

**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1244

Case No. 1334

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Ms. Jacqueline R. Scott; Mr.
Dayendra Sena Wijewardane;

Whereas at the request of a staff member of the United Nations, 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 and periodically thereafter until 31 January 2004;

Whereas, on 30 January 2004, the Applicant filed an Application containing pleas which read as follows:

“II. Pleas;

...

2) The Applicant requests that the decision not to follow the recommendation of the [*ad hoc* Joint Disciplinary Committee on Tax Cases (JDC)] in his case be rescinded, and the recommendations followed;

3) That the Applicant be thus subject to the disciplinary measures recommended by the JDC, namely; that he receive a fine of \$500.00 and a one-year written censure for his lack of due care in filing tax reimbursement claims with the Organization for three years;

4) That the decision to demote the Applicant permanently to TC-1 be rescinded ...;

5) That the Applicant be eligible for promotion in accordance with the normal rules and regulations of the Organization;

6) That the finding of facts by the JDC in the case be accepted, namely, that both the Applicant and his accountant lacked a clear understanding of both [United States] tax law and of the [United Nations'] tax reimbursement system;

7) That the facts found by the JDC, that a critical element of fraud is the intent to defraud, and that the Applicant did not intend to defraud the Organization, be accepted by the Administration as the facts in the case.”

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 11 June 2004 and periodically thereafter until 30 September;

Whereas the Respondent filed his Answer on 15 September 2004;

Whereas the statement of facts contained in the report of the JDC reads, in part, as follows:

“Findings of Fact

[The Applicant entered the service of the Organization on 20 September 1991, on a short-term contract as a Messenger, Mail Operations Section, at the G-1 level. After holding a series of short-term contracts, on 21 November 1992 the Applicant received a fixed-term contract. At the time of the events that gave rise to this Application, he had a fixed-term contract and held the position of Mover at the TC-2 level.]

... The basic facts are not in dispute. For tax years 1996, 1997 and 1998 the [Applicant] admitted that the discrepancies identified in respect of his income tax returns were caused by his filing returns with the tax authorities which differed from the copies he provided to the United Nations Income Tax Unit (...) to be used as the basis for reimbursement. The [Applicant] filed with the Income Tax Unit, to be used as the basis for reimbursement, copies of returns which made use of the standard deduction. However, on the returns filed with the Internal Revenue Service (IRS) and other tax authorities for those years, he itemized his deductions, thereby decreasing his overall tax liability to the IRS and other tax authorities without notification to the Income Tax Unit.

... On the returns submitted to the Income Tax Unit for reimbursement in 1996, 1997 and 1998, the [Applicant] did not minimize his income tax by itemizing his deductions in violation of his duty to do so and contrary to his certification in each of these years on United Nations form F.65.

... [In] 1999, he submitted the same returns to the Income Tax Unit and to the IRS. The IRS adjusted the returns and reduced his tax liability for that year. The staff member never reported the reduction in tax liability to the United Nations.

... The transcripts received from the IRS based on the [Applicant's] authorization indicated that [he] received the following refunds: \$1,982.00 for 1996; \$1,921.00 for 1997; \$3,307.00 for 1998; and \$2,922.00 for 1999. The

Income Tax Unit was never notified about the refunds, despite the [Applicant's] obligation to do so ...

...

... The discrepancies started about the time the [Applicant] bought a house and began paying mortgage and real estate taxes. Thereafter, his [outside] accountant started to prepare two sets of tax forms, one containing the standard deduction which was submitted to the [United Nations], and the other containing itemized deductions which was submitted to the IRS and other tax authorities. As a result, the [Applicant] began receiving refund checks from the IRS ...

...

... It appeared from the accountant's testimony that he believed that the [United Nations] withheld tax funds from the [Applicant's] salary and forwarded it to the tax authorities. He further explained that since the [United Nations] was not entitled to the [Applicant's] mortgage and real estate deductions, that he applied the standard deduction application on the [Applicant's] tax returns for submission to the [United Nations], which in turn would result in the [United Nations] issuing future checks to the [Applicant]. The accountant apparently believed that the [Applicant] was somehow required to minimize his returns which would result in a refund to [him]. ... The accountant apparently did not understand the purpose of the F.65 form, explaining to the [Applicant] that this form was for 'verification', which authorized the [United Nations] to obtain staff members' data from the [United States] government. The accountant and the [Applicant] apparently believed that this was to ensure that the IRS and the [United Nations] would interact to determine the accuracy of the ... tax returns."

On 27 July 2001, the Officer-in-Charge, Office of Human Resources Management, referred the matter to the *ad hoc* Joint Disciplinary Committee on Tax Cases.

