United Nations AT/DEC/1182

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1182

Case No. 1275: NJUKI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Brigitte Stern, Vice-President, presiding; Mr. Spyridon Flogaitis; Mr. Dayendra Sena Wijewardane;

Whereas, on 23 September 1998, Alvin Njuki, a former staff member of the United Nations, filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 30 September 2002;

Whereas, on 18 September 2002, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read, in part, as follows:

"***SECTION II: PLEAS***

…

(c) The Tribunal is honourably requested to order the rescission of the decision of the Executive Director of [the United Nations Environmental Programme (UNEP) to separate the Applicant from service without notice] …

(d) The Tribunal is honourably requested to expunge … two contradictory affidavits [given] as evidence.

…

(f) The Tribunal is honourably prayed to order my reinstatement as a senior Codifier on the basis of my "Very Good" performance rating from October 1973 to July 1997. …

(g) The Tribunal is honourably prayed to … order that I be reinstated at the same level and grade and be compensated for the period … without income."

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 March 2003;

Whereas the Respondent filed his Answer on 7 March 2003;

Whereas the Applicant filed Written Observations on 22 July 2003;

Whereas the facts in the case are as follows:

The Applicant joined UNEP, Nairobi, on a three-month fixed-term appointment, as a Registry Clerk at the G-2 level, on 1 October 1973. His appointment was subsequently extended a number of times and, effective 1 March 1977, he was granted a permanent appointment. At the time of the events which gave rise to the present Application, the Applicant held the position of Senior Codifier at the G-5 level.

On 4 March 1997, the Applicant submitted to the medical services a claim for reimbursement of Kshs. 24,250 in respect of dental care for his wife. The receipt presented in support of the claim bore two different types of handwriting. Consequently, on 20 March, the Head Nurse, Joint Medical Service, Nairobi, wrote to the Chief, Human Resources Management Service (HRMS), informing that the Applicant had submitted a medical claim which "looked suspicious". She noted that the Applicant had "been claiming excessive amounts of money on a weekly basis," and that this had been pointed out to him. The Head Nurse further stated that, the dentist purportedly treated the Applicant's wife had confirmed that although the receipt was issued by his office, the Applicant's wife had never been treated in his clinic, nor had a payment on her behalf been recorded. The Head Nurse added that it appeared that a dentist and an accountant, who were employees of the said clinic, had issued the receipt. Finally, she recommended that the Applicant be removed from the Medical Insurance Plan (MIP) pending an investigation into the matter.

On 1 April 1997, the Applicant was presented with the Head Nurse's allegations and, on 4 April, he responded thereto, admitting that he had presented the claim in question but stating that the payment had been received by the dentist and

that there was a breakdown of the treatment on the back of the receipt. The Applicant further refuted the Head Nurse's allegations concerning excessive medical claims.

On 29 July 1997, the Applicant was informed that, having reviewed his case, the Executive Director, UNEP, had decided that, effective 1 August 1997, he would be suspended from duty without pay. The Applicant was further informed that this did not constitute a disciplinary measure and that an *ad hoc* Joint Disciplinary Committee (JDC) would be established to hear his case.

On 26 January 1998, the Applicant wrote to the Coordinator of the *ad hoc* JDC stating, inter alia, that the dentist who had issued the receipt was employed by two clinics and that while treating the Applicant's wife in one clinic, he had issued the receipt for payment using the other clinic's receipt.

On 9 July 1998, the *ad hoc* JDC in Nairobi submitted its report. Its findings and recommendation read, in part, as follows:

> "*(e) The Committee's Findings*
>
> The allegation that the medical claim pertaining to dental treatment during March 1997 is fraudulent is correct. The Committee also found that … [the] Administration had the jurisdiction to handle this case, and it makes no difference that funds defrauded would come from the MIP or another source.
>
> *(f) Aggravating or mitigating factors that might be relevant*
>
> [The Appellant] had attempted to obtain in a fraudulent manner funds from the United Nations, and were it not for the watchful eye of the nurse, he could probably have done so. The Committee therefore took a grave view of this case. Given the many years the [Appellant] was in the Organization, he should have known better. He was also not apparently remorseful as he did not admit, or seek pardon. Thus he deliberately sought to procure funds from the MIP without any justification and reflected to outsiders a negative image of the United Nations."
>
> *(g) Advice of the Joint Disciplinary Committee*
>
> In the circumstances, the Committee recommends that the Secretary-General applies the following sanction:
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> *'That the [Appellant] be separated from service, without notice in accordance with staff rule 110.3 (a) (vii)'."*

The *ad hoc* JDC report included an annex entitled "Documents before the Committee". The list contained in this annex did not include the Applicant's 26 January memorandum.

