

Case No.:

the Ministry indicated on 11 July 2008 that it needed the Applicant's bank statements for an audit to combat fraud.

6. By e-mail dated 12 July 2008, the Applicant, through UNOPS, requested the Ministry to return to her the receipts in connection with which a bank statement was to be furnished, explaining th

reclaimed on purchases made on her behalf by people who did not have diplomatic status. She asked for the Netto and SuperBest receipts to be removed from her application for reimbursement dated 27 June 2008.

11. At a meeting on 17 September 2008, the Chief of Protocol at the Danish Ministry of Foreign Affairs handed the Executive Director of

(b) The items purchased were basic foodstuffs such as milk, bread, fruit and vegetables. Nine different bank cards had been used on a single day to buy a total of 19 litres of milk of seven different brands and four different levels of fat content, for example;

(c) At her meeting with the panel, the Applicant claimed that the shopping had been done for her by other people (family members,

referral to DC was not required), he explained that he had decided to refer the matter to DC nonetheless, in part so as to allow the Applicant to reconsider her decision not to disclose certain information that it would have been in her interests to divulge.

19. On 19 January 2009, DC acknowledged receipt of the case file and notified the Respondent that a copy would be transmitted to the Applicant pursuant to the rules in force.

20. On 19 February 2009, counsel for the Applicant wrote to the General Counsel, UNOPS, asking for the charges against her to be withdrawn on the grounds that the responsibility lay with the Danish judicial authorities, not DC, to determine whether the Applicant had broken Danish law.

21. On 13 March 2009, the General Counsel, UNOPS, replied to counsel for the Applicant that it was not necessary for UNOPS or DC to pronounce on the question whether the Applicant had broken Danish law; the question was whether the Applicant was guilty of professional misconduct within the meaning of administrative instruction ST/AI/371 and, in particular, whether she had made a false declaration in connection with a United Nations benefit and whether her conduct brought discredit upon the United Nations. The General Counsel reiterated that the Applicant's refusal to furnish testimony from people who had supposedly made purchases on her behalf lent little credibility to her explanations.

22. On 30 March 2009, the Applicant submitted her response to DC. She denied any offence and complained of numerous violations of her right to due process.

23. By e-mail dated 24 April 2009, the General Counsel, UNOPS, informed the Applicant that UNOPS was prepared to interview, in strict confidence, the people who had supposedly made purchases on her behalf and would undertake not to disclose their identities or the information they divulged to the Danish authorities. He encouraged the Applicant to disclose

24. By e-mail dated 28 April 2009, the Applicant replied to the General Counsel, UNOPS, regretting that he had not taken up some matters that she had previously raised, complaining of violations of her right to due process and indicating that she had decided to await the outcome of the disciplinary proceedings.

25. On 18 May 2009, the Respondent submitted to DC his rejoinder to the Applicant's response, making it clear that the charge against the Applicant was not that she had broken Danish law but that she had submitted cash-till printouts that she knew were not hers and did not belong to anyone who had shopped for her or on her behalf, falsely certifying that they entitled her to reimbursement of VAT by the Danish authorities.

26. The exchange of memoranda then continued as follows: repeat of earlier statement by the Applicant, 1 June 2009; comments by the Respondent, 4 June 2009; observations by the Applicant, 8 June 2009; further comments by the Respondent, 9 June 2009; and further observations by the Applicant, 10 June 2009.

27. On 25 June 2009, DC delivered its report to the Executive Director of UNOPS. It concluded unanimously that:

- (a) the Applicant had been afforded due process;
- (b) the Administration had made a case of misconduct against the Applicant;
- (c) there was evidence showing that the Applicant had falsely certified store receipts as being eligible for tax reimbursement. The evidence also went to show that the Applicant's conduct fell short of the standard of integrity expected of an international civil servant;
- (d) the Applicant failed to provide countervailing evidence to disprove the charges;
- (e) the Applicant's wrongdoing was serious, and warranted a disciplinary measure.

DC unanimously recommended separation of the Applicant from service with one month's notice and payment of termination indemnity.