On 23 October 2001, Counsel for the Applicant advised the JDC that, "when [the Applicant] finally obtained counsel and understood the manner in which he had contravened the tax system, he immediately cooperated in paying back any money he might owe, and in having his accountant amend his tax forms where required".

On 20 December 2001, the JDC submitted its report. Its conclusions and recommendations read as follows:

"IV. Conclusions

16. .. [T]he Panel concluded that the staff member and his accountant lacked a clear understanding of both [United States] tax law and of the [United Nations'] tax reimbursement system and that the staff member never intentionally 'double filed' his tax returns for the purpose of defrauding the Organization. It appeared to the Panel that even at the hearing stage, neither the staff member nor his accountant fully understood the mistakes that had

been made. Notwithstanding this conclusion, the Panel noted that the staff member has a personal, non-transferable responsibility to comply with the provisions governing tax reimbursement by the [United Nations] in addition to an obligation to comply with certifications and undertakings made by him in seeking reimbursement. Moreover, the staff member must bear the responsibility for choosing and relying upon the advice of others, and for the negligent manner in which he handled his claims for tax reimbursement from the [United Nations] for the years in question.

V. *Recommendations*

17. In light of the above considerations, the Panel recommends that the staff member be fined \$500 and that the Secretary-General issue a one-year written censure for the staff member's lack of due care in carrying out his responsibilities in filing tax reimbursement claims with the Organization for years 1996, 1997, 1998 and 1999. The Panel also recommends that the outcome of this proceeding play no role in the decision to be taken in extending the staff member's fixed-term contract, which expires on 31 December 2001."

On 26 March 2002, 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 given careful consideration to the findings and conclusions of the JDC. The Secretary-General recognizes that a critical element of fraud is the intent to misrepresent facts, but he does not agree with the finding of the JDC that you did not intend to defraud the Organization. He also finds your non-compliance with your obligations, as stipulated on the [United Nations] certifications, inexcusable. He considers that your conduct fell short of the standard of conduct expected of an international civil servant and amounts to serious misconduct within the meaning of staff rule 110.1, warranting disciplinary action. Based on the above considerations, and in view of the serious nature of your misconduct, the Secretary-General has decided to impose upon you the disciplinary measure of demotion by one grade, in accordance with staff rule 110.3 (a) (vi), with no possibility for promotion, with effect from close of business on the day you receive this letter.

Regarding the JDC's last recommendation, the issue has been rendered moot with the extension of your fixed-term appointment for two years."

On 30 January 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent exceeded his authority in not following the recommendation of the JDC which was specially constituted to hear all tax cases that came for JDC review in 2001.

2. The allegation of misconduct which the JDC found to have been substantiated was negligence, not fraud. The Respondent erred in deciding not to accept this finding of fact.

3. The Respondent violated the principle of proportionality in imposing a disciplinary sanction completely disproportionate to the offence found by the JDC.

Whereas the Respondent's principal contention is:

The Secretary-General's decision not to follow the recommendation of the JDC but to impose a more severe disciplinary measure on the Applicant was a proper exercise of his discretion.

The Tribunal, having deliberated from 1 to 22 July 2005, now pronounces the following Judgement:

I. The Applicant appeals to the Tribunal to rescind the decision of the Secretary-General not to follow the recommendations of the JDC convened to decide the Applicant's case. The Applicant was found guilty of negligence by the JDC with respect to the filing of his tax returns with the United Nations and the IRS, for tax years 1996, 1997, 1998 and 1999. The JDC, after hearing testimony from the Applicant and his accountant, upon whose advice the Applicant relied, recommended that the Applicant receive a fine of US\$ 500 and a one year written censure for his lack of due care in filing tax reimbursement claims with the Organization for several years. The Secretary-General, however, refused to accept the facts found by the JDC or to follow its recommendations, instead finding the Applicant guilty of fraud that amounted to serious misconduct and imposing the disciplinary measure of demotion by one grade with no possibility of promotion.

II. The Applicant does not dispute that he improperly filed his tax returns with the United Nations during the years in question. He is willing to accept the findings of fact made by the JDC, that his failure to properly file the returns in question was due, not to any intent to defraud, but solely to a lack of due care and a lack of understanding of the United Nations' tax reimbursement system. He also accepts the recommendations made by the JDC as being proportional to the nature of his wrongdoings. He challenges, however, the characterization by the Secretary-General of his actions as fraudulent, rather than negligent, and he further challenges the proportionality of the disciplinary measures meted out by the Secretary-General, claiming that in light of the JDC's findings that there was no intent to defraud, but

simply negligence, the demotion without possibility of promotion was an abuse of discretion which violated his rights.

