



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 997

Case No. 1109: VAN DER GRAAF

**Against: The Secretary-General
of the United Nations**

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Mayer Gabay, President; Ms. Marsha A. Echols; Mr. Spyridon

Flogaitis;

Whereas at the request of Richard van der Graaf, a former staff member of the United Nations Office at Vienna (hereinafter referred to as UNOV), the President of the Tribunal, with the agreement of the Respondent, extended until 31 May, 31 August and 30 November 1999 the time limit for the filing of an application with the Tribunal;

Whereas, on 23 November 1999, the Applicant filed an Application containing pleas which read as follows:

"II. PLEAS

...

2. On the merits, the Applicant respectfully requests the Tribunal *to find*:

(a) That the decision of the Secretary-General to demote him to D-1, communicated to [the Applicant] on 28 December 1998 by letter of ..., [the] Under-Secretary-General for Management dated 16 December 1998, was based on grounds that had not been alleged;

(b) That the actions of [the Applicant] in defending himself against the allegations in this case did not constitute abuse of authority;

(c) That the JDC [Joint Disciplinary Committee] violated the applicable procedures to the detriment of [the Applicant] by not including in the report a synopsis of the evidence;

(d) That the recommendation of the JDC was based in part on evidence not made available to [the Applicant];

(e) That OIOS [Office of Internal Oversight Services] failed to make a proper investigation before it submitted its report of 13 January 1998 recommending the commencement of disciplinary procedures against [the Applicant] and that, as a result, [the Applicant] was suspended for an entire year with adverse professional and emotional consequences;

(f) That the actions taken by the United Nations at the time of [the Applicant]'s suspension and immediately thereafter were unnecessarily public and harsh.

3. Whereafter the Applicant most respectfully requests the Administrative Tribunal *to order*:

(a) The rescission of the decision of the Secretary-General to demote [the Applicant] in rank from D-2 to D-1, conveyed to [the Applicant] in the letter of [the Under-Secretary-General for Management], dated 16 December 1998;

(b) The payment of \$50,000 compensation for the public humiliation and emotional damage arising out of the actions of the United Nations in connection with the investigation and at the time of [the Applicant]'s suspension and immediately thereafter."

Whereas the Respondent filed his Answer on 14 July 2000;

Whereas the Applicant filed Written Observations on 12 September 2000, and on 6 October 2000, the Respondent provided his comments thereon;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 14 April 1967, on a one-year intermediate term appointment as an Associate Expert for Urban Community Development at the Department of the Municipal Council, Chingola, Zambia. His appointment was extended several times and became permanent on 1 February 1980. At the material time, the Applicant held the

position of Director, Division of Administration and Common Services, UNOV, at the D-2 level, and was also in charge of the administration of the Centre for International Crime Prevention, and the United Nations Drug Control Programme (UNDCP).

On 26 June 1997, a junior professional staff member employed by UNDCP sent a memorandum entitled "The corruption, abuse of power and sexual harassment of [the Applicant]" to the Under Secretary-General for Internal Oversight Services. The junior professional complained that the Applicant had sexually harassed and intimidated him, had extorted goods, services, favours and money from him, and had attempted to destroy the career of the junior professional's wife. The junior professional claimed that he had been subject to abuse for two years but had not reported it earlier because of the Applicant's high position and constant references to his close ties to senior management.

The Office of Internal Oversight Services (OIOS) proceeded to conduct an investigation and submitted its report to the Director-General, UNOV, on 13 January 1998. The report stated that the Applicant had continually denied any relationship with the junior professional other than that of "unofficial counselor" until the final interview, when OIOS investigators played the Applicant a cassette which the junior professional had used to secretly record a conversation between himself and the Applicant. Upon hearing the tape, the Applicant volunteered that he and the junior professional were in love with each other. OIOS had found no evidence of a reciprocal relationship and concluded that the Applicant had "violated Staff Rule 110.1, relating to misconduct ..., in that he improperly and repeatedly sought a sexual relationship with the complainant, even when his advances had been regularly rejected over a two year period". It further concluded that the Applicant had retaliated against the junior professional in contravention of Secretary-General's Bulletin ST/SGB/273 of 7 September 1994, by lodging charges against him in October 1997 and by "improperly using UNOV staff and resources to attempt to discredit [him]". The report recommended the initiation of disciplinary proceedings for serious misconduct against the Applicant as well as his suspension on full pay pending the outcome of the proceedings.