On 3 August 1998, the Chief, HRMS, informed the Applicant that the Executive Director, UNEP, agreed with the *ad hoc* JDC's recommendation and had decided, effective 27 July 1998, to separate him from service without notice.

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

Whereas the Applicant's principal contentions are:

1. The Applicant is an innocent victim, who believed the claim he presented to be genuine. The arrangements for obtaining the receipt had been between the Applicant's wife and the dentist. It is not refuted that the Applicant's wife did indeed require the dental treatment.

2. The *ad hoc* JDC did not consider the Applicant's defence and explanation. The only defence the *ad hoc* JDC considered was on the issue of whether the case was within its jurisdiction or that of the MIP.

3. The Head Nurse and the *ad hoc* JDC were biased against the Applicant and his rights had been violated. The *ad hoc* JDC reached its conclusions based on allegations and not hard facts.

4. The decision to suspend the Applicant from service without pay pending investigation was *ultra vires* as it had not been approved by the Executive Director, UNEP, prior to writing the memorandum informing the Applicant of same. The said suspension from duty exceeded the 90 day period, in violation of staff rule 110.2(a).

5. The Administration should have been more lenient with the Applicant, considering his record of long, good service.

Whereas the Respondent's principal contentions are:

1. The Applicant's fraudulent conduct - as opposed to any extraneous factors - is the sole motive for his separation from service.

2. The Applicant's suspension from duty was in accordance with due process.

The Tribunal, having deliberated from 30 June to 23 July 2004, now pronounces the following Judgement:

I. The Applicant joined UNEP on 1 October 1973 on a fixed-term appointment. Effective March 1977, he was offered a permanent appointment as a Mail Clerk at the G-4 level and at the time of his separation from service, in August 1997, he held the position of Senior Codifier at the G-5 level.

On 4 March 1997, the Applicant submitted to the medical services a claim in respect of dental treatment received by his wife. Upon contacting the clinic whose name was on the receipt presented by the Applicant, the medical services were informed that the Applicant's wife had never been treated there. In April, the Applicant was charged with submitting false medical claims pertaining to the dental treatment of his wife. Subsequently, as his explanations were not found to be satisfactory, the Applicant was advised that the Executive Director, UNEP, had decided to refer his case to an *ad hoc* JDC and that, effective 1 August 1997, he would be suspended from duty without pay, pursuant to staff rule 110.2(a).

Having considered his case, the *ad hoc* JDC recommended that the Applicant be separated from service without notice, in accordance with staff rule 110.3(a)(vii). On 3 August 1998, the Applicant was informed that the Executive Director, UNEP, had accepted this recommendation and that the separation had become effective on 27 July 1998.

It is against this decision that the Applicant appeals, claiming that his rights of due process had been violated, thus vitiating the disciplinary process and the subsequent decision to separate him from service. The Applicant is requesting the Tribunal to order the rescission of the Executive Director's decision and his reinstatement in service.

II. The Tribunal considers that the allegations brought against the Applicant constitute a serious matter and that the UNEP Administration acted appropriately in conducting an investigation and presenting the Applicant's case to an *ad hoc* JDC.

However, the Tribunal finds that the disciplinary process was tainted by serious irregularities, which indeed violated the Applicant's rights of due process, as explained below.