III. The Tribunal has consistently upheld the Secretary-General's broad discretion in disciplinary matters; specifically, in determining what actions constitute serious misconduct and what attendant disciplinary measures may be imposed. The Tribunal recognizes, however, that

“unlike other discretionary powers, such as transferring and terminating services, it is also a special exercise of quasi-judicial power. For these reasons the process of review exercised by the Tribunal is of a particular nature. The Administration's interest in maintaining high standards of conduct and thus protecting itself must be reconciled with the interest of the staff in being assured that they are not penalized unfairly or arbitrarily.” (Judgement No. 941, *Kiwanuka* (1999).)

Such review, and any findings of the Tribunal resulting therefrom, must be made based upon the unique facts and circumstances of each particular case.

In reviewing such quasi-judicial determinations and in keeping with the general principles of law in disciplinary cases, in each case, the Tribunal generally examines (i) whether the facts on which the disciplinary measures were based have been established; (ii) whether the established facts legally amount to misconduct or serious misconduct; (iii) whether there has been any substantive irregularity (e.g. omission of facts or consideration of irrelevant facts); (iv) whether there has been any procedural irregularity; (v) whether there was an improper motive or abuse of purpose; (vi) whether the sanction is legal; (vii) whether the sanction imposed was disproportionate to the offence; (viii) and, as in the case of discretionary powers in general, whether there has been arbitrariness. (See *Kiwanuka*, para. III.)

As the Tribunal has held in its earlier jurisprudence, in determining whether the established facts legally amount to misconduct or serious misconduct, which is a matter of law,

“the Tribunal will in its review decide whether it agrees that the Administration, in exercising its discretion, has, according to the written law and general principles of law, made the appropriate characterization and imposed a sanction which is not disproportionate to the offence”. (*Kiwanuka (ibid.)*)

IV. The Tribunal first turns to the issue of whether the facts on which the disciplinary measures were based have been established and whether the established

facts legally amounted to misconduct or serious misconduct. According to the JDC, which engaged in extensive fact finding, including hearing testimony from the Applicant as well as the individual accountant who provided the Applicant with the incorrect advice, the Applicant never intended to defraud the Organization. Instead, the JDC found that, based upon the testimony provided by the Applicant and his accountant, and taking into account the credibility of the two individuals, the Applicant had acted out of ignorance, not fraudulent intent when he improperly filed his tax returns. In reaching its conclusion, the JDC apparently took into account the fact that English was not the Applicant's native language and that the Applicant was employed in a low-level position within the Organization. It also noted that the Applicant was the only United Nations employee to whom the accountant provided advice and that the accountant admittedly was not familiar with the United Nations system of tax reimbursement. The JDC apparently took note of the fact that the accountant had reviewed written materials he had received from his client, the Applicant, with respect to the United Nations system of tax reimbursement and that the accountant had then contacted someone at the United Nations in an effort to understand the rules relating to the tax reimbursement system. Of particular significance is the JDC's finding that, even at the time of the hearing, it was apparent that neither the Applicant nor his accountant fully understood the complexities of the United Nations' tax reimbursement system. For example, the accountant believed that the Applicant was "somehow required to minimize his returns which would result in a refund to the [Applicant]", notwithstanding that form F.65 requires that the Applicant turn over any refund he receives. Furthermore, the JDC found that the Applicant's accountant did not understand the nature of the certification required by form F.65. Instead of advising the Applicant that form F.65 was a certification by the Applicant that, in relevant part, the returns filed by the Applicant with the United Nations were identical to those filed with the IRS, that all information provided by the Applicant was true and correct, and that if the Applicant received a refund from the IRS he would notify the Organization and repay the refund to the Organization, the accountant advised the Applicant that the form was merely for verification purposes, so that the Organization and the IRS could share data and insure the accuracy of the tax returns filed.

V. In light of its factual findings, the JDC concluded that the Applicant "never intentionally 'double filed' his tax returns for the purpose of defrauding the Organization". However, the JDC did note that the Applicant had a "personal, non-transferable responsibility to comply with the provisions governing tax reimbursement

by the Organization in addition to an obligation to comply with certifications and undertakings made by him in seeking reimbursement” and that “the [Applicant] must bear the responsibility for choosing and relying upon the advice of others and for the negligent manner in which he handled his claims for tax reimbursement from the Organization for the years in question”. Therefore, in relevant part, the JDC recommended that “the [Applicant] be fined \$500.00 and that the Secretary-General issue a one-year written censure for the [Applicant]’s lack of due care in carrying out his responsibilities in filing tax reimbursement claims with the Organization”.