On 19 January 1998, the Under-Secretary-General for Management advised the Applicant that he would be placed on "suspension with pay with effect from receipt of this letter", and that allegations of misconduct would be submitted to him shortly. On 20 January

1998, the Applicant was asked by the Deputy to the Director-General, who was accompanied by three other staff members, "to surrender [his] grounds pass". He was subsequently asked to leave the premises of UNOV and was escorted out of the building by security officers.

On 22 January 1998, a German newspaper, "Die Presse", citing the Spokesman of the Director-General, UNOV, reported that a high-ranking UN Official had been suspended following accusations of sexual harassment of a male colleague. This was followed by a press release from the UN Information Service, Vienna, which identified the Applicant by name and position.

Also on 22 January 1998, the Assistant Secretary-General, Office of Human Resources Management (OHRM), presented the Applicant with allegations of misconduct, charging him with "abuse of [his] authority, sexual harassment of [the junior professional], and retaliatory action against [the junior professional]". She invited him to respond to the charges within two weeks.

On 20 July 1998, the Assistant Secretary-General, OHRM, referred the case to the Chairperson, JDC, in Geneva. At the request of the Applicant, however, the Under-Secretary-General for Management decided, on 6 August 1998, that the case be transferred to "a JDC in New York".

The JDC adopted its report on 30 November 1998. Its findings of fact, conclusions and recommendation read, in part, as follows:

"Findings of fact

...

39. ... [T]he Panel agreed ... that the situation could have been handled in a more sensitive way, for example, premature media exposure could have been prevented, and the process of his eviction from the UNOV premises by four Security Officers was an exaggerated and unnecessarily humiliating gesture.

...

Conclusions

65. ... [T]he Panel felt that OIOS should have conducted a more thorough investigation into the background, motives and overall circumstances that had led to the filing of the complaint by [the junior professional staff member] ...

66. ... [T]he Panel deduced ... [that]:

(i) [The junior professional], himself or in conjunction with his wife, being aware of [the Applicant]'s reputed attraction to young Arab men, decided that [the junior professional] would befriend and cultivate [the Applicant], most probably in order to try to arrange some improvement in [the junior professional's wife]'s workplace or simply to have a high-ranking friend who might prove useful ...

(ii) After two years of trying to develop this relationship and steer it to his advantage, ... [s]eeking to end the relationship that was getting out of control, [the junior professional] then gathered compromising evidence, including taping the conversation in the car, and filed his complaint in June 1997.

67. Of paramount importance to the Panel was [the Applicant]'s conduct in the whole episode with [the junior professional]. The Panel felt that the fact that [the Applicant] had allowed himself to be involved in an inappropriately intimate relationship with a junior staff member, a person whose relations with [the Applicant] were initially based on [the Applicant] counseling him on his family and other problems, demonstrated a serious lack of discretion and judgement that had negative impact on the working environment in UNOV.

The Panel would have expected that a staff member with the level and experience of [the Applicant], as a senior official responsible for administration and personnel, would have anticipated that the relationship he apparently sought with [the junior professional] could only have been distorted by the difference between their rank and position and interests.

68. The Panel therefore concluded that the conduct of [the Applicant] in this matter was incompatible with the standards of conduct expected of a staff member of his position, and constituted a breach of his obligation to the United Nations.

VIII. Recommendation

69. In light of the foregoing, the Panel *unanimously agreed* that the Administration had failed to prove with adequate evidence that [the Applicant] had made unwelcome sexual advances to [the junior professional], or that [the Applicant] had abused his authority in the relationship with [the junior professional]. Therefore, the charge of sexual harassment fails.

70. The Panel also *unanimously agreed* that the Administration had not presented adequate evidence to show that [the Applicant]'s actions in his attempt to discredit [the junior professional] were acts of retaliation against [the junior professional].

