

Introduction

1. The Applicant joined the United Nations in June 1999 as a Personal Assistant at the United Nations Mission in Bosnia and Herzegovina (UNMIBH) and held that position until June 2003. Following a short break in service, she was recruited as a Facilities Management Assistant at the United Nations Mission in Liberia (UNMIL). She thereafter moved to the United Nations Operation in Cote d'Ivoire (UNOCI) on 1 September 2004 and still occupies that post at the F-3 level.

2. On 7 August 2007 the Applicant was charged with having made threats against another staff member and having improperly used United Nations information and communication technology resources for this purpose.

3. She responded to the charges on 7 September 2007.

4. The case was referred to the Joint Disciplinary Committee (JDC) on 30 November 2007. The JDC concluded that the evidence on the record was not sufficient to support the charges of misconduct against the Applicant.

5. On 8 March 2010 the Applicant was informed that the charges against her had been dismissed.

6. On 16 June 2010, the Applicant filed an Application with the Tribunal which she

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a. The Applicant was the author of the threat letter and poster copies of which were sent to various UN officials in December 2005 and February 2006.

b. The Applicant delivered or caused to be delivered the envelopes containing the threat letter and poster to UN officials at New York Headquarters and at UNMIL Headquarters.

c. The Applicant's assertion that she had assisted a person named "Chad" in writing the letter sent to the UN officials and that she believed that FC was sexually exploiting Liberian women was not credible.

d. The Applicant was most probably motivated by a desire to have FC removed from the mission area and to frustrate his relationship with another woman herein referred to as U.

13. Following the release of the OIOS investigation report, by memorandum dated 21 June 2007, the then Director, Department of Field Support (DFS), Mr. Philip Cooper, referred the case to the Office of Human Resource Management (OHRM) for appropriate action.

14. In a memorandum dated 7 August 2007, Ms. Georgette Miller, then Director, Division for Organizational Development, Office for Human Resources Management (OHRM), charged the Applicant with having made threats against a staff member and having improperly used United Nations information and communication technology resources for this purpose.

15. On 17 September 2007, the Applicant responded to and denied all the charges. The case was referred to a Joint Disciplinary Committee (JDC)

16. By letter dated 8 March 2010 from Ms. Catherine Pollard, Assistant Secretary General, OHRM, Department of Management, the Applicant was informed that the charges against her had been dismissed.

Applicant's Case

17. The Applicant's case is summarized as follows:

18. It was an abuse of discretion on the part of the Administration to bring charges against her based on unsubstantiated evidence and as a result substantive and procedural irregularities were committed in charging her with misconduct.

19. The charges leveled against her were based on an investigation that was not thoroughly or properly carried out and as a consequence essential facts were not taken into account and erroneous conclusions were drawn from available facts, specifically:

a. She had informed the Administration in her response to the charges that on the day and at the time the threat letter was delivered to the United Nations officials in New York she had an appointment with her doctor in preparation for surgery scheduled for 17 January 2006;

b. On the day that the letter was delivered to UNMIL the Applicant was travelling from New York to Abidjan and there was no evidence in the OIOS Investigation Report that showed that the Applicant had delivered or caused to be delivered the threat letter to UNMIL;

c. She had an obligation under Section 3 (e) ST/SGB/2003/13 (Special Measures for Women and Children)

20. It is the Applicant's contention that had all the foregoing essential facts been taken into account and the totality of the circumstances been thoroughly investigated and reasonably and properly assessed, he would not have been charged with the acts of misconduct.

21. The Applicant submitted that it was for the head of office or the responsible officer to decide whether evidence revealed by the investigation appeared to indicate that the report of misconduct was well founded. The head of office or responsible officer is vested with a wide discretion at this initial stage. That discretion, however, is to be exercised judiciously in the light of what the investigation has revealed. The discretion cannot and should not be used capriciously. It is incumbent on the person vested with that discretion to scrutinize the evidence carefully before deciding whether any act of misconduct as defined has been committed. A judicious exercise of the discretion requires a proper analysis of the meaning of the words. It appears to indicate that the report of misconduct is well founded in regard to the evidence contained in the relevant rules.

