

**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1263

Case No. 1346

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. Goh Joon Seng;

Whereas at the request of a former 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 1 March 2004 and twice thereafter until 30 April;

Whereas, on 5 April 2004, the Applicant filed an Application requesting the Tribunal, *inter alia*:

“III. PLEAS

7. With respect to competence and procedure ...
...
(c) *to decide* to hold oral proceedings ...
8. On the merits ...
(a) *to rescind* the decision of the Secretary-General imposing the disciplinary penalty of summary dismissal on the Applicant;
(b) *to order* that the Applicant be immediately reinstated to the P-5 level at the appropriate step with effect from 29 April 2002 and that all adverse material concerning this matter be removed from her file;

- (c) *to find and rule* that the Joint Disciplinary Committee [(JDC)] erred in matters of law and fact in reaching its conclusions;
- (d) *to find and rule* that the manner in which the Respondent conducted the disciplinary review was procedurally flawed, tainted by prejudice and other extraneous considerations and violated the Applicant's rights to due process;
- (e) *to award* the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;
- (f) *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 five years' net base pay in view of the special circumstances of the case;
- (g) *to award* the Applicant as cost, the sum of \$20,000.00 in legal fees and \$1,000.00 in expenses and disbursements."

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 30 July 2004 and periodically thereafter until 30 November;

Whereas the Respondent filed his Answer on 30 November 2004;

Whereas the Applicant filed Written Observations on 13 October 2005;

Whereas, on 7 November 2005, the Tribunal decided not to hold oral proceedings in the case;

Whereas the statement of facts, including the summary of the Applicant's employment history, contained in the report of the JDC reads, in part, as follows:

"II. *Employment history*

... [The Applicant] joined the Economic Commission for Latin America and the Caribbean (ECLAC), Santiago, Chile, on 12 September 1998 as Chief, Agricultural Development Unit (ADU), Division of Production, Productivity and Management (DPPM), at the P-5 level under a two-year fixed-term appointment (...). Her [fixed-term appointment] was subsequently extended for two years through 11 September 2002. [S]he was summarily dismissed effective 26 April 2002.

III. *Background leading to summary dismissal*

... On 9 January 2002, the ... Office of Internal Oversight Services (OIOS) issued an investigation report (MIS Case No. 01/02), in which it reported that, in November 2001, in the course of an on-site routine audit review of the programme management and administrative practices in ECLAC, its inspectors received a communication from an ECLAC staff member alleging that [the Applicant] had diverted the services of ADU staff

members and consultants for preparing the PhD thesis of ... her husband. In this connection, the OIOS inspection team ... retrieved computer files, which included much of the text of the final draft of the PhD thesis of [the Applicant's husband] from the office computer of [the] Secretary to [the Applicant]. They also downloaded files, tables and graphs and figures from the computer of ... a consultant to the ADU. They later obtained official copies of [the Applicant's husband's] PhD thesis in French and asked ... the ADU consultant and [another] ADU staff member, for assistance in comparing them with the text downloaded from [the Applicant's Secretary's] computer for similarities. Furthermore, they interviewed [a number of staff members and obtained written statements from them]. ...

... In its report of investigation, ... OIOS accused [the Applicant] of having 'instructed consultants and research assistants of the [ADU] to conduct intensive research and to produce numerous intermediate and final outputs which were then incorporated into her husband's thesis.' According to that report, 'material evidence was downloaded from computers of the staff of the Unit ... [A] detailed comparative analysis of the contents of the official copy of the PhD thesis of [the Applicant's husband] and the research outputs prepared by ADU staff members, has proven that 817 paragraphs of text, tables, graphs and figures were directly plagiarized in the text of the thesis from the materials prepared in the ADU. All of that material was prepared by ADU staff on direct instructions of [the Applicant].'

... Under cover of a memorandum dated 7 February 2002 to [the Applicant], ... [the Office of Human Resources Management (OHRM)] transmitted the said OIOS report of investigation [and] informed [her] that on the basis of the OIOS report and its exhibits, the Administration was charging her with fraud, abuse of her authority as Chief of [the] ADU, misuse of the property and assets of the Organization including its human resources, misleading staff regarding the purpose and propriety of their work, intimidating staff members and interfering with their ability to discharge their official duties. ...