71. However, the Panel *unanimously agreed* that by using officials at UNOV and by using his influence and high position in his action to discredit [the junior professional], [the Applicant] had abused his authority as a Director in Vienna.

72. Most importantly, the Panel *unanimously agreed* that [the Applicant]'s conduct in handling the whole matter, entertaining an intimate personal relationship with a junior UNOV staff member, whose wife also had administrative difficulties over which [the Applicant], as head of UNOV Administration had considerable influence, was incompatible with the standards of conduct expected of a staff member of his position and constituted breach of his obligation to the United Nations.

73. In light of the foregoing and in view of the serious nature of the misconduct, the Panel *unanimously recommends* that [the Applicant] be demoted to the D-1 level with immediate effect and with no possibility for promotion.

... "

On 16 December 1998, the Under-Secretary-General for Management transmitted a copy of the JDC report to the Applicant and informed him as follows:

"...

... The Secretary-General has taken note of the Committee's opinion that the requirements of due process have been complied with by the Administration in your case and that there were no procedural flaws that precluded the Committee's consideration of the substance of this case.

In respect of the charge of sexual harassment of [the junior professional], the Secretary-General has taken note of, and agrees with, the Committee's finding that it was not proved with adequate evidence that you had made unwelcome sexual advances to [the junior professional], and that, therefore, the charge of sexual harassment failed.

In respect of the charge of retaliatory action against [the junior professional], the Secretary-General has taken note of, and agrees with, the Committee's finding that your actions were defensive in nature, that they were aimed at undermining the credibility of [the junior professional] as a witness since the case rested on credibility, and that no adequate evidence had been adduced to show that those actions constituted a reprisal within the meaning of paragraph 18 (f) of ST/SGB/273 ... Therefore, the charge of retaliatory action fails.

In respect of the charge of abuse of authority, the Secretary-General has taken note of, and agrees with, the Committee's finding that, while you had not abused your authority in the relationship with [the junior professional], you had abused your authority as the Director of Administration of UNOV ... The Secretary-General also considers that your omitting to take appropriate action on the issues that were the subject of your complaint to OIOS ... when you first became aware of them, impugns your managerial and administrative conduct as you improperly decided not to take timely action in respect of these issues because of your relationship with [the junior professional].

The Secretary-General also considers that your conduct in handling the whole matter, entertaining an intimate personal relationship with another UNOV staff member whose wife had administrative difficulties, over which you, as Head of Administration, had considerable influence which you also applied, was incompatible with the standards of conduct expected of a staff member of your position. Finally, the Secretary-General considers that your conduct during the investigation whereby you continuously lied to the investigators about the true nature of your relationship with [the junior professional] and admitted it only after faced with irrefutable evidence, was also incompatible with the standards of conduct expected of an international civil servant.

In view of the foregoing, the Secretary-General is in agreement with the Committees' conclusion that your actions constituted misconduct within the meaning of staff rule 110.1. The Secretary-General further considers that your conduct violated in particular staff regulations 1.4 and 1.5.

... [T]he Secretary-General has decided that you be demoted to the D-1 level with effect from close of business on the day you receive this letter and, taking into account that you shall reach the retirement age on 5 April 2000, with no possibility for promotion.

..."

On 19 January 1999, the Under-Secretary-General for Management, informed the Applicant that he had been assigned to the position of Chief, Conference and General Service Division, Economic Commission for Africa, in Addis Ababa. The Applicant did not receive medical clearance to take up this position and resigned from the Organization, effective 28 February 1999.

On 23 November 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision of the Secretary-General was based upon an allegation with which he was not initially presented.
2. The Applicant's actions in defending himself did not constitute abuse of authority.
3. There is no basis for the finding of the Secretary-General that the Applicant failed to take appropriate action on the issues that were the subject of his complaint to OIOS when he first became aware of them.
4. There is no evidence to show that the Applicant "continuously lied" to the investigators about his relationship with the junior professional.
5. The JDC violated the applicable procedures by not including a synopsis of the evidence in the report.
6. The recommendation of the JDC was based in part on evidence not made available to the Applicant.
7. The failure of OIOS to conduct a proper investigation led to an unnecessary disciplinary procedure against the Applicant, including his suspension.
8. Actions taken by the United Nations at the time of the Applicant's suspension and immediately thereafter were unnecessarily harsh and public.