22. The reliance by the Administration on the findings of the procedurally defective OIOS investigation was not a proper exercise of discretion and denied the

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e. The Applicant admitted having knowledge of threatening letter after evidence from a forensic examination of her UN computer was presented to her.

30. Pursuant to paragraphs 3, 5 and 6 of ~~SI~~ 371, a decision was made by the Assistant Secretary General, OHRM, to commence disciplinary proceeding against the Applicant after reviewing the findings against the Applicant contained in the OIG Investigation Report.

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Applicant's movement to the higher level of ~~FS~~ Step VII, as a Facility Management Assistant, effective 1 July 2007. The modification to the Applicant's appointment was made retroactive to 1 July 2007.

36. In response to the Applicant's contention that she been promoted in 2007 she would have been eligible for two more promotions between 2007 and 2009 as well as had the opportunity to apply for other posts both UNOCI and other missions, the Respondent submit

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39. The Applicant contended that it was an abuse of ~~disc~~ on the part of the Administration to bring charges against her based on unsubstantiated evidence and that as a result both substantive and procedural irregularities were committed in charging her with misconduct. She further argued that the ~~charges~~ charges against her were based on an investigation that was not thoroughly or properly carried out and as a consequence essential facts were not taken into account and erroneous conclusions were drawn from the facts.

40. The Respondent submitted ~~the~~ investigation by OIOS into this matter, including the role, if any, of the Applicant, arising out of a letter containing threats against a UN staff member received on 28 December 2005 at the O(in)P2ice of the UnderSecretaryGeneral for OIOS in New York, was ~~siti~~2ied and was in accordance with ST/AI/371. The Respondent further submitted that the findings in the OIOS Investigation Report gave rise to a grounded suspicion, reasonable suspicion or probable cause that the alleged misconduct occurred.

41. The procedure for initiating an investigation for the purposes of disciplinary proceedings is set out in ST/AI/371. Paragraph 2 of ST/AI/371 provides that where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a ~~discip~~ disciplinary measure may be imposed, the head of office or responsible officer shall undertake a preliminary investigation.

42. Paragraph 3 of ST/AI/371 provides that if the preliminary investigation appears to indicate that the report of misconduct ~~is~~ founded, the head of office or responsible officer should immediately report the matter to the Assistant SecretaryGeneral, O(in)P2ice of Human Resources Management

43. Paragraph 9 (b) of ST/AI/371 provides that should the facts appear to indicate misconduct ~~is~~ occurred, the Assistant SecretaryGeneral, O(in)P2ice of Human Resources Management shall refer the matter to ~~JDC~~ JDC for advice

44. In *Lutta* UNDT/2010/052 the Tribunal noted that the discretion granted to the head of office to determine whether the investigation appears to indicate that a report of misconduct is well founded should be exercised judiciously in the light of what the investigation has revealed. The discretion cannot and should not be used capriciously. It is incumbent on the person vested with that discretion to scrutinize the evidence carefully before deciding whether any act of misconduct as defined has been committed. A judicious exercise of the discretion requires a proper analysis of the meaning of the words *appears to indicate that the report of misconduct is well founded* in regard to the evidence.

45. The Tribunal further noted that in that case the words *well founded* can be assimilated to “grounded suspicion, reasonable suspicion” “probable cause

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to paragraph 9(b) of ST/AI/371. The Tribunal is satisfied that the findings of the ASG/OHRM were those of an objective observer who had scrutinized the entire dossier and made conclusions on the basis of the evidence before him. There was no procedural irregularity on the part of the Organization as there was full compliance with ST/AI/371.

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55. The Applicant submitted that her career advancement was impeded in that

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The Applicant in this case has not gone beyond merely making this assertion and this claim must fail.

63. With regards to her claim for emotional distress and its impact on her health as a result of the ac

Applicant to warrant the award of compensation for any injury to her health.
Applicant is therefore not entitled to compensation on this ground.

Conclusion

67. In view of the foregoing the Application is dismissed in its entirety.

(Signed)

Judge Nkemdilim Izuako

Dated this 6th day of December 2012

Entered in the Register on the 6th day of December 2012

(Signed)

Jean Pelé Fomété Registrar, Nairobi