concluded. Indeed, at a later point but before appointment, the Human Resources Officer was given, as I have mentioned above, a complete *curriculum vitae* from the applicant's home country's federal police on 19 October 2006, which referred to the applicant's secondment to the ICTY as an investigator from 1 September 1995 to 30 November 1997. It follows that, even if there had been a misrepresentation, the contract was not affected by it.

47. As to the reasons for the applicant's contracts with ICTY and OSCE not being renewed, it is sufficient to say that neither situation was clear and that there are a number of inconsistencies concerning the evidence gathered by the investigators in both respects, but inadequately analysed, as well as failures to make apparently sensible enquiries. However, these matters do not involve material misrepresentations. Whether they amount to anterior facts sufficiently established is another question which I do not need to discuss having regard to my conclusions on the unlawfulness upon other grounds of the relevant administrative decisions. In fairness to the applicant, however, I should indicate that there are good grounds for questioning the cogency of the investigation report in relation to these matters.

48. It will have been noted that the respondent alleged, apparently in the alternative, that the applicant's misrepresentations were fraudulent. However, the letter of termination is not cast in terms of fraud or dishonesty, no doubt deliberately. The respondent does not, in the course of extensive submissions, identify with precision any alleged dishonesty on the applicant's part, rather choosing ambiguous language that might carry this imputation but might not. This approach to allegations of fraud is unacceptable. The submission alleges that the applicant made a representation of fact to the Organization which was not true to his knowledge but does not identify this representation nor the basis for asserting its untruthfulness. It is submitted that the letter of termination stated that "the applicant misrepresented his

employment history with the United Nations, thereby disguising the fact that he was reprimanded at the ICTY and the reasons for non-renewal of his appointment", implying, though ambigiously, that this disguising was intentional. This is a mischaracterization of the letter of termination which, in fact, is neither cast in this language nor implies dishonesty.

49. Quite apart from inappropriate imprecision, a fundamental difficulty facing the respondent's allegations of fraud is that they depend on conclusions in the investigation report that was not tendered for the purpose of proving either the truth of its contents or the correctness of the investigators' opinions. There is no evidence of fraud presently before me. Even if the notification of termination contained an allegation of fraud, implicit in the reference to the less than perf

explicitly relied on in the letter of termination and which provided the basis for post termination benefits. The possibility

availability of any other mode of ending an employment contract upon this basis. (Including, of course, material mistakes of fact as a ground of voidability, since inevitably this would amount to a relevant anterior fact – only mistakes that are fundamental to the contract will make it voidable at general law.) The remaining question is whether the possibility of ending the contract for misrepresentation otherwise than under regulation 9.1 remains open. To my mind, this question is also easily disposed of. As provided in staff rule 109.1(b), termination within the meaning of the Staff Regulations covers *every*

53. The respondent contends that the UN Administrative Tribunal has found that it is not essential for the Secretary-General to expressly invoke regulation 9.1 for a termination to be effective under that provision and that, by extension in the present case, the Secretary-General was entitled to end the contract on grounds of misrepresentation otherwise than under regulation 9.1, even though no notice was given that this was the ground for doing so, citing the judgment in *Moore* (1999) UNAT 923. In that case, the applicant submitted a personal history form that the Administrative Tribunal found was intentionally dishonest. The Secretary-General did not in terms invoke staff regulation 9.1(b) to terminate the staff member's employment, but instead declared the contract invalid because of material omission and misrepresentation. The Administrative Tribunal held that, despite the language used in the declaration of invalidity, in fact the contract was ended by virtue of regulation 9.1 and that it applied "whether expressly invoked or not". The judgment does not suggest that a material misreprese

The test for termination

55. It is worth mentioning, perhaps, that no ordinary human being could meet the "highest standards of integrity" or the "highest standards of efficiency", let alone both of these requirements: saints are usually not all that practical and practically effective people are rarely saints. Although it is understandable that such expressions are used because of their origin in th