... In a letter dated 5 March 2002 ... [the Applicant] responded to the charges against her. She characterized the OIOS report ... as a piece of fiction, a fraud by which the OIOS acts in bad faith to obtain unjustified destruction of [her] career and also that of [her] husband. She stated that, contrary to the allegation that she had used the resources of the Organization to help her husband prepare his PhD thesis, [her husband] had assigned his studies on poverty to ECLAC, which were used in various projects, including the preparation of a book on poverty. [The Applicant] maintained that the ADU's book on poverty and her husband's PhD thesis on poverty were different pieces of work ... and that the first used outputs of the latter. [The Applicant] asked how it was possible for [her Secretary] to continue to work on her husband's thesis until 3 August 2001, as asserted by the OIOS inspectors, after the thesis had been deposited at [the] University of Paris XIII on 28 June 2001. ... [The Applicant] questioned the veracity of [the ADU consultant's] statement, which she characterized as a result of threats and intimidation ... [The Applicant] claimed that the existence of the ADU book on poverty was proved by [Mr. K.] who stated that he had heard about a book that [the Applicant] was preparing for publication in Europe ... Furthermore, in the view of [the Applicant], 'it would not matter if the typists or the

secretaries were not aware of all of the projects, including the ‘book on poverty’ ... since the Head of the Division to which my Unit belonged was made aware of it and declared such knowledge expressly to the OIOS’.

... In a letter dated 18 March 2002 to [OHRM], [the Applicant] provided an additional statement calling the charges against her ‘unsubstantiated’. ...

...

... In a letter dated 26 April 2002, [the Applicant was advised] of the decision taken by the Secretary-General to summarily dismiss her for serious misconduct, with immediate effect ...”

On 21 June 2002, the Applicant wrote to the Secretary-General requesting review of the decision to summarily dismiss her from ECLAC. On 20 October 2002, the Applicant requested that her case be submitted to the JDC. Her case was submitted to the JDC in New York for review on 5 March 2003.

On 25 September 2003, the JDC issued its report. Its conclusions and recommendation read, in part, as follows:

“VIII. Conclusions and recommendation

66. In sum, the Panel agreed that the Administration had presented adequate evidence to substantiate its finding that [the Appellant] had assigned considerable work to consultants, research assistants, and her General Service assistant, under the pretext of preparing an official ADU book on poverty, which was used in completing her husband’s doctoral thesis. It also agreed that [the Appellant] had failed to carry the shifted burden of providing adequate evidence justifying her conduct. It had no doubt that this was serious misconduct within the meaning of staff regulation 10.2. There was no evidence of substantive irregularity. While the OIOS inspectors made mistakes during their investigation, the procedural missteps were not so fundamental as to vitiate the outcome of the investigation. The Panel further agreed that, beyond mere assertions, [the Appellant] did not provide any evidence of improper motive or abuse of purpose on the part of the Administration. The disciplinary measure of summary dismissal was legal, as it was based on the findings of the Administration in light of the OIOS report of investigation and it was issued by the highest authority of the Administration. While disciplinary matters fell within his discretionary authority, the Secretary-General displayed respect for the established procedure and the due process rights of [the Appellant].

67. In light of the foregoing, the Panel unanimously agreed to make no recommendation in respect of the present request.”

On 2 October 2003, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her that the Secretary-General

agreed with the JDC's findings and conclusions and had decided to accept the JDC's unanimous recommendation and to take no further action on her appeal.

On 5 April 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The repeated criticisms of the Applicant's management style while head of the ADU contained in the OIOS report and which, according to the OIOS are evidence of an intent to defraud, are in stark contrast to her official performance reports.
2. The OIOS never established a *prima facie* case, i.e. one in which there was adequate evidence to sustain a charge of fraud in light of the Applicant's reasonable explanations and clear evidence.
3. The JDC committed numerous errors of fact and based its conclusions solely on the suppositions arising out of the flawed OIOS investigation, shifting the burden of proof onto the Applicant to disprove the charges. The JDC failed to ensure that the conclusions as to the Applicant's misconduct were justified and reasonable in light of all the evidence. In a number of instances, on disagreements on fact and interpretation, the JDC ignored the Applicant's evidence without explanation and accepted the version put forth by the Respondent without reasoning or proof.
4. The penalty was disproportionate to the wrongdoing allegedly committed by the Applicant.

Whereas the Respondent's principal contentions are:

1. The Secretary-General's decision to summarily dismiss the Applicant was a valid exercise of his discretionary authority, confirmed by the conclusions reached by the JDC, and was not vitiated by procedural irregularities, improper motives or any other extraneous factors.
2. The JDC reached its conclusions by correctly applying the standards developed by the Tribunal. There were no mistakes of fact.
3. The OIOS investigation was not flawed by improper motives and prejudice.
4. The sanction imposed was proportionate to the offence.

5. The Applicant's request for the award of costs and damages is without merit.

The Tribunal, having deliberated from 7 to 23 November 2005, now pronounces the following Judgement:

I. The Applicant joined ECLAC, Santiago, Chile, on 12 September 1998 as Chief, ADU, at the P-5 level under a two-year fixed-term appointment. Her appointment was subsequently extended for two years through 11 September 2002.

