



ADMINISTRATIVE TRIBUNAL

Judgement No. 1051

Case No. 1137: SELEBWA

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Mr. Julio Barboza, Vice-President;
Mr. Spyridon Flogaitis;

Whereas, on 22 May 2000, Dorcas Miloyo Selebwa, a former staff member of the United Nations Environment Programme (hereinafter referred to as UNEP), filed an Application containing pleas which read, in part, as follows:

"SECTION II: PLEAS

(a) Preliminary/Provisional Measures sought by the Applicant:

...

- (i) That the Administrative Tribunal ... take specimens of the Applicant's ... handwriting and together with the original forged document, they be referred to a handwriting expert ... for comparison.
- (ii) In the alternative ... the Tribunal [make available] to the Applicant ... [the] original forged document for handwriting examination and comparison ...

(iii) The findings of the handwriting examination be admitted as testimony ...

...

(v) [That the] Tribunal ... permit production of additional documents and hearing of witnesses should the Applicant so desire.

...

(b) Decision [contested] and [the rescission of which] the Applicant [requests]

...

(ii) The Applicant ... contests the excessively harsh disciplinary measure of summary [dismissal].

(c) Relief Sought by the Applicant ...

...

(ii) [That the] Tribunal ... quash/set aside the recommendations of the Nairobi Joint Disciplinary Committee ...

(iii) [That the] Tribunal ... recommend that the Applicant be reinstated with full pay from the date of summary dismissal or as shall be deemed appropriate.

(iv) In the alternative [that] the Tribunal ... recommend a review of the excessively harsh disciplinary measure of summary dismissal, meted out against the Applicant and [that] a less severe measure be recommended."

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 October 2000 and periodically thereafter until 15 August 2001;

Whereas the Respondent filed his Answer on 3 August 2001;

Whereas, on 2 July 2002, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined UNEP on a one-month short-term appointment as a shorthand typist at the G-5, step 1 level, on 14 April 1975. At the time of the events which gave rise to the

present Application, the Applicant was serving as a Personnel Assistant, Personnel Registry, Human Resources Management Service, (HRMS), United Nations Office at Nairobi (UNON), at the G-6 level.

In the course of 1993, a Ms. Mary Sabwa took three pre-employment secretarial tests. Having failed all three tests, she was informed on 25 October 1993 that she stood no chance of being recruited as a secretary in UNEP. On 12 May 1994, however, Ms. Sabwa was recruited as a secretary in the Environmental Law and Institutions Programme Activity Centre (ELI/PAC), UNEP, on an initial three-month contract. On 7 July 1993, ELI/PAC requested a seven-month extension of Ms. Sabwa's contract. While processing the request, the Recruitment Unit discovered that Ms. Sabwa's documents indicated that she did not have the minimum requirements for a secretarial position with UNEP. The matter was brought to the attention of the Junior Training Assistant, Test Unit, Ms. Kogi, and the Recruitment Officer responsible for general service recruitment, Ms. Musoga. On 6 December 1995, the Office of Internal Oversight Services (OIOS) was asked to investigate a complaint that "a secretary" (Ms. Sabwa) had been employed in ELI/PAC on the basis of forged test records.

OIOS submitted its report to the Executive Director, UNEP, on 16 December 1997. Having examined the documents and conducted interviews, OIOS found, inter alia, that Ms. Sabwa's name was handwritten on to the typewritten "Tests Records" indicating that she had passed all tests. The results letter, informing Ms. Sabwa that she was among the successful candidates, was prepared on phased-out letterhead and signed by a former Chief, Recruitment Unit, Ms. Muigai. According to the report, the Applicant had allegedly approached Ms. Kogi requesting "copies of Ms. Sabwa's documents" because she wanted to help her find employment outside the Organization. On 9 May 1994, Ms. Sabwa's file was sent to ELI/PAC, which office chose Ms. Sabwa to fill the position of temporary secretary. It was subsequently discovered that Ms. Sabwa was not qualified for the position and that a duplicate file had been created for her using photocopies. These documents bore the forged signature of Ms. Muigai. The photocopied documents were examined by an external document examiner who confirmed that the handwritten words "Mary Sabwa" on the "Test Records" were made in the Applicant's hand. This was also confirmed by two of the Applicant's colleagues. OIOS found that the Applicant had "used her official position to get access to Ms. Sabwa's original file and manipulated documents to reflect that she had passed the secretarial tests in September 1993 before passing

the doctored files over to Recruitment section", and recommended that she be separated from service "in accordance with Staff Rule 110.1".

