

**Administrative Tribunal**

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30 January 2004

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ADMINISTRATIVE TRIBUNAL**Jugement No 1143**

Case No. 1236 : SAID

Against : The Secretary-General of the
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Spyridon Flogaitis,
Member; Ms. Brigitte Stern, Member;

Whereas at the request of Galal Said Ben Said, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, extended to 31 January 2002 the time limit for the filing of an application with the Tribunal;

Whereas, on 18 January 2002, the Applicant filed an Application containing pleas which read, in part, as follows:

“II: PLEAS

7. ... the Applicant respectfully requests the Tribunal:

...

(c) *to decide* to hold oral proceedings ...

(d) *to order* the Respondent to produce the full 1998 Audit Report for the UNICEF Djibouti Office.

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *to rescind* the decision of the Executive Director of UNICEF to separate the Applicant from service for misconduct without notice;

(b) *to find and rule* that the UNICEF Ad Hoc Joint Disciplinary Committee [(JDC)] erred in reaching its conclusions and recommendations;

- (c) *to order* that the Applicant be reinstated in service at the GS-2 level, with retroactive effect from 23 November 1999;
- (d) *to award* the Applicant ... compensation on an exceptional basis in the amount of [\$25,000] for the actual, consequential and moral damages suffered by the Applicant ...
- (e) *to fix* pursuant to Article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three years' gross salary with interest from 23 November 1999 in view of the special circumstances of the case;
- (f) *to order* that a letter exonerating the Applicant of any wrongdoing be published and that all prejudicial materials relating to this case be removed from the Applicant's records;
- (g) *to award* the Applicant as cost, the sum of \$10,000... in legal fees and \$500 in expenses and disbursements;
- (h) *To award* an additional sum of \$10,000 for the delays caused by the Respondent ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 May 2002 and periodically thereafter until 31 March 2003;

Whereas the Respondent filed his Answer on 31 March 2003;

Whereas the Applicant filed Written Observations on 6 May 2003;

Whereas, on 31 October 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant was employed by UNICEF, Djibouti, as a temporary driver/messenger under several special service agreements, from 15 May 1989 until 30 June 1991. On 1 July 1991, he was granted a one-year fixed-term appointment as a Driver at the GS-2 level. His appointment was subsequently extended several times, until his separation from service, on 30 November 1999.

On 30 March 1999, the Applicant was informed that an audit was being conducted in the UNICEF office in Djibouti and that the preliminary findings suggested his involvement in serious irregularities. He was further informed that, pending the completion of the investigation, he was being placed on suspension with pay but that this suspension did not constitute a disciplinary measure.

On 25 June 1999, the Applicant was presented with the formal charges against him, as well as a copy of the Audit Report. According to the Audit Report, catering services were obtained from a local bakery for the celebration of the Day of the Child, which took place on 22 November 1998. An invoice for 320,000 Djibouti francs (DF), supposedly issued by the bakery, was certified for payment by the Information/Communication Officer of the Djibouti office and a cheque payable to the bakery was issued. Since this was a procurement action above US\$ 500, it required a purchase order, which was not found and therefore the case was investigated. The investigators met with the owner of the bakery and his son who, when shown a copy of the invoice, indicated that it was false and that the original order from UNICEF was for DF38,000 only. They produced a copy of the bakery's original invoice, amounting to exactly DF38,000. Upon review of a copy of the cheque it was noted that it was decossed by the Information/Communication Officer and endorsed by him to the Applicant for cash. The owner of the bakery and his son also stated that the bakery's rubber stamp was used by someone else, without their permission. The owner's young daughter stated that a driver came one day and took the rubber stamp out of the bakery for a short while and then returned it. During an interview with Internal Audit and with the Assistant Representative in Djibouti, the Applicant admitted to having cashed the cheque and indicated that he had paid the bakery DF38,000, paid another supplier (Mr. A.) for drinks, and kept the rest of the money. The charges contained in the letter were that he was guilty of fraud by cashing a UNICEF check that was illegally endorsed in his name and in retaining a portion of the money. The letter further informed the Applicant that his actions, constituted conduct not befitting an international civil servant.

On 19 July 1999, the Applicant rebutted the charges. According to the Applicant, his statement admitting to cashing the cheque was made under duress, and he gave the full cashed amount to Mr. A. The Applicant submitted a notarized declaration from Mr. A, taking full responsibility for use of the bakery's rubber stamp as well as for the cashing of the cheque. The Applicant further stated that it is acceptable practice in Djibouti to cash checks on behalf of others.

On 23 November 1999, the Applicant was informed that, following careful review of the matter as well as consideration of his 19 July letter, the Executive Director, UNICEF, had decided to summarily dismiss him for serious misconduct.

On 16 January 2000, the Applicant requested that a JDC be convened to review the Executive Director's decision to summarily dismiss him.

