UNITED NATIONS DISPUTE TRIBUNAL

Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

BERTUCCI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
François Loriot

Counsel for respondent:
Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. On the applicant's retirement from the United Nations in 2008 certain monies were withheld from his entitlements upon the ground that there were pending disciplinary proceedings concerning allegations of mismanagement that had resulted in financial loss. After exchanges of correspondence, eventually all the applicant's entitlements were paid. This case concerned the delayed release of USD13,829. The applicant's case is that this delay was not lawful because the charges were groundless. He also claims that the investigation (by the Procurement Task Force of the Office of Internal Oversight Services (P

left open the possibility that I would be prepared to consider whether there had been procedural unfairness such as to vitiate the investigation and, hence, the charges. Whether this would prove necessary depended on the legal and factual issues that arose and which were in the process of particularisation.

The disciplinary process

4. On 5 March 2008 PTF/OIOS informed the applicant that it was in the process of completing its investigation of which he was the subject. It appears that the most significant allegations were found to be unsubstantiated. He was invited to provide comments on the remaining allegations, of which he had already been informed, and which were again summarized in what appear to be considerable detail. He was informed that these were provisional findings and was invited to provide any further information or material as to why these should not be made. On 7 March 2008 the applicant responded and, pointing out that the provisional findings in respect of a specific issue had disregarded his account of the facts in apparent reliance on other documentation and statements that were not available to him, he asked to have access to the OIOS files relating to the issue so that he could "dispel any doubts that may remain on these minor allegations". On 10 March 2008 PTF/OIOS informed the applicant that, in effect, his account of the facts would be considered prior to the report being finalised but, since the matter was still in the investigative stage, he was not entitled to the statements he sought and was not proposed to give them to him, based upon OIOS investigations policy; should charges ensue and the disciplinary phase commence, the material would then be made available. On 4 April 2010 the applicant provided a detailed (and apparently convincing) response to the allegations and repeated his request for access to the statements.

5. On 12 June 2008 the applicant wrote to the Under-Secretary-General for DESA (USG) complaining, inter alia, that "due process" had been disregarded in his case and providing a compendious list of wrongful behaviour, undue pressure, unfair aspects of the PTF/OIOS investigation and disclosure of the investigation to the press and the like. He reiterated that his ability to respond to the allegations was handicapped by not being provided with the PTF/OIOS report and the full text of the

the applicant was due to retire on 31 July 2008, no mention was made either then or later of any decision to hold back any of his retirement entitlements, although this had been part of the recommendations in the report.

9. ST/AI/371 (revised disciplinary measures and procedures) requires the "preliminary investigation" (which is what OIOS conducted here) to be considered by the Assistant Secretary-General of the Office of Human Resources Management (ASG/OHRM) in order to decide "whether the matter should be pursued" (sec 5) and, if so, to "[i]nform the staff member in writing of the allegations and his or her right to respond" and provide "the documentary evidence of the alleged misconduct" (sec 6). The staff member's response, if any, is submitted to the ASG/OHRM (sec 8) who "*shall proceed*" to "[d]ecide that the case should be closed", in which event the staff member must be notified, or "should the facts appear to indicate that misconduct has occurred, refer the matter to the joint disciplinary committee for advice" (sec 9) (emphasis added). Despite the applicant's timely response to the charges, the process required by sec 9 of the ASG/OHRM has still not taken place despite the extraordinary lapse of time. The mandatory character of the process is demonstrated by the above emphasized phrase. It is obvious, as it seems to me, that it follows that this must be done within a reasonable time.

10. As I explained in *[Applicant]* UNDT/2010/069, the capacity of the Secretary-General to continue disciplinary proceedings after separation of the staff member is limited, even accepting that for certain purposes (such as seeking recompense) it continues. In this case, however, once the Administration had decided to pay the applicant his entitlements, that purpose had lapsed and, as it appears to me, the Secretary-General has no contractual entitlement to continue to subject the applicant to the disciplinary procedures, since no consequences could ensue. Although the Secretary-General might still conduct an investigation under his administrative powers in order to determine whether for example, the findings of the investigators were valid, in whole or in part, and any wrongdoing had occurred, the applicant could not be *required* to participate: in effect, therefore, the process would be one-sided. If the Secretary-General decides to conduct an investigation or some other process to determine whether some wrongdoing had or had not occurred, of course, the staff

member could be invited to take part but there would be no contractual obligation on

course of the disciplinary proceedings". light of the history of those proceedings, to suggest there was actually a "course" was a considerable exaggeration.