Following an investigation conducted in January 2002 by an investigator from OIOS, on 7 February, the Applicant was charged with fraud; abuse of authority; misuse of property and assets of the Organization, including its human resources; misleading staff regarding the purpose and propriety of their work; and, intimidating staff members and interfering with their ability to discharge their official duties. The charges were based on OIOS findings that the Applicant had assigned work to consultants and General Service staff under the pretext of preparing an official book on poverty, when the true purpose was to assist her husband in the research and writing of his doctoral thesis. According to the report, the Applicant instructed consultants and research assistants of the ADU to conduct intensive research and to produce numerous intermediate and final outputs which were then incorporated into her husband's thesis; "material evidence was downloaded from computers of the staff of the Unit"; subsequent interviews and inquiries with the staff involved, along with the comparative analysis of outputs produced by them and the unofficial text of the thesis revealed that 817 paragraphs of text, tables, graphs and figures were directly plagiarized in the text of the thesis from the materials prepared in the ADU; and, all of that material was prepared by ADU staff on direct instructions of the Applicant.

The Applicant responded to the charges on 5 March 2002, claiming that it was her husband who had provided ECLAC with methodology and data that he employed in his thesis, for ECLAC to use in its work. She further claimed procedural irregularities, bias and violation of her due process rights, and that the sanction imposed was not proportionate to the alleged offence.

On 26 April 2002, she was summarily dismissed for serious misconduct. The case was subsequently referred to the JDC, which submitted its report on 25 September 2003. The JDC found that the Administration had presented adequate evidence to substantiate its findings, and made no recommendation in respect of the appeal. The

Secretary-General accepted the JDC's recommendation and decided to take no further action.

II. Staff regulation 10.2 authorizes the Secretary-General to impose disciplinary measures on staff members. Under staff rule 110.3, disciplinary measures range from written censure to summary dismissal. This power may be vitiated by violations of due process, material mistakes of fact or extraneous considerations.

III. The decision of the Secretary-General is in line with and based on the findings of the JDC. On the findings and conclusions of the JDC, there is no dispute that between May-August 2000 and January-mid-June 2001, the ADU consultant analyzed and modified statistics, data, graphs and tables in Spanish and saved them on her computer. Likewise, the Applicant's Secretary spent a considerable amount of time formatting and saving on her computer documents that the Applicant had given to her. These documents were in Portuguese, French and Spanish. These documents appeared in the Applicant's husband's thesis.

IV. The only question is whether the files and data contained in the computers of the ADU staff, to the extent that they also appeared in the Applicant's husband's thesis had been made available by the Applicant's husband to the ADU for ECLAC's book on poverty or some other projects as claimed by the Applicant, or were works of ADU staff carried out on instructions of the Applicant for use by her husband in the preparation of his thesis as concluded by OIOS, the Administration and the JDC.

On this issue, the JDC had examined all relevant evidence, interviewed witnesses and reviewed the case thoroughly. It then came to the conclusion that the Applicant had assigned a considerable amount of work to ADU staff under the pretext of preparing a book on poverty. The Applicant had also not produced any evidence of the book on poverty that the ADU was purportedly preparing to publish. The finding of the JDC on this issue is also consistent with the finding of OIOS.

V. The Applicant, however, contends that the OIOS investigation was flawed by improper and prejudicial lapses in procedure and tainted by reliance on biased, partial or unreliable testimony and by the failure to conduct a thorough analysis of the case.

The JDC had also addressed this issue:

“the JDC noted that OIOS had initiated an investigation into [the Applicant’s] conduct following receipt of a communication alleging her misuse of ADU resources for preparing the PhD thesis of her husband. Though she alleged that the OIOS investigation was improperly motivated, [the Applicant] was unable to provide any evidence to show improper motive or abuse of purpose on the part of Administration behind the decision to summarily dismiss her, thus failing to carry the burden of proof that the Administrative Tribunal has consistently placed on those making allegations of that nature. (See Judgement No. 1083, *Chinsman* ... (2002).)”

VI. The Applicant also argues that the OIOS investigation was flawed because there was no verbatim record of interviews conducted by OIOS. Only unsigned summaries of the interviews were prepared. Complaints were also raised of violation of due process by OIOS in accessing ADU computers without the staff members to whom these computers were assigned being present.

This issue was also considered by the JDC:

“The Panel questioned the concerned witnesses and examined those investigative defects carefully. Taking into account the overall circumstances, including the main investigator’s admitted inexperience in carrying out investigations, the Panel did not believe that the defects were so fundamental as to vitiate the outcome of the investigation. In this connection, the Panel considered that [the Applicant’s] due process rights were respected, in that she was informed of the allegations of misconduct with supporting documents and was given sufficient and repeated opportunities to explain and justify her conduct.”