On 5 March 2001, the JDC submitted its report. It unanimously observed and concluded the following:

“ ...

4. ... The JDC ... noted the testimony under oath by [Mr. A] who (although not the legitimate payee), ultimately cashed the cheque and his statement under oath that he took full responsibility for the cashing of the cheque and the use of the stamp from the Patisserie.

5. ... The JDC considered the Office situation to be an aggravating factor in the case, in that management, accountability and internal control all appeared to be lax.

6. ... the JDC finds it plausible that [the Applicant] could have been involved in an attempt to defraud UNICEF ... However ... the JDC ... did not find the charge of misconduct to be consistent with or substantiated by the evidence presented ...

7. While [the Applicant] was certainly involved in finding the caterer, this was carried out at the request of the Information/Communications Officer. ... Assisting in finding a caterer who was then engaged by a UNICEF Officer does not appear to be sufficient evidence that [the Applicant] intended to defraud UNICEF, or that he knew the engaged caterer was not related to the Patisserie ...

8. ... the JDC found it possible that ... [the Applicant] was simply trying to respond to a superior Officer, even though the request was for an action outside his normal role as driver, and probably outside the scope of his defined responsibilities.

9. The JDC did not conclude that [the Applicant] in his position as driver could be responsible for ‘having caused the cheque ... to be irregularly decrossed and wrongfully endorsed’. There is no evidence presented that he had been given any such role, and highly unlikely as driver that he would. It was certainly the Operations Officer and the Information/Communications Officer who was also Officer in Charge in the absence of the Representative, who by virtue of their signatures were responsible and actually caused the cheque to be decrossed. ...

10. There is no question that [the Applicant] drove the caterer to the Bank to facilitate the cashing of the UNICEF cheque. However, the fact that the Bank did cash the cheque seems to be evidence that the practice of cashing decrossed cheques existed. It is the Bank that should be held responsible to only cash cheques under arrangements that it deems correct and acceptable. It therefore seems unlikely that the Bank would cash the cheque so that it could be paid to someone other than the legitimate payee unless the Bank was satisfied that the necessary identification of the ultimate payee had been made. This was apparently done by obtaining the Patisserie stamp on the cheque.

11. The documentation is not clear as to whom was actually responsible for obtaining the Patisserie stamp. ... The sworn testimony of the caterer is that he was fully responsible, not [the Applicant], for obtaining the stamp from the relative at the Patisserie who would in fact have known him, even if they were not on good terms.

...

14. The JDC did not find evidence in the documentation that [the Applicant] was present or involved in the preparation of the false invoice, the preparation of the cheque, the submission of the cheque to the UNICEF Operations Officer for signature by the Information/Communications and Operations Officers, or that he was somehow active other than perhaps being physically present during the decrossing of the cheque by these Officers. All such actions would have been clearly outside his role and responsibilities.

15. Driving someone to the Bank is consistent with [the Applicant's] role. Since the person he drove was not a UNICEF employee, the JDC also assumes that an instruction to make this trip had been issued by someone else in authority since drivers are usually not free to make such trips without authorization or documenting use of the gas and vehicle.

16. [The Applicant] is indeed responsible for his own actions, as UNICEF charges, but as a driver, he cannot be responsible for the actions of those in higher authority or roles of responsibility. It would in fact be difficult for a driver to refuse an instruction from a superior to drive someone, or to hold a driver responsible for knowing that the person he was driving was intending to carry out a fraudulent act.

17. The unanimous conclusion of the JDC was that while it is entirely possible that [the Applicant] was somehow involved in some attempt to defraud UNICEF, the evidence as presented is NOT sufficient to support the misconduct charge ...

...

19. The JDC unanimously recommends further review and consideration of the charge of misconduct and the disciplinary action that was taken in view of the charge and the documentary evidence that was presented in the [Applicant's] case..."

On 7 August 2001, the Executive Director transmitted a copy of the JDC report to the Applicant and informed him as follows:

"I have taken note of the [JDC's] conclusion that you were involved in an attempt to defraud UNICEF. The [JDC] also concluded that the evidence as presented was not sufficient to support the misconduct charge. Therefore, the [JDC] recommended that a further review and consideration should be undertaken of the charge of misconduct and the disciplinary action taken in your case.

In accordance with the [JDC's] report, I have reviewed your case and have decided that, in view of your misappropriation of part of the proceeds of a UNICEF cheque, which was for an amount in excess of services actually received by UNICEF, your actions did constitute misconduct. However, in light of the [JDC's] recommendation, I have decided to convert your *summary dismissal to dismissal for misconduct, without notice*, in accordance with staff rule 110.3(vii). In accordance with Annex III(c), I have decided that you be paid one-half the normal termination indemnity, an

amount equal to 3.5 months salary, based on your years of service with UNICEF.”