The authority to terminate

59. Counsel for the respondent conceded that authority to terminate the applicant's contract resided solely in the Secretary-General and no other official and that, in fact, the Secretary-General had not made the decision. The letter of termination, however, categorically stated that this was the decision of the Secretary-General. This was completely untrue and, what is more, must have been either known to the author to be untrue or was made recklessly without regard to its truthfulness or otherwise. Moreover, since the Secretary-General had not actually made the decision, the attribution to him of a reason was a fabrication, necessarily conscious. Furthermore, since a decision by the Secretary-General was essential to the validity of the termination, it was misleading as to a fundamental matter going to the propriety of the termination itself. In a case where the termination was based upon alleged misrepresentations made by the staff member this was, to say the least, ironic. There was no way that the applicant could have known that the attribution of the decision to the Secretary-General was

61. In my short time on the Tribunal, I have seen many communications referring to decisions as made by the Secretary-General which, I now understand, were not made by him at all. This is completely unacceptable. Firstly, all communications,

The relationship between misconduct proceedings and termination

63. The grounds in regulation 9.1 authorising the Secretary-General to terminate a contract are, in summary:

i.

disciplinary measures; it would be virtually impossible to find any individual who consistently complied with such standards. Ordinary human failings, within a reasonable range, would only very

provide further evidence and, thirdly, the interposition of an objective and relatively independent third party, in the form of the Joint Disciplinary Committee, which is able to examine the evidence and any additional matters brought to its attention for the purpose of advising the Secretary-General on an appropriate outcome, which advice is not required to be followed but which must certainly be seriously considered before the decision is taken.

66. It might be reasonably thought that the construction of such an elaborate scheme for dealing with misconduct justifying a disciplinary measure under chapter X of the Staff Rules (for ease of reference described simply as "misconduct") implies that all misconduct (necessarily where it might justify dismissal), must go through this process before it can be relied on for the purpose of making an decision adverse to a staff member, especially that which involves separation from service.

67. The second approach is that separation by way of termination under regulation 9.1 does not entail the same consequences as dismissal under chapter X, since the staff member is given substantial benefit where this provision is invoked and, accordingly, there is no need to provide the staff member with the chapter X safeguards even where the conduct relied on to justify a termination also amounts to misconduct. So far as reputation is concerned, the staff member is entitled to place a response to any allegations on his file: see ST/AI/292.

68. I should deal with the intermediate position where, although as it happened misconduct has occurred, the conduct justifying termination is characterised in terms which do not imply the moral turpitude involved in misconduct. It seems to me that, where this can be done, and the more limited conduct relied on does not of itself involve misconduct, but justifies termination on a ground specified in regulation 9.1, no question of conflict with chapter X arises, and it is not necessary to comply with the procedures it prescribes. To put it another way, it is only where the conduct relied on to terminate under regulation 9.1 is also misconduct that the question whether it is necessary to proceed under chapter X arises.

69. This question was considered by the UN Administrative Tribunal in *Sam-Thambiah* (2005) UNAT 1214 where the staff member was terminated under regulation 9.1 for conduct reflecting to some extent upon his integrity, but in respect of which misconduct proceedings were not undertaken. The Administrative Tribunal stated –

> The Secretary General of ISA chose not to pursue disciplinary action against the Applicant in this case. He chose to have the matters alleged against the Applicant investigated and dealt with as performance issues rather than as allegations of misconduct, thus obviating the need to investigate or seek to prove the mental element or the wilfulness of the actions which would ordinarily be relevant had he chosen to seek to establish misconduct. The Tribunal considers that this decision was legitimate in the circumstances, having regard to the nature of the issues raised. This would not necessarily be so had they been of different character, as some activities can only be viewed as allegations of dishonesty, and in such instances, disciplinary procedures must be involved.