The Tribunal finds that the JDC engaged in a thorough investigation of the facts and that the JDC’s factual findings, including its finding that the Applicant did not have the intent to defraud, but, rather, merely was negligent in exercising due care in the filing of his returns, were borne out by the evidence. In spite of these factual findings, however, the Respondent concluded that the Applicant, in fact, had intentionally defrauded the Organization. It is based upon this factual conclusion on the part of the Administration, then, that the Respondent characterized the Applicant’s conduct as constituting serious misconduct warranting demotion without possibility of promotion.

In determining whether the Applicant is guilty of fraud, a determination of intent must be made, and the JDC explicitly indicated that no intent was found. Instead, the JDC concluded that the Applicant was guilty only of lack of due care. The Respondent, however, ignored completely the JDC’s finding of no intent and without explanation stated that he did “not agree with the finding of the JDC that [the Applicant] did not intend to defraud the Organization”. The Tribunal finds the Respondent’s decision especially perplexing, given the rather specialized nature of this JDC, an appointed fact-finding body made up of individuals carefully chosen for their skills and expertise in matters of tax and finance, whose sole purpose was to adjudicate tax cases; a fact-finding body established presumably because of the complex nature of tax and the impracticality of having staff members untrained and uneducated in matters of tax and finance attempting to adjudicate such complicated matters. (See generally Judgement No. 1185, *Van Leeuwen* (2004).) In light of the above, the Tribunal finds that the fact of intent, as found by the Respondent, is not reasonably justified or supported by the evidence, and that therefore, the Respondent’s characterization of the Applicant’s conduct as misconduct, and in particular, serious misconduct is legally incorrect and constitutes an abuse of the Respondent’s discretion.

VI. As the Tribunal finds that the Respondent's determination that the Applicant engaged in serious misconduct is flawed, in light of the evidence, the Tribunal next turns to the issue of whether the Respondent further abused his discretion by imposing a sanction of demotion without possibility of promotion on the Applicant. While the Tribunal agrees with the JDC as to the personal and non-transferable responsibility of the staff member with respect to the filing of his taxes and the certifications relating thereto, the Tribunal concludes that, in light of the JDC's finding of negligence, the disciplinary measure of demotion without the possibility of promotion, which was not limited in time, was disproportionate to the offence committed by the Applicant, and that the imposition of such an extreme disciplinary measure, in view of the circumstances, was a further abuse of the Respondent's discretion. The Tribunal also notes that the Applicant agreed to reimburse the United Nations unconditionally, and did not avail himself of the United Nations' tax amnesty programme, even though he may have been eligible to do so. In the Tribunal's view, this underscores the fact that the Applicant was genuinely unaware of the circumstances, and the consequences thereof, in which he found himself. In reaching its decision, the Tribunal is persuaded by the apparently limited knowledge of tax and other financial matters on the part of the Applicant and the apparent misunderstanding of the intricacies of the United Nations tax reimbursement system on the part of the Applicant and his accountant. The Tribunal takes judicial notice of the complexities of both the United Nations system of tax reimbursement and the United States tax system. (See Judgement No. 424, *Ying* (1988) and *Van Leeuwen* (*ibid.*)). The Tribunal also notes the responsibility of the Respondent himself to ensure that all staff members fully comprehend their tax obligations to the Organization:

“To this end, the Tribunal notes that the Organization should make every effort to promulgate issuances on these issues, ensuring that they are informative and comprehensive, yet simple and easy to understand. Consideration should be given to the special skills which are necessary for understanding rules of such a technical nature, skills which not everyone possesses.” (*Van Leeuwen*, para. III.)

VII. As the Tribunal has stated, it considers the decision of the Respondent to demote the Applicant with no possibility of promotion as disproportionate to a finding of negligence applicable in this case, as opposed to one of fraud. The Tribunal takes the view and expects that the Applicant should therefore be put back in a position to continue with his career with reasonable prospects as to his future and makes its order on that basis.

VIII. In light of the foregoing, the Tribunal

1. Orders the rescission of the decision of the Secretary-General to demote the Applicant with no possibility of promotion;
2. Should the Secretary-General, within 30 days of the notification of this Judgement decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in his case, the Tribunal fixes the compensation to be paid to the Applicant at two years' net base salary at the rate in effect at the date of Judgement, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,
3. Rejects all other pleas.

(Signatures)

Julio Barboza
President

Jacqueline R. Scott
Member

Dayendra Sena Wijewardane
Member

Geneva, 22 July 2005

Maritza Struyvenberg
Executive Secretary