On 18 January 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The charges against the Applicant are not supported by the evidence; the Respondent's conclusions are based on a number of assumptions that were never proven; the Respondent was unable to show intent to commit fraud. The disciplinary sanction of separating the Applicant from service is disproportionate to the alleged offence.
2. The Applicant's supposed “confession” was never intended as an admission of fraud or misappropriation and was given by the Applicant under duress.
3. There is no prohibition in Djibouti from cashing a cheque at the request of a third party, as the Applicant did and as was honoured by the bank.
4. The Applicant did not bear any responsibility for the issuance or decrossing of the cheque.
5. The Respondent's decision is procedurally flawed. The original imposition of summary dismissal was not warranted by the facts.
6. The Applicant was denied his due process rights and the adjudication of his case was unduly delayed.

Whereas the Respondent's principal contentions are:

1. The Applicant failed to meet the standards of conduct required of an international civil servant.
2. The Executive Director's decision respected the Applicant's due process rights, and was not tainted by prejudice, arbitrariness or extraneous factors.
3. The Applicant's requests for damages are unwarranted.

The Tribunal, having deliberated from 22 October to 17 November 2003, now pronounces the following Judgement.

I. The Applicant contests the decision of the Executive Director of the United Nations Children's Fund (UNICEF) to dismiss him without notice. He claims that the decision was based on insufficient evidence, that it was taken following a

procedure vitiated by a number of irregularities and, lastly, that it was disproportionate to the seriousness of his conduct.

II. In its jurisprudence, the Tribunal has consistently held that the Secretary-General (and by delegation the administrators of the subsidiary organs, such as UNICEF) has considerable discretion in taking disciplinary decisions (see Judgements No. 300, *Sheye* (1982), and No. 987, *Edongo* (2000).) That discretion extends to the characterization of the alleged conduct and the choice of the appropriate sanction.

III. However, the powers of the Secretary-General in that regard are not unlimited. The Tribunal has consistently held that it is competent to review the way in which the Secretary-General exercises his discretionary authority in disciplinary matters. In that regard, the Tribunal follows a procedure that it has reaffirmed on several occasions and examines (i) whether the facts on which the disciplinary measures were based have been established; (ii) whether those facts legally amount to misconduct or serious misconduct; (iii) whether there has been any substantive irregularity; (iv) whether there has been any procedural irregularity; (v) whether there was an improper motive or abuse of discretionary authority; (vi) whether the sanction is legal; (vii) whether the sanction imposed was disproportionate to the offence; and (viii) whether the Secretary-General has been arbitrary in the exercise of his authority (see Judgements No. 898, *Uggla* (1998), and No. 941, *Kiwanuka* (1999).)

IV. The Tribunal will first consider the question of whether the facts on which the disciplinary measures were based have been established. In the present case, the task of the Tribunal is complicated by the fact that the events surrounding the organization of the Djibouti Day of the Child are unusually confused. It is clearly established that a number of irregularities were committed during the organization of the event. The judgement in the *Dilleyta* case, (No. 1103 (2003)) which is related to this one, is sufficient to convince the Tribunal of that. The problem, however, is to untangle the facts of the case to determine whether the Applicant himself was guilty of misconduct that contributed to those irregularities, to the detriment of UNICEF.

V. The Tribunal regretfully finds that neither the Administration nor the Applicant has presented a completely convincing version of the facts.

VI. The Administration claims that the Applicant played a central role in the misappropriation of UNICEF funds and that the arguments he has presented to exonerate himself are not credible and should therefore be rejected. The Tribunal finds that the evidence produced does not enable it to arrive at that conclusion. The Applicant claims that he was not guilty of misconduct, but simply acted in good faith at the request and on the instructions of his supervisor. He also claims that his original confession was given under pressure and that the subsequent statements of Mr. A. give a clear account of his limited role in the case. The Tribunal unfortunately finds that this version of the facts is not convincing either.

VII. Careful examination of the available evidence reveals the outline of the role played by the Applicant in this case. It is incontestable that the Applicant, at the request of his supervisor, Mr. Dilleyta, the Information and Communications Officer, contacted Mr. A., an employee at that time of Pâtisserie Moderne and half-brother of the owner, Mr. A., to arrange for the breakfast organized as part of the Day of the Child celebrations. In other words, he acted as an intermediary between the restaurateur and UNICEF. It is also not contested that Mr. Dilleyta, who at the time these events occurred was Officer-in-Charge in the absence of the Representative and was therefore responsible for financial matters, certified the falsified invoice and initiated the issuance of the cheque for 320,000 Djibouti francs, which he subsequently uncrossed. The Applicant was incontestably asked to cash the cheque for 320,000 Djibouti francs, which Mr. Dilleyta had uncrossed.

