

**Administrative Tribunal**

Distr.: Limited
31 January 2006

Original: English

ADMINISTRATIVE TRIBUNAL**Judgement No. 1274**

Case No. 1357

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, on 24 May 2004, a former staff member of the United Nations filed an Application requesting the Tribunal, *inter alia*:

“7. ...

...

(c) *to decide* to hold oral proceedings on the present application in accordance with Article 8 of its Statute and Chapter IV of its Rules;

8. On the merits, ...

(a) *to rescind* the decision of the Secretary-General to separate the Applicant from service with compensation in lieu of notice;

(b) *to find and rule* that the disciplinary penalty imposed by the Respondent was unduly harsh and disproportionate to the offense she admitted having committed, in light of all the attending circumstances;

(c) *to order* that the Applicant be reinstated in service with effect from 3 March 2004;

(d) *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 two year's net base pay;

- (e) *to award the Applicant as cost, the sum of \$7,500.00 in legal fees and \$500.00 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 7 October 2004 and once thereafter until 30 November;

Whereas the Respondent filed his Answer on 30 November 2004;

Whereas the Applicant filed Written Observations on 29 July 2005;

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

Whereas the statement of facts, including the employment record, contained in the report of the Joint Disciplinary Committee (JDC) reads, in part, as follows:

“II. *Employment history*

... On 11 November 1991, [the Applicant] joined the United Nations under a short-term contract as a Messenger, at the level GS-1, with the Messenger Unit, Department of Management (DM). Subsequently [she] was offered several fixed-term appointments and was promoted to the GS-2 and GS-3 levels. On 10 May 1999 the DM Executive Office approved the release of [the Applicant] on temporary assignment to the Office of the Iraqi Programme (OIP). Effective 1 January 2000, [she] was offered a one year fixed-term contract as a Finance Clerk at the GS-3 level, step VII, at the OIP. She was released on a permanent basis to the OIP effective 1 July 2001. [The Applicant] worked for the OIP until 30 September 2003. Effective 1 October 2003, [the Applicant] was released to work for the United Nations Mission in Liberia at the G-4 level.

III. *Background leading to the charge*

... The alleged misconduct occurred in March, May and June 2003. According to the note to the file, (hereinafter the investigation report) dated 9 September 2003, from [the] OIP, [the Applicant] indicated that for the months of March and May 2003, she claimed and accepted overtime payments for hours that she had not in fact worked. She allegedly altered the overtime form, after it had been approved by her supervisor for hours legitimately worked, to include the non-worked hours. [The Applicant] then used her access to [the Integrated Management Information System (IMIS)] to enter the false information. According to the report, [the Applicant] was paid for 48 non-worked hours at the ‘time and a half’ rate, and 27 non-worked hours at the ‘double time’ rate.

... The investigation report further indicated that [the Applicant] made a similar false claim for non-worked overtime for June 2003, reinforced by a request to charge three days of previously-claimed sick leave to annual leave, allegedly to enable her to qualify for weekend overtime. This irregularity was discovered before payment for that month was made.

... On 17 July 2003, a meeting took place between [the Applicant], ... her supervisor, and ... her Executive Officer [with regard to the Applicant's June 2003 overtime claim]. At that meeting, [the Applicant] expressed regret and admitted that she had engaged in wrongdoing that was prompted by her personal financial difficulty. When ... asked if that was the first time she had done so, she responded affirmatively. However, when, as part of the investigation, management reviewed her prior claims for overtime, it discovered the falsified March and May 2003 claims ...

... On 31 July 2003, a subsequent meeting took place ... When [the Applicant] was asked about the discrepancies that were found for the months of March and May 2003, she admitted adding overtime hours to both March and May 2003 overtime forms after her supervisor ... had approved the valid ones. The investigation report signed by her Executive Officer and dated 9 September 2003 emphasized that:

‘it is apparent that [the Applicant] had tampered with the overtime records and was indeed paid for a number of unauthorized overtime hours for March and May 2003. The overtime claimed for June 2003 obviously were not reported nor certified in IMIS and therefore no payment was made.’