70. As I have already pointed out, misconduct that is capable of justifying dismissal is the subject of special rules designed to ensure orderly investigation and a fair process, including the utilization of the JDC. Proceeding from general rules of construction, the applicable rule in these circumstances is that which is widely known in its Latin expression: *generalia specialibus non derogant*; in English, the general does not derogate from the particular. Despite the Latin, it really is a rule of common sense. It seems to me, with respect, that the approach stated by the Administrative Tribunal in *Sam-Thambiah* is correct. Accordingly, misconduct cannot be relied on to terminate under regulation 9.1. Wrongful conduct, however, that occurred at a time prior to employment with the Organization cannot be the subject of proceedings under chapter X and thus, in principle, could justify termination as a relevant anterior fact under regulation 9.1, since chapter X does not apply to them. On the other hand, where it is alleged, for example, that the staff member had *dishonestly* failed to disclose the prior misconduct or dishonestly attempted to conceal it, proceedings under that instrument could be taken and the dishonest nondisclosure could not be used as grounds of termination under regulation 9.1.

71. The notification of termination described the conduct relied on by the decision-maker to terminate the applicant's employment. Although susceptible of some ambiguity, I do not think those matters amounted to misconduct. The reference to the lack of integrity is, however, problematic since it suggests misconduct. The mere fact that the investigation report contained allegations of misconduct is immaterial. Since, in the present circumstances, I do not actually need to decide whether the termination was invalid for failing to comply first with chapter X and arguments could be put either way as to whether misconduct was in fact a ground for termination, I do not intend to decide the point.

72. Before concluding this aspect of the case, I should deal with applicant's complaint concerning the failure to complete the disciplinary process as prescribed in ST/AI/371. It appears to be undisputed that the investigation of the applicant was undertaken pursuant to sec 2 of this instrument. It is not known if the steps prescribed by secs 3 and 5 have actually been undertaken although it is likely, I think, that OHRM (perhaps the ASG) was given the investigation report under sec 3. There can be no doubt that, in light of the mandatory language of sec 5, if the investigation indicated that the report of misconduct was well founded (*vide* sec 3), the ASG was obliged to "decide whether the matter should be pursued". Making such a decision is mandatory and not discretionary. "Pursued" in this section is a reference to the procedure prescribed in secs 6 to 9 of the instrument. It is indisputable that that procedure was not undertaken and it must therefore be inferred that the ASG/OHRM made a decision (as he or she was obliged to do, one way or another) that the matter should not be pursued. Although it is not specifically so provided, the requirements of good faith and fair dealing required the ASG, in this event, to inform the staff member of his or her decision. The other consequence of the decision not to pursue the matter is that it must be regarded as closed and the disciplinary process completed. It cannot be resurrected in these proceedings. The decision not to proceed with the disciplinary process supports the conclusion that the termination here could not be legally justified on the grounds amounting to misconduct.

Due process in preliminary investigation

73. The applicant submitted that the investigation violated his due process rights, which should have an impact on the amount of compensation to be awarded to the applicant. The respondent's position is that procedural rights under ST/AI/371 attach only after the staff member is charged with misconduct and that during the preliminary investigation the staff member is not entitled to be made aware of the allegations, the scope of the investigation, and does not have access to the documentary evidence and witnesses.

74. I am far from persuaded that the respondent's submissions with respect to the rights afforded to staff during preliminary investigations are correct. Although ST/AI/371 discusses what must be afforded to staff after they have been charged with misconduct (sec 6) and it does not prescribe any course of action in this respect at the preliminary investigation stage, it does not follow that the usual requirements of good faith and fair dealing do not apply. However, it has not been submitted to me by the parties on what procedural basis DSS conducts its investigations.

75. The respondent's interpretation of due process in preliminary investigations appears to run counter to several pronouncements of the Administrative Tribunal, including those issued prior to the investigation in this case (*Sokoloff* (2005) UNAT 1246; *Singhal* (2005) UNAT 1260; UNAT 1261 (2005); UNAT 1262 (2005); UNAT 1267 (2005); *Tissot* (2009) UNAT 1447). (Neither counsel included these cases in their submissions and I regret that I have to remind them that it is their duty to bring relevant authority – including authority that contradicts their position – to the Tribunal's attention.)