The JDC reached similar conclusions with regard to another attack on the procedural propriety of the investigation centred on the enlisting of the “services of [a staff member under the Applicant’s supervision, Ms. D.,] as investigator, causing an inherent conflict of interest”. The Applicant and Ms. D. had a less than collegial relationship, and the latter had requested to be removed from the Applicant’s supervision. It was therefore inappropriate for the investigator to call on her to assist him. However, the Panel found no evidence that the investigator had allowed this staff member to unduly influence or prejudice the investigation process.

While recalling its Judgement No. 1175, *Ikegame* (2004) where, in paragraph XII, it “expressed concern that the Administration’s joint bodies maintain an impeccable level of impartiality and fairness”, and held, in paragraph XIII, that “[u]nder circumstances ... where there was both a perceived and a real conflict of interest, the Tribunal ... [might] be justified in dismissing the entire case against the

Applicant, because of the tainted proceedings”, in the instant case, the Tribunal agrees with the JDC that the Applicant has not produced convincing evidence that both OIOS and the JDC are wrong in their findings and conclusions. The Secretary-General’s decision herein was in line with and based on the JDC’s findings. It was not motivated by extraneous factors. It was therefore a proper exercise of his discretionary powers and the Tribunal cannot and will not substitute its own discretion for that of the Secretary-General.

VII. As an alternative ground the Applicant contends that the sanction of immediate dismissal is disproportionate to the offence.

Staff regulation 1.2 (b) states that “[s]taff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.”

Paragraph 2 of administrative instruction ST/AI/371 of 2 August 1991, on “Revised Disciplinary Measures and Procedures” states:

“Misconduct is defined in staff rule 110.1 as ‘failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other administrative issuances, or to observe the standards of conduct expected of an international civil servant.’ Conduct for which disciplinary measures may be imposed includes, but is not limited to:

- (a) Acts or omissions in conflict with the general obligations of staff members set forth in article 1 of the Staff Regulations and the rules and instructions implementing it;
- (b) Unlawful acts ... on or off United Nations premises, and whether or not the staff member was officially on duty at the time;
- ...
- (g) Acts or behaviour that would discredit the United Nations.”

VIII. The Applicant violated these standards. The Secretary-General viewed this as a violation warranting immediate dismissal. This was entirely within his discretionary powers. The Tribunal is not persuaded that the Secretary-General in the exercise of this power was influenced by improper motives or any extraneous factors other than to uphold the standards of conduct expected of an international civil servant, especially one holding a P-5 appointment.

IX. In view of the foregoing, the Tribunal rejects the Application in its entirety.

(Signatures)

Julio Barboza
President

Goh Joon Seng
Member

New York, 23 November 2005

Maritza Struyvenberg
Executive Secretary

SEPARATE OPINION BY MS. JACQUELINE R. SCOTT

I. In the instant case, the JDC appears, in reaching its decision, to have considered fairly and comprehensively the evidence, including hearing the testimony of witnesses and reviewing the various documents, computer files and circumstantial evidence. As the JDC was in the best position to assess the credibility of the witnesses and the authenticity of the evidence, I accept the JDC's assessment of the facts. Therefore, I agree with the findings of the majority, that the sanction imposed upon the Applicant by the Secretary-General, as recommended by the JDC, was appropriate and proportionate. I disagree, however, with the conclusions reached by the majority with respect to the issue of whether the Applicant's rights to due process were violated by a conflict of interest.

II. As the majority concedes, Ms. D. was the Applicant's subordinate and the two enjoyed a "less than collegial" relationship. In fact, Ms. D. had previously requested that she be transferred from the supervision of the Applicant, which request had been granted. During the course of the investigation of the Applicant, Ms. D. participated in

the investigation. Upon the dismissal of the Applicant, Ms. D. was promoted to the Applicant's former position. Although the majority accepts the JDC's findings that there was no evidence that Ms. D. "unduly influence[d] or prejudice[d] the investigation process, or that Ms. D. had displayed prejudice or ulterior motives towards the Applicant", I cannot agree. While it is possible that Ms. D. had no ulterior motives in joining the investigation of the Applicant, it would appear otherwise, as Ms. D. stood to benefit significantly by the dismissal of the Applicant, being not only the heir apparent but the heir in fact of the Applicant's job.

III. As the Tribunal has previously held, apparent, as well as actual, conflicts of interest undermine and diminish the fairness and impartiality of the process, investigative or adjudicative (see *Ikegame (ibid.)*). As there was sufficient evidence for the JDC to reach its conclusions without taking into consideration Ms. D. and her role in this case, I do not find that the conflict of interest vitiated the recommendation of the JDC and the decision of the Secretary-General to dismiss the Applicant. However, as her rights to due process were violated by a conflict of interest which, at best, creates the appearance of impropriety, and at worst is an actual conflict, I would have awarded compensation to the Applicant.

(Signatures)

Jacqueline R. **Scott**
Member

New York, 23 November 2005

Maritza **Struyvenberg**
Executive Secretary