... By memorandum ... dated 25 September 2003, [the] Executive Director of the OIP, reported this case to the Assistant Secretary-General[, Office of Human Resources Management (OHRM)]. In this memorandum, [the Executive Director] stated that:

‘Given that this would seem to be a one-off lapse, driven by financial need, in what has been a good career of almost 12 years with the Secretariat, my recommendation is that the overpayment be recovered but that no further disciplinary action be taken’.

... In a memorandum dated 3 October 2003, ... OHRM informed [the Applicant] of the charge[s] against her[, namely fraud, misrepresentation in connection with a claim for payment by the United Nations, and intentional alteration of official documents and records. She was advised that ‘[t]his conduct, if established, would constitute a violation of the standards of integrity and of conduct expected of staff members of the United Nations’, and] ... asked ... to respond to the allegations ...

... In a memorandum dated 27 October 2003 ..., [the Applicant] provided her response. (...)

... In a memorandum dated 16 November 2003, [the] Assistant Secretary-General[, OHRM], referred [the Applicant's] case to [JDC] in New York for advice as to what disciplinary measures, if any, should be imposed on [her] in connection with her acts of misconduct.”

On 7 January 2004, the Applicant provided the JDC with a copy of a cheque in the amount of US\$ 2,550 she had submitted to the OIP as restitution for the overtime payments in March and May 2003.

On 29 January 2004, the JDC submitted its report. Its observations, conclusions and recommendation read as follows:

“VI. Considerations

24. As acknowledged by the parties, the Panel noted that the facts in this case are not in dispute. [The Applicant] admitted during the hearing that she committed the misconduct as charged ... The misconduct, thus, has been established.

...

28. Before addressing what disciplinary measure to recommend, the Panel examined whether there were any mitigating factors in the case. Although it did not excuse or justify her actions, the Panel noted that, based on the available evidence, it did appear that [the Applicant] had been experiencing serious difficulties for a period of time prior to the misconduct in financially supporting herself and her two children. ... While it did not consider it a mitigating factor, the Panel noted that [she] was a single parent raising two children. In deliberating on what disciplinary measure to recommend, the Panel took into account the staff member's 12-year unblemished record of service ... as well as the Administration's decision to approve the staff member's mission assignment to Liberia on 1 October 2003 after learning of her alleged misconduct (but prior to formally charging her on 3 October ...).

29. The Panel considered, under the totality of the circumstances, including [the Applicant's] obvious remorse for her actions, that summary dismissal or separation from service would not be an appropriate recommendation. While cognizant of the Secretary-General's discretionary authority in cases of misconduct, the Panel considered that a severe penalty, such as summary dismissal or separation, would be disproportionate in this particular case and under the circumstances described.

...

31. The Panel ... noted with concern the ease with which [the Applicant] could enter and alter data into IMIS regarding her own overtime.

VII. Conclusion and recommendations

32. The Panel concludes that [the Applicant's] actions constitute misconduct under the Staff Regulations and Rules. The Panel *unanimously recommends* to the Secretary-General that [she] be demoted one grade for one year. The Panel further recommends that a written censure by the Secretary-General be given to [her] and that a copy of this written censure be placed in her Official Status file. The Panel *also unanimously recommends* that [the Applicant] not be allowed to work with IMIS without proper supervision.

...”

On 2 March 2004, the Under-Secretary-General for Management transmitted a copy of the JDC report to the Applicant and informed her as follows:

“The Secretary-General ... agrees with the JDC's conclusion that misconduct has been established in this case. He has given careful consideration to the factors listed by the JDC in support of its recommendation for rather lenient disciplinary measures. However, as your actions showed a clear and repeated intention to defraud the Organization for financial gain, the Secretary-General

has concluded that such conduct constitutes a serious violation of the [United Nations] standards of conduct and integrity and is incompatible with continued service in the Organization. Pursuant to his discretionary authority to impose appropriate disciplinary measures, the Secretary-General has decided to separate you from service with compensation in lieu of notice pursuant to staff rule 110.3 (a) (vii), with effect from close of business on the day you receive this letter.”

On 24 May 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The decision of the Secretary-General to impose the penalty of separation from service with compensation in lieu of notice was unduly harsh and disproportionate to the offence.
2. The Respondent’s decision was arbitrary, the JDC having found that dismissal would be disproportionate under the circumstances of the case.