76. In *Sokoloff*, a staff member was separated from service as a result of an investigation of allegations of sexual harassment. The Administrative Tribunal found that there was an "apparent contradiction" between provisions of General Assembly resolution 48/218B (requiring "due process for all parties concerned and fairness during any investigation"), the 2005 OIOS Manual of Investigation Practices and

Policies (which stated that staff members "cannot refuse to answer and are not entitled to the assistance of counsel during the … fact finding exercise"), and UNDP/ADM/97/17 (which explained specific procedural requirements for UNDP investigations). The Tribunal held that, as soon as a person is identified, or reasonably concludes that he or she has been identified, as a possible wrongdoer in any investigation procedure and at any stage, he or she has the right to invoke due process with "everything" that this guarantees, including notification of allegations in writing; access to all documentary evidence; and access to counsel –

> The Tribunal considers that the Applicant was probably identified as a possible wrongdoer once the "Note for the file" was filed, but, in any event, was certainly so considered upon the release of the Addendum to the investigation report. It finds, therefore, that from that point on he was protected by the provisions of UNDP/ADM/97/17, which

arguable that no sensible or reasonable investigator, let alone decision-maker, would draw important conclusions upon this material without having available and considering the responses of the applicant, not only as to the issues but also as to the character, position and possible interests of the witnesses relied on and the witnesses, if any, identified by the applicant. This is especially true of the assessments of the applicant's credibility on matters in which his account differed significantly from those of persons interviewed by the investigators. In all candour, I should observe that my admittedly tentative examination of the investigation report gives rise to questions about the adequacy of analysis of these contradictions and, perhaps more damaging, the objectivity of the investigators. As it is not necessary for present purposes that I come to any final conclusi

The Secretary-General again, had not made the decision. It follows that the reason attributed to him was a fabrication.

84. Counsel for the respondent contended that such a decision was made by the OIC/OHRM "acting in the capacity of the ASG". I regret that, without evidence of this fact, this statement from the bar table cannot be accepted. Aside from anything else, the letter signed by OIC/OHRM unqualifiedly attributes the decision to someone else. There are times when assurances can be accepted and times when it would be naïve to do so. This is a case in the latter class. There is no evidence of delegation of authority to the OIC/OHRM and, again, I will not accept counsel's statement in lieu of evidence.

85. Another fundamental obstacle to the respondent's contention is that, at all events, the ASG does not have authority to place a staff member on special leave pending the outcome of the preliminary investigation. The term "special leave" is used in rule 105.2(a) to describe two circumstances: the first "at the request of a staff member for advanced study or research in the interest of the United Nations, in cases of extended illness, for child care or for other important reasons for such period as the Secretary-General may prescribe"; and the second, special leave at the instance of the Secretary-General. It is clear that the first class has two elements, namely, the request of the staff member and the specified purpose. Here, the applicant did not request leave; nor was leave given for one of the specified purposes. The delegation provided by Annex II of ST/AI/234/Rev.1 is limited to the grant of special leave of this kind. Accordingly, the ASG had no authority to place the applicant on special leave pending the outcome of the investigation. Regrettably, the submission of counsel did not even condescend to a discussion of the rule or the delegation. His submission is without merit and must be rejected.

86. The notice of 14 September 2007 purported to place the applicant on special leave for three months or until completion of the investigation, whichever was the earlier. On 7 December 2007 the investigation not having been completed, the placement on special leave was purportedly continued. Again, the decision was

untruthfully attributed to the Secretary-General, again the reason was fabricated. This time the author of the notification was the Director, Division for Operational Development of OHRM. This action was again unauthorised and, again,e no9ve s ano

parties are directed to provide written submissions on the scope of the proposed compensation hearing.

Conclusion

90. The respondent failed to comply with