VIII. However, his involvement in the other events (prior and subsequent) has not been clearly established. In particular, it is not clearly established that the Applicant himself procured the Pâtisserie's stamp and apposed it to the false invoice submitted to UNICEF, or even that he accompanied Mr. A., who might have procured the stamp himself. It is not established that the Applicant played an active part in certifying the invoice or uncrossing the check originally made out to the order of Pâtisserie Moderne. Nor is it clearly established who were the ultimate recipients of the money obtained by the Applicant upon presentation of the cheque uncrossed by his supervisor.

The Tribunal rejects the idea implied in some of the Administration's statements, suggesting that the mere presence of the Applicant at certain events is in itself sufficient to demonstrate that he was implicated in fraudulent transactions. Moreover, with respect to all these facts, the Administration has not put forward additional arguments or produced new evidence, which might have resulted from a real re-examination of the facts, as recommended by the JDC. Although the Tribunal shares some of the doubts expressed by the Administration about the truth of the version put forward by Mr. A., particularly with regard to the presentation of the supplementary invoices, it cannot reject all the latter's testimony.

To sum up, the Tribunal does not have sufficient evidence reasonably to conclude that the Applicant bears the chief responsibility for the facts alluded to above. On the contrary, it would appear that one, if not the chief, cause of the misappropriation was the certification of the false invoice and the uncrossing of the check by the Communications Officer.

IX. The question to be decided now is whether the mere fact that the Applicant cashed the uncrossed cheque constitutes misconduct in the sense of rule 110.1 of the Staff Regulations and Rules of the United Nations. In making that determination, the Tribunal must take into account all the circumstances of the case. In particular, it is important to evaluate the conduct of the Applicant *in concreto*, bearing in mind what, in his position, he could or should have known.

X. After a careful examination of the facts, the Tribunal concludes that, although the Applicant was probably not the source of most of the irregularities that were committed, he played an undeniable part in the sequence of actions that led to the misappropriation of UNICEF funds. Moreover, although it is true that the Applicant was induced to intervene in matters that exceeded his normal duties, it is reasonable to assume that he was aware that the transactions that he was involved in were out of the ordinary. His dealings with Mr. A., in particular, surely enabled him to arrive at a fairly good understanding of the relations between the actors in these unfortunate events and to figure out who was going to get the money obtained from cashing the cheque.

XI. On the other hand, the argument that the Applicant was acting on the instructions of his superiors is relevant and should be considered. Nevertheless, it would not be enough to exonerate the Applicant of all responsibility. At best, it might constitute a mitigating circumstance. The Tribunal finds that it is in fact established that the UNICEF office in Djibouti did not always function properly. In the case before the Tribunal, it has been established that the Applicant's immediate supervisor was guilty of serious misconduct in agreeing to certify an invoice that he ought to have checked first and in agreeing, without further thought, to resort to the unusual payment procedure of uncrossing a cheque, and that, following these deviations from normal procedure, the Applicant, a driver for UNICEF, was asked to perform a task outside the scope of his duties. These facts must be taken into account in evaluating the conduct of the Applicant and the proportionality of the sanction.

XII. Taking all these facts into consideration, the Tribunal cannot find that the Applicant is innocent. On the contrary, his actions constitute misconduct not befitting an international civil servant, and it is not unfair that the Administration imposed a disciplinary sanction.

XIII. The Tribunal now comes to the question of whether, as the Applicant alleges, the decision-making process leading to the sanction was tainted by procedural irregularity. The Tribunal does not find that there was any significant procedural irregularity and therefore rejects the Applicant's claims in this regard.

XIV. The Tribunal also rejects the allegations of improper motive or abuse of authority, which are not supported by the evidence presented to the Tribunal.

XV. Following this line of reasoning, the Tribunal therefore finds that, even though he was not the chief party responsible, the Applicant did have a hand in the misappropriation of UNICEF funds and his actions constituted misconduct not befitting an international civil servant. It may well be that the Applicant was merely a link in a chain of regrettable actions, but it does seem that without his involvement those actions would not have achieved their end. Since he played the role of an accomplice in the events, it is not unfair that he should suffer the consequences,

which do not appear to be disproportionate. The Administration, taking some account of the observations of the JDC, modified its original decision to impose summary dismissal and ultimately decided on the less severe measure of dismissal without notice. The Tribunal considers this sanction to be justified and proportionate, in view of the role played by the Applicant in the misappropriation of UNICEF funds.

XVI. For the foregoing reasons, the Tribunal:

1. Declares the decision of the Executive Director of UNICEF to dismiss the Applicant without notice to be justified in fact and in law;
2. Rejects all other claims.

(Signatures)

Julio Barboza
President

Spyridon Flogaitis
Member

Brigitte Stern
Member

New York, 17 November 2003

Maritza Struyvenberg
Executive Secretary