13. On 16 December 2008 the applicant was informed of the intention of the Administration to proceed against him pursuant to ST/AI 2004/3 and he was invited to provide any response he might wish to make within the usual timeframe. On 16

Tribunal to lead evidence or make submissions whilst it remained disobedient. I considered that this was not a denial of the rules of procedural fairness since the respondent was not denied the opportunity to participate fully in the proceedings. All that was necessary for this participation to be allowed was that he complied with my orders. He declined to do so and, accordingly, declined the opportunity to be heard.

15. On 18 March 2010, in the context of c

administrative review suggested, at least at that stage, the disciplinary proceedings were still alive, though necessarily only in the sense that a decision was still to be made as to whether they would either be closed or sent to a joint disciplinary committee. At the end of the day, it appears that there has, in fact, been no decision to proceed with any misconduct charges against the applicant or, in other words, that "the facts appear to indicate that misconduct has occurred", as provided in sec 9(b) of ST/AI/371. Nor has the Secretary-General made any decision under rule 10.3 of Chapter X.

19. Under both the old staff rules and the new, misconduct involves the failure of the staff member to comply with the obligations imposed – as it is expressed – with the Organization's legal instruments, or to "observe the standards of conduct expected of an international civil servant": see rules 110.1 and 10.1(a) respectively. This says no more than that there can be no misconduct without a breach of the staff member's contract. But not every breach, of course, will be misconduct. In general, it may be said that some significant level of moral turpitude is required. Thus, gross negligence or recklessness could qualify, of course, but not a mere mistake or error of judgment. This distinction, as it happens, is made in ST/AI/2004/3 which applies specifically to recovery of loss caused by staff negligence or violation of legal instruments and excludes "[i]nstances when a … loss … results from inadvertent error, oversight or simple negligence, or ability to foresee the negative consequences

to the relevant degree. There is a question whether the level of negligence previously required was not significantly higher than the present, having regard to the requirement that it be an "extreme" failure (whether wilful or reckless). In the result, since the applicant's money was repaid in full, this question is not directly relevant.

21. For the purpose of withholding entitlements on separation, the only legal requirement prescribed by sec 3.5 of ST/AI/2004/3 is that the staff member must be "under investigation". The investigation in question is a preliminary investigation under sec 3.1, instigated by the relevant head of department or office for the purpose of establishing whether there was gross negligence which resulted in loss. The test for this instigation is merely "reason to believe" that the staff member may have been grossly negligent, causing loss. As I explained in *Abboud*, this is an undemanding test, amongst other things satisfied even if there is evidence of innocence, unless of course that evidence is so cogent and credible as to render it unreasonable to entertain the suspicion in question. The application of this test is dealt with further below.

Consideration

22. In principle, the mere fact that monies are withheld is a breach of the contract of employment unless it is done in accordance with a condition of the contract. Here, that condition concerned the existence of circumstances bringing the entitlement within ST/AI/2004/3. The monies may be retained and held pending the completion of the proceedings or, presumably, their being closed by decision of the ASG/OHRM under sec 4.4(a). It may be inferred that this is what happened here.

23. As I have already explained, the prerequisite for withholding the funds is not the guilt of the staff member of gross negligence, but the existence of a "reason to believe" that he or she is guilty and the monies are legally withheld even if it is proved that the allegations are not substantiated, as is clearly envisaged by sec 4.1. Since either the case is closed or the process proceeds (until 30 June 2009 to a JDC) it must be presumed that the monies were paid following a determination that the allegations of gross negligence were not substantiated. No other path to repayment is

provided and the Organization is estopped from relying on its own unlawfulness and claiming that it paid the money by some other process. Having embarked on the journey prescribed by ST/AI/2004/3, it cannot detour but must follow the path to the end – press the allegation of gross negligence or withdraw it – it cannot, as it were, simply stop the process by unilateral action without stopping the entire process, which necessarily involves a decision that the allegations are not substantiated.

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despite the allegations, this is not the case he has in reality sought to make before the Tribunal by producing evidence rather than opinion. I do not say that his opinion is untrue, I simply find that there is no evidence that permits me to accept it.