Whereas the Respondent's principal contentions are:

1. The decision to impose a disciplinary measure upon the Applicant was based on the finding that his action constituted misconduct with which he had been originally charged.
2. The Applicant's due process rights were fully respected.

The Tribunal, having deliberated from 5 to 23 July 2001, now pronounces the following judgement:

- I. The Applicant appeals the decision to demote him from the D-2 to the D-1 level with no possibility of promotion. He claims that his demotion was based on a different charge than

the one initially brought against him and that such a shift in grounds violates his rights of due process. Further, he claims that the actions taken by the Organization at the time of his suspension were unnecessarily public and harsh.

II. The case concerns two issues: (i) whether there was a shift in grounds as to one of the charges made against the Applicant during the disciplinary proceedings and (ii) whether the Applicant incurred unwarranted humiliation following the OIOS investigation.

III. On 26 June 1997, a junior professional staff member serving with UNDCP, Vienna, sent a letter to the Under-Secretary-General for Internal Oversight Services as a result of which an investigation was initiated against the Applicant. The OIOS report recommended that the Secretary-General institute disciplinary proceedings against the Applicant.

On 20 January 1998, the Applicant was asked to leave the premises of UNOV and was escorted out of the building by security officers. On 22 January 1998, the Assistant Secretary-General, OHRM, formally charged the Applicant with misconduct, specifically "abuse of authority, sexual harassment of [the] junior [professional] staff member, and retaliatory action against that same staff member". On 30 March 1998, the Applicant refuted all three allegations.

IV. The case was referred to the JDC in New York at the request of the Applicant. The Panel noted that the Applicant was charged with retaliatory action, sexual harassment and abuse of authority. It found that the charge of retaliatory action failed because the Applicant's actions were aimed at undermining the credibility of the junior professional staff member, rather than acts of retaliation.

The Panel dismissed the charge of sexual harassment based on its findings that the relationship between the two men was reciprocal. In this regard, the Tribunal does not agree with the JDC conclusion that a *prima facie* consensual relationship between parties cannot constitute sexual harassment. In this case, the fact that the Applicant was of a higher rank than the junior professional staff member may indicate that there was not, in fact, valid consent, as it is the Tribunal's view that consent can be vitiated by a power imbalance between the parties.

With reference to the third charge, the Panel found that by using officials at UNOV and his influence and high position in an attempt to discredit the junior professional staff member, the Applicant had abused his authority as a Director in Vienna. Further, the JDC found,

"[the Applicant's] conduct in handling the whole matter, entertaining an intimate personal relationship with a junior UNOV staff member, whose wife also had administrative difficulties over which [the Applicant], as head of UNOV Administration had considerable influence, was incompatible with the standards of conduct expected of a staff member of his position and constituted breach of his obligation to the United Nations."

The JDC recommended that the Applicant be demoted to the D-1 level with no possibility of promotion, with immediate effect, which recommendation was accepted by the Secretary-General.

VI. The Applicant's primary contention is that the decision of the Secretary-General to demote him was based on an allegation with which he was not initially presented, i.e., abuse of authority, in violation of staff rule 110.4. This rule provides that staff members should be given a reasonable opportunity to respond to allegations made against them. The Applicant argues strenuously that the charge of abuse of authority should have been dismissed, either because it was not charged *ab initio* or because the ultimate finding did not relate to the grounds on which the charge was originally made. The facts point otherwise: the charge of "abuse of authority" came early enough so that the Applicant had an opportunity to defend himself. Contrary to the Applicant's assertions, the charge of "abuse of authority" was made nine months prior to the hearing before the JDC. The fact that additional evidence supporting a charge of "abuse of authority" emerged during the hearings, could not vitiate the original charge and is not a valid basis to claim a "shift in grounds". (See Judgement No. 744, *Eren* (1995).)

Moreover, the Application misrepresents the facts in this matter. First, the Applicant deliberately misquoted the Secretary-General. The Applicant states

"[t]he Secretary-General also agreed with the JDC that the charge of retaliatory action against [the junior professional staff member] failed, since the actions taken by the [Applicant] 'were defensive in nature', that they were aimed at

undermining the credibility of [the junior professional staff member] as a witness since the case rested on credibility".