The documentation presented to the Tribunal demonstrates that, having been presented with the charges against him, the Applicant was given an opportunity to comment thereon and that subsequently the case was referred to an *ad hoc* JDC. On 26 January 1998, the Applicant submitted to the Coordinator of the *ad hoc* JDC a memorandum by which he provided a new explanation as to the events which prompted the disciplinary charges against him. In his memorandum, the Applicant stated that the receipt, which the Respondent characterized as fraudulent, was issued by a doctor who had been employed in two clinics. The said doctor had treated the Applicant's wife in clinic A but had mistakenly written out the receipt in respect of this treatment using a receipt from clinic B. That was the reason for clinic B's

statement, that the Applicant's wife had never been treated there. However, this explanation apparently was not before the *ad hoc* JDC when it considered the case and when it made its recommendation to the Executive Director. This is evident from the *ad hoc* JDC report, attached to which is an annex entitled "Documents before the Committee – [the Applicant] MIP". This list of documents does not include the Applicant's above-mentioned memorandum of 26 January 1998, leading the Tribunal to conclude that this important document was neither discussed by the *ad hoc* JDC nor taken into consideration.

The Tribunal has consistently upheld the importance of safeguarding the rights of due process of Applicants, while maintaining the Respondent's discretionary authority in disciplinary matters. The Tribunal recalls Judgement No. 1143, *Said* (2003), where it stated:

> "…
>
> II. In its jurisprudence, the Tribunal has consistently held that the Secretary-General (and by delegation the administrators of the subsidiary organs …) 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).)" (This listing is not intended to be exhaustive.)

In the present case, the Tribunal finds that the absence of the Applicant's explanation before the *ad hoc* JDC constituted a grave violation of due process, both procedurally and substantively, thus vitiating the process. The Tribunal finds this particularly serious when considering that the Applicant was a holder of a permanent appointment and was separated from service, having been accused of committing fraud. The Tribunal is of the view that the *ad hoc* JDC should have taken into account

and investigated the Applicant's explanation contained in his memorandum, regardless of what the final result of that investigation might have been.

III. The Tribunal will now turn its attention to the Applicant's claim, that his suspension from duty without pay exceeded the statutory 90 days mentioned in staff rule 110.2(a). The Tribunal notes that throughout the disciplinary process, i.e. from 1 August 1997 until 27 July 1998, the Applicant was suspended from duty without pay.

Staff rule 110.2(a) states:

> "If a charge of misconduct is made against a staff member and the Secretary-General so decides, the staff member may be suspended from duty during the investigation and pending completion of disciplinary proceedings for a period which should normally not exceed three months. Such suspension shall be with pay unless, in exceptional circumstances, the Secretary-General decides that suspension without pay is appropriate …"

The Tribunal is of the opinion that the Staff Regulations and Rules provided this period of 90 days having considered it to normally be sufficient time in which to conduct and conclude an investigation into allegations which are serious enough in nature so as to warrant suspension from duty. Furthermore, it was envisaged that such suspension from duty would normally be with pay.

In the present case, however, the Applicant was suspended from duty, without pay, for a period far exceeding that which is provided in staff rule 110.2(a). The Respondent submitted no explanation why such a prolonged period was required. The Tribunal believes that the 90 day period specified in staff rule 110.2(a) cannot be extended arbitrarily or without good reason, especially when the staff member is placed on suspension from duty without pay. Furthermore, the Administration's motives for any such extension are subject to consideration and scrutiny by the Tribunal.

The Tribunal finds that, under the present circumstances, neither the substance of the case reasonably required more than 90 days for completing the investigation, nor was reasonable explanation provided for why the Applicant was placed on suspension without pay for such a lengthy period. Staff members accused of misconduct are presumed innocent until the conclusion of the disciplinary process, and unless such staff members attempt to obstruct justice, the staff members should not have to pay the price for the Administration's inability to conclude the process within 90 days.

IV. In view of the foregoing, the Tribunal:

1. Orders the rescission of the decision of the Executive Director to separate the Applicant from service without notice in accordance with staff rule 110.3 (a) (vii);
2. Fixes the compensation to be paid to the Applicant at two years' net base salary at the rate in effect at the time of this Judgement, if the Secretary-General decides within 30 days of the notification of the Judgement, in the interest of the United Nations, not to reinstate the Applicant;
3. Orders the Respondent to pay the Applicant compensation equivalent to all salary and allowances to which he would have been entitled, for the entire period less the 90 days stipulated in staff rule 110.2(a) during which the Applicant was suspended without pay; and,
4. Rejects all other pleas.

(*Signatures*)

Brigitte **Stern**
Vice-President, presiding

Spyridon **Flogaitis**
Member

Dayendra Sena **Wijewardane**
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**
Executive Secretary