On 6 January 1998, the Applicant was advised that the Executive Director, UNEP, had decided to summarily dismiss her for serious misconduct pursuant to staff rule 110.3 (viii), effective immediately. On 20 January, the Applicant wrote to the Secretary-General, requesting review of this decision and that the case be referred to a Joint Disciplinary Committee (JDC).

In a memorandum dated 26 May 1998, the Under-Secretary-General for Management advised the new Executive Director, UNEP, that the decision to dismiss the Applicant was severely flawed and suffered from a number of procedural errors. Accordingly, he recommended that the decision be rescinded, and that the Applicant be reinstated and placed on suspension with pay, retroactive to the date of dismissal. As a result, on 20 July 1998, the Applicant was so informed and invited to respond to the charge of having falsified "a candidate's test records". On 24 September, the Applicant responded that the allegations were the result of a conspiracy against her and that OIOS had made numerous mistakes. On 11 January 1999, OIOS submitted additional comments to UNON, rebutting the Applicant's claims.

On 30 June 1999, the case was referred to the Joint Disciplinary Committee, Nairobi, (JDC). On 23 December 1999, the JDC submitted its report. Its findings, conclusions and recommendation read, in part, as follows:

"IX Findings

...

... [The document examiner] has clearly stated that the handwriting on the forged test record bearing Mary Sabwa's name was the handwriting of [the Applicant]. The panel did not find any reason which would prevent it from accepting [his] expertise in this regard. ...

[The Applicant] has submitted that it would be insensible of her, if she had been the culprit, to have handsigned the test record. Several witnesses, however, have testified to the fact that files in the Recruitment Section were obviously not kept in the kind of order that they should have been kept in and therefore the panel believes that [the Applicant] had a reasonable expectancy to assume that her forgery would never be discovered.

...

Further incriminating [the Applicant] is the fact that, in her own words, she was not in charge of secretarial files since 1992. ... [T]here was no reason for [the Applicant] to be in possession of Ms. Sabwa's file as it was outside the scope of her normal duties. ...

...

The totality of evidence as described above against [the Applicant] has produced a strong prima facie case against her and [the Applicant] was unable to exonerate herself by countervailing evidence.

...

In evaluating which disciplinary measure should be recommended in accordance with Staff Rule 110.3, the panel had to take into account the fact that it was one of [the Applicant]'s very core duties as Personnel Assistant in charge of the Records Unit to ensure that official records of the organization would not be tampered with ...

X Conclusions

...

In the light of the foregoing considerations, the panel concludes that the evidence points to the [Applicant] as the perpetrator of the alleged acts of misconduct and that the [Applicant] failed to provide credible countervailing evidence that would make such a conclusion improbable.

XI Recommendations

...

In the light of the above considerations and conclusions and the grave nature of misconduct of which the [Applicant] has been found guilty, the panel recommends to the Secretary-General that the [Applicant] be summarily dismissed.

Remarks:

The panel observed that there was an inordinate and unjustifiable delay in handling [the Applicant's case] and as a result [her] rights to due process were violated. ...

The panel was further of the opinion that the investigations by OIOS were not conducted in a truly objective and fair manner and did not exhaust all available means of gathering and examining evidence."

On 11 February 2000, the Under Secretary-General for Management transmitted a copy of the JDC report to the Applicant and informed her as follows:

"...