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Parties' contentions

42. The Applicant's contentions are:
- a. That the conduct for which she was separated did not constitute professional misconduct;
 - b. That the Respondent had not proved her guilt beyond reasonable doubt, and the decision at issue was therefore null and void;
 - c. That the Respondent had not given her the benefit of the doubt during the course of the proceedings;
 - d. That the decision to separate her from service was tainted by such factual errors, mistaken conclusions and errors of law as to justify granting the Applicant all her pleas;
 - e. That the disciplinary measure imposed upon her was grossly disproportionate to the misconduct alleged (assuming that the act alleged had been proven beyond all reasonable doubt, which was not the case):
 - f. That the Respondent had not produced the full text of the memorandum submitted in September 2008 by the Danish Ministry of Foreign Affairs to UNOPS, or the minute of the meeting between the Ministry and the Executive Director of UNOPS. The Respondent had also made a number of misrepresentations during the internal proceedings. In so doing, he had gravely infringed the Applicant's right to defend herself, and that in itself justified the

till printouts which she knew did not belong to her or to individuals who had done shopping for her; and that she untruthfully certified that those receipts and printouts entitled her to reimbursement of VAT. In so doing, she was guilty of professional misconduct within the meaning of administrative instruction ST/AI/371;

- b. Given the evidence to hand, the Administration has established a presumption of misconduct on the part of the Applicant. Established jurisprudence holds that the Administration is not required to prove a staff member guilty beyond reasonable doubt, merely to furnish evidence from which it would be reasonable to deduce that misconduct has occurred. Once misconduct is established, the onus is on the staff member to establish his or her innocence by furnishing evidence of his/her own or a satisfactory explanation;
- c. In the event, the Applicant's explanations that 39 different people had gone shopping for her (and 15 of them had gone, on the same day, to the same Copenhagen supermarket when there are dozens of supermarkets in the city, and then that 19 litres of milk had been purchased for one social gathering) are simply not credible. Besides this the Applicant, without valid motive and despite repeated assurances from the Respondent that the information would be used in confidence, has refused to divulge the names of

memorandum and the minute of the meeting between the Ministry and the Executive Director, UNOPS, are not evidence in this case and do not have to be forwarded to the Applicant;

- g. The Danish Government was not involved in the disciplinary proceedings.

Considerations

Applicable law, regulations and judgments

44. Chapter X of the Staff Regulations states that the Secretary-General can impose disciplinary measures on any staff member in the event of professional misconduct.

45. Chapter X of the old Staff Rules, which applied at the time when the Applicant submitted the impugned reimbursement claim, defines unsatisfactory conduct leading to disciplinary proceedings and measures as “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”. It also gives a list of disciplinary measures which the Secretary-General can legally impose on any staff member. The measure imposed on the Applicant appears in that list.

46. Administrative instruction ST/AI/371 of 2 August 1991, “Revised Disciplinary Measures and Procedures”, offers guidelines on the application of Chapter X of the Staff Rules then in force. Paragraph 2 of the instruction gives examples of conduct that may give rise to disciplinary measures, such as “misrepresentation or false certification in connection with any United Nations claim or benefit”, or “acts or behaviour that would discredit the United Nations”.

47. Circular UNOPS/ADM/97/01-A of 22 April 1997, “Disciplinary and other measures relating to misconduct of staff while in the service of UNOPS”, also provides guidance on the application of Chapter X of the Staff Rules then in force.

48. Last, the rules of procedure of the UNDP/UNFPA/UNOPS Disciplinary Committee establish the procedure for referral of a disciplinary case to that Committee.

Regularity of proceedings

49. The Tribunal must begin by considering the Applicant's allegations that the investigation procedure and disciplinary proceedings were tainted with irregularities.

50. First, the Applicant claims that the Administration did not respect the Disciplinary Committee's rules of procedure, in particular article 2.1, on two counts: (i) in failing to refer her case to the Committee within one month of receiving her memorandum responding to the charge of professional misconduct; and (ii) inasmuch as the party referring the case to the Committee was the Executive Director of UNOPS, not the General Counsel.

51. While it has been shown that the Applicant's case was referred to the Disciplinary Committee three days later than the one-month deadline provided for in the Committee's rules of procedure, and that the referral was made by the hierarchical superior of the General Counsel, UNOPS, namely

Tribunal finds no explicit or implicit prohibition of this kind in the circular cited.

The onus of proof in disciplinary cases

57. There is consistent jurisprudence from the former United Nations Administrative Tribunal (UNAT) on the question of the onus of proof in disciplinary cases.

58. UNAT held on many occasions that the Respondent is not required to prove beyond reasonable doubt that misconduct has occurred; on the other hand, the onus is on the Respondent to produce sufficient evidence to sustain his conclusions, in other words to establish sufficient facts to permit a reasonable deduction that the law has been broken. Once the Administration has assembled enough evidence to sustain the conclusion that misconduct has occurred, it is up to the staff member to furnish evidence to the contrary

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Entered in the Register on this 7th day of April 2010

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Víctor Rodríguez, Registrar, UNDT, Geneva