27. The other case sought to be made on the applicant's behalf is that he was denied procedural fairness in being unable to obtain access to the complete conversations of the witnesses whose statements were relied on by the investigators to make adverse findings. The applicant said that he needed to check whether there were other parts of those conversations than those relied on to see whether there were any qualifications or other information that reduced the cogency of the cited material or otherwise should have made it less significant. I should say that I do not necessarily accept that the applicant should not have had access to this material before the investigation was closed (absent considerations of confidentiality, which were at no time claimed). The only reason given was that he was not entitled to it at that stage because that was the practice of OIOS. On its face, this is scarcely cogent, let alone reasonable. He had been invited to respond to the proposed or conditional findings but, without having access to all the material relied on by the investigators, absen

nature of the contract itself (that is to say, the object it or some aspect of it serves), the making of an implicit or explicit representation intended to be acted on, or a specific entitlement or obligation. The requirement of "due process" is an aspect of good faith. Reference to "due process" as *justifying* the imposition of a rule, as distinct from *characterizing* a rule, is thus, to my mind, neither helpful or persuasive. The requirement does not (or ought not) exist in a vacuum and, as is stated above, should be linked to some other contractual element.

29. Here, the logical foundation for requiring disclosure of the evidence relied on is the right (assuming it to exist) of the staff member to make a case for his or her innocence for the ASG/OHRM to consider before deciding whether "the case is to be pursued". As is implied above, I should acknowledge some skepticism as to whether indeed the staff member has a *right*, as a general rule, to make a submission at this stage of the process, though it is no doubt reasonable to invite him or her to do so. The express provision of a right to respond to the allegations when formulated and conveyed (ie, after it has been decided that they are to be pursued, *res ipsa hypothesi*, therefore, *after* the investigation is completed and it has been concluded that they appear to be substantiated, suggests that there is no *right* to respond to the content of the investigation at a previous stage. It is enough, perhaps, to say that if, in any particular case, it would be unreasonable for the ASG/OHRM to decide to pursue the case without obtaining input from the staff member, then the right would arise. This would depend on the nature of the alleged misconduct and the adequacy and character of the report. On the other hand, commonsense suggests that it would actually be sensible to give the staff member an opportunity to make a response before deciding to take the matter further and, confidentiality questions apart, it is difficult to see a good reason for refusing to provide all the relevant material. It would be consistent with sound principles of administrative action to act with a maximum degree of transparency (qualified by the particular requirements of the individual case) to provide the staff member with all the material relevant to the case being considered against him or her before deciding to proceed but, in light of the prescribed procedure to which I have drawn attention, I do not think (as I presently

see the position under ST/AI/371) that the requirements of good faith give rise to a legal obligation to do so before that decision is made.

30. Here, there was an opportunity provided for the applicant to respond to the provisional findings but he was denied details of all the information that would have permitted him to do so for reasons which, as expressed, were patently unreasonable. Having taken the step of inviting a response, the Administration was not entitled to arbitrarily refuse to make full disclosure of the matters to which the response was necessarily directed, namely the evidence upon which the provisional findings was based. Accordingly, I conclude that the applicant was denied procedural fairness in the refusal of the investigators and then other officials of the Administration to provide the applicant with the complete interviews of the relevant witnesses.

31. In the end, however, I am not satisfied that this disclosure would have made any difference to the applicant's position. He was informed that, once charged, he would have access to the material sought. He was charged. I do not know whether in fact he sought access but the evidence before me, tendered by the applicant himself, clearly shows that he was informed that he could have access if he sought it. He has not produced any material that suggests that the parts of the witness' conversations relied on by the investigators were misquoted, or taken out of context. Nor has he shown that they were in any way unfair, let alone that, if he had been given access to the complete documents, he would have been able to demonstrate sufficient doubt (together with the other matters upon which he relied) as to the cogency of the report to show that it did not give rise to the reasonable belief, or provide a sufficient basis for determining, that there was the appearance of substantiation of the existence of his negligence leading to the loss in question.

32. It follows that the preponderance of evidence establishes that the applicant's entitlements were lawfully withheld, in that the report disclosed matters which were objectively capable of justifying the conclusion that there was *reason to believe* he had been guilty of gross negligence resulting in financial loss, even though he may, on fuller examination of the relevant facts, have been found to be entirely innocent. Moreover, I am unable to conclude that the allegations did not *appear* to be