The Secretary-General has concluded that the charges are well-founded and that your conduct constituted a serious violation of the standards of conduct and integrity expected of each staff member of the Organization and that this misconduct is incompatible with continued service with the Organization. He has therefore decided to accept the unanimous recommendation of the Committee and to summarily dismiss you pursuant to staff rule 110.3(viii) ..."

On 22 May 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JDC erred in according the testimony and report of the document examiner undue evidential weight and relying on it wholly.
2. The JDC erred in totally ignoring the testimony of Ms. Mary Sabwa which exonerated the Applicant and incriminated another staff member.
3. The JDC erred in placing the burden of proof on the Applicant.
4. The JDC finally erred in concluding that the Applicant had failed to produce countervailing evidence when the purportedly forged document was never made available to her to obtain her own expert advice.

Whereas the Respondent's principal contentions are:

1. The Secretary-General's decision to summarily dismiss the Applicant for serious misconduct was a valid exercise of his discretionary authority based on facts adduced during the OIOS investigation and substantiated in the proceedings before the JDC.
2. The decision was not vitiated by mistake of fact or of law, by lack of due process or by bias, prejudice, improper motive, abuse of discretion or other extraneous factors.

The Tribunal, having deliberated from 2 to 23 July 2002, now pronounces the following Judgement:

- I. The Applicant appeals the Respondent's decision of 11 February 2000, pursuant to the JDC's recommendation to summarily dismiss the Applicant for serious misconduct. The

Applicant claims that her summary dismissal was procedurally deficient, discriminatory in nature and taken in disregard of her due process rights and the procedures set out in the Staff Rules.

II. The case concerns the imposition of a disciplinary sanction. There is longstanding jurisprudence on the issue of disciplinary measures handled by the Tribunal. In its jurisprudence, the Tribunal has "consistently recognized the Secretary-General's authority to take decisions in disciplinary matters, and established its own competence to review such decisions only in certain exceptional conditions" (see Judgements No. 525, *Yougbare* (1991); No. 849, *von Seth* (1997)).

III. In April 1975, the Applicant entered the service of UNEP as a shorthand typist at the G-5 level. At the material time she was serving as a Personnel Assistant at the G-6 level.

On 12 May 1994, Ms. Mary Sabwa was recruited as a secretary for UNEP with an initial contract for three months. Following a request from her employer to extend her contract, it was discovered that she did not have the minimum requirements for a secretarial position with UNEP. In December 1995, OIOS investigated a complaint that Ms. Sabwa had been recruited on the basis of forged documents.

During the investigation, the Junior Training Assistant in the Test Unit testified that Ms. Sabwa sat for three tests in the course of 1993 but failed all three. On 23 October 1993, Ms. Sabwa was informed that she stood no chance of being recruited as a secretary in UNEP. According to Ms. Kogi, the Applicant had approached her and requested copies of Ms. Sabwa's file. The Applicant had indicated that since Ms. Sabwa had been unsuccessful, her documents were no longer of any use to UNEP, and the Applicant needed them in order to assist Ms. Sabwa in obtaining employment outside UNEP. Ms. Kogi handed the file to the Applicant who returned the file at the end of the day.

Ms. Musoga testified to OIOS that, in April 1999, before the Applicant left on mission, she submitted three secretarial applicants' files to her, including the allegedly forged file of Ms. Sabwa. Based on this file, Ms. Sabwa was selected for employment. After Personnel was alerted that the test scores were forged and initial investigation uncovered that she had two files, one showing her failed attempts, and the second, containing a forged test record.

OIOS submitted the forged test record to a handwriting expert who determined that the Applicant had written the words "Mary Sabwa" on the forged test record. In its report, OIOS concluded that the Applicant falsified Ms. Sabwa's test record.

IV. The Applicant's case was referred to the JDC. In its report, the JDC stated: (i) once a *prima facie* case of misconduct is established by the Organization, the staff member must provide satisfactory proof explaining and justifying the conduct in question; (ii) the Applicant did not offer any explanation for her handwriting on the forged test record; and, (iii) the totality of the evidence against the Applicant produced a strong *prima facie* case against the Applicant and she was unable to exonerate herself by countervailing evidence.