What the Secretary-General actually wrote was,

"actions [taken by the Applicant] were defensive in nature, that they were aimed at undermining the credibility of [the junior professional staff member] as a witness since the case rested on credibility, *and that no adequate evidence had been adduced to show that those actions constituted a reprisal ... Therefore, the charge of retaliatory action fails.*" (Emphasis added)

In omitting the emphasized phrase, the Applicant purports to convince the Tribunal that the Secretary-General dismissed the charge of 'abuse of authority' whereas what he actually dismissed was the charge of reprisal.

The Applicant purports to rely on *Eren*, wherein the Tribunal reversed a decision of the Secretary-General accepting a JDC finding of not guilty but nevertheless imposing disciplinary measures for substandard performance. As the parties in that case had not been notified that their performance was under review, the imposition of the disciplinary measures raised due process concerns. The rationale of *Eren* is that being informed of the charges against oneself is fundamental to the right to make a defense. In the instant case, the Tribunal has considered whether the Applicant was sufficiently informed of the charges against him to permit him to make a defense. The Tribunal finds that he was so informed and that his due process rights were fully respected. The Tribunal finds also that as all the charges against him arose from the same factual situation, the Applicant had full and fair opportunity to defend himself. This may be contrasted with the facts in *Eren*, where the investigation unearthed substandard performance ancillary to the original charge.

VII. The Tribunal notes that the Secretary-General based his finding of "abuse of authority" in part on the fact that the Applicant used officials at UNOV, his influence and high position in actions to discredit the junior professional staff member. It is unquestionably within the broad discretionary powers of the Secretary-General to impose disciplinary measures of a more lenient nature than those originally recommended. What may not have constituted reprisal meriting the Applicant's dismissal was nonetheless an abuse of authority meriting demotion.

In cases of misconduct, the Tribunal has repeatedly held that the discretion of the Secretary-General is, and must remain, necessarily extensive (Judgement No. 351, *Herrera* (1985)) and that he has broad discretionary power in determining disciplinary sanctions (see Judgements No. 674, *Gonda* (1994) and No. 941, *Kiwanuka* (1999)). It is not necessary to establish beyond any reasonable doubt a patent intent to commit irregularities or sole responsibility therefore. The Tribunal finds that the Secretary-General was justified in demoting the Applicant for conduct incompatible with the standards of conduct expected of an international civil servant.

VIII. The Applicant's secondary claim rests on the fact that actions taken by the Respondent at the time of the suspension, and immediately thereafter, were unnecessarily public and harsh. During the hearings, the JDC was surprised and dismayed by the OIOS decision to make public aspects of the results of its preliminary investigation in its annual report to the General Assembly, when it knew that the case was under active consideration.

A letter informing the Applicant of his suspension without pay was delivered by four staff members, and he was escorted from the Vienna International Center by four UN security officers. Additionally, an official statement was issued to the major Austrian daily newspaper on the Applicant's suspension, identifying characteristics and details of the case, including allegations of homosexuality and sexual harassment. This was followed by a press release containing the Applicant's name, nationality and status, and details regarding the allegations against him.

The Tribunal finds this conduct unreasonably insensitive and public. Both the humiliation that resulted from the manner in which the Applicant was escorted from his office and the publication of the allegations against him were unnecessary and inappropriate.

IX. In conclusion, the Tribunal holds that the Secretary-General's decision to demote the Applicant was based on findings of misconduct with which he was originally charged and that the Applicant's rights of due process were fully respected; but that the humiliation brought upon the Applicant was disproportionate and unnecessary, warranting compensation.

X. For the foregoing reasons, the Tribunal:

- i) Orders the Respondent to pay the Applicant ten thousand dollars, as compensation for moral damage; and,
- ii) Rejects all other pleas.

(Signatures)

Mayer GABAY
President

Marsha A. ECHOLS
Member

Spyridon FLOGAITIS
Member

Geneva, 23 July 2001

Maritza STRUYVENBERG
Executive Secretary