V. The Applicant claims that the JDC erred when it placed the burden of proof on her, and when it concluded that she failed to provide countervailing evidence. The Applicant claims that the JDC report ignored statements made by Ms. Sabwa which exonerated her and incriminated another staff member. The Applicant contends that she was never in any way party to the alleged forgery. The Respondent submits that, although the Applicant argues that she did not know Ms. Sabwa, according to Ms. Kogi she had asked specifically for Ms. Sabwa's file. In addition, the forged test record bore the Applicant's handwriting, as confirmed by the handwriting expert and a staff member who was familiar with the Applicant's handwriting.

The Respondent also claims that the evidentiary standards of establishing a *prima facie* case of serious misconduct are sufficient to warrant separating the Applicant from service in the absence of a satisfactory explanation from the Applicant. The Respondent further claims that the facts concerning the Applicant's misconduct were established. The JDC carefully examined the charge brought against the Applicant and her responses thereto, as well as other facts and circumstances, and concluded that the Applicant committed forgery on Ms. Sabwa's test records. The Tribunal has held that once a *prima facie* case of misconduct is established, the staff member must provide satisfactory evidence to justify the conduct in question. (See Judgements No. 484, *Omosola* (1990) and No. 850, *Patel* (1997).) Since the Applicant did not do so, the Secretary-General's decision must stand.

VI. The Tribunal has consistently held that the Applicant bears the burden of proving prejudice or other improper motives (see Judgements No. 336, *Maqueda Sanchez* (1984); No. 448, *Large* (1989); No. 465, *Safavi* (1989); No. 479, *Caine* (1990); and, No. 515, *Khan (ibid.)*). The Respondent claims that the Applicant did not submit any proof that the review process was vitiated. The Tribunal agrees that the Applicant failed to meet her burden of proof.

VII. The Tribunal has repeatedly affirmed that the United Nations Charter and the Staff Regulations vest in the Secretary-General the authority to determine whether a staff member has met the required standards of conduct. The choice of disciplinary measure to be imposed pursuant to staff regulation 10.2 falls within the Secretary-General's discretionary powers. (See Judgements No. 542, *Pennacchi* (1991) and No. 941, *Kiwanuka* (1999).) The Tribunal has consistently maintained that its competence to review the Secretary-General's discretionary powers to discipline United Nations staff is confined to determining whether the Secretary-General's actions were vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake of fact, amongst additional criteria. (See Judgements *Khan (ibid.)*; and No. 616, *Sirakyan* (1993).)

As the Tribunal has held in Judgements No. 890, *Augustine* (1998) and No. 897, *Jhuthi* (1998), the taking of disciplinary measures involves the exercise of discretion by the Administration but it is also the exercise of a quasi-judicial power. In disciplinary cases the Tribunal examines inter alia: (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 procedural irregularity; (iv) whether there was an improper motive or abuse of purpose in the imposition of the sanction, (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; and, (viii) in the case of discretionary powers in general, whether there has been arbitrariness. The Tribunal finds that the Secretary-General's dismissal of the Applicant for serious misconduct was a valid exercise of that discretionary power. As Personnel Assistant in charge of the Records Unit, it was the Applicant's core duty to ensure that the official records of the Organization were not tampered with.

The Tribunal is satisfied that, based on the facts and the totality of the circumstances, the decision to summarily dismiss the Applicant was not vitiated by bias, prejudice, improper motive, abuse of discretion or extraneous factors. Accordingly, the Tribunal finds that all appropriate procedures were followed in this case, that the Applicant committed a serious violation of the United Nations standards of conduct and that her conduct was incompatible with continued service with the Organization.

VIII. For the foregoing reasons, the Tribunal rejects the Application in its entirety.

(Signatures)

Mayer GABAY
President

Julio BARBOZA
Vice-President

Spyridon FLOGAITIS
Member

Geneva, 23 July 2002

Maritza STRUYVENBERG
Executive Secretary