Whereas the Respondent’s principal contentions are:

1. The Applicant’s conduct constituted serious misconduct.
2. The disciplinary measure imposed on the Applicant constituted a proper exercise of the Respondent’s authority and discretion and was not disproportionate to the offences committed by the Applicant.
3. The Applicant’s arguments based on alleged mitigating circumstances are without merit.

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

I. The Applicant appeals a decision of the Secretary-General to separate her from service with compensation in lieu of notice. While she does not dispute the findings by the JDC of misconduct, the Applicant alleges mitigating circumstances that make the Secretary-General’s sanction disproportionate to the misconduct. She also alleges that her rights to due process were violated, in that she was denied sufficient time and opportunity to consult with her counsel prior to the hearing before the JDC.

II. The Applicant, who served in the Organization for approximately 12 years, was serving as a Finance Clerk at the time of the alleged misconduct. In her capacity

as Finance Clerk, the Applicant had access to IMIS, the computer system that, among other things, tracked overtime hours worked by staff members and the attendant compensation to which they therefore became entitled. The record reflects that in March and May of 2003, the Applicant claimed and accepted overtime payments for hours that she had not, in fact, worked. Apparently, the Applicant altered her time sheet, after it had been approved by her supervisor for hours legitimately worked, to include overtime hours that she did not actually work. Then she used her access to IMIS to alter the electronic record to reflect these fraudulent hours. In addition, in June of 2003, the Applicant again falsified her overtime hours, but apparently did not enter them in IMIS. Finally, in connection with her false claim for overtime in June, the Applicant requested that three days of sick leave be changed to reflect three days of annual leave, so that she would be eligible to qualify for weekend overtime. She only received payment for the fraudulent claims made in March and May; the irregularity came to light before the June payment was made. The Applicant received approximately US\$ 2550 in unearned overtime payments.

III. The fraudulent claims were revealed by the Applicant herself, who, in a meeting with her supervisors on 17 July 2003, admitted that she had improperly claimed overtime in June and expressed remorse at her conduct. In that meeting, in response to a question from her supervisors as to whether this was the first time she had tampered with the overtime payments, the Applicant answered in the affirmative. Subsequent to this initial meeting, however, an investigation of the situation revealed similar fraudulent conduct by the Applicant with respect to payments made in March and May. Upon inquiry, the Applicant also admitted her culpability with respect to these payments. The Applicant's supervisors recommended that the overpayment be recovered but that no further disciplinary action be taken against the Applicant, concluding that this was a momentary lapse in an otherwise "good career of almost 12 years".

On 3 October 2003, the Applicant was formally charged and was asked for her response to the allegations of misconduct. She was also advised of the availability of the assistance of the Panel of Counsel.

In defence of her actions, the Applicant asserted her conduct was the result of extreme financial duress, occasioned by her separation from her husband. As a result, she had become a single mother to her two children and the financial provider for herself and her children. In addition, she alleged, her sister had recently died, and she was suffering emotional distress. She recognized the seriousness of her misconduct,

apologized and asked forgiveness from the Organization. The Applicant subsequently voluntarily repaid the illegal overtime payments to the Organization. On 16 November 2003, the case was referred to the JDC to determine the extent of disciplinary measures, if any.

IV. At the time of the JDC hearing, the Applicant was on mission in Liberia. She alleges that she only met with her counsel by telephone and that her only contact with the JDC was by telephone. At the JDC hearing on 15 January 2004, the Applicant was represented by counsel. The record is devoid of any evidence that the Applicant's counsel at any time raised concerns about the Applicant's access to and communication with him.

The JDC concluded that the Applicant's actions constituted misconduct under the Staff Regulations and Rules. However, in light of the Applicant's unblemished 12 year career and her unfortunate financial and personal circumstances, the JDC unanimously recommended that she be demoted one grade for one year, that she receive a written censure by the Secretary-General, and that the censure be placed in her Official Status file. The JDC further unanimously recommended that the Applicant not be allowed to work with IMIS without supervision. Finally, the JDC recommended that the Organization "take immediate action to review the functioning of IMIS with a view to prohibiting staff members assigned to working with IMIS from entering data concerning themselves".

The Secretary-General agreed with the JDC's conclusion of misconduct, but refused to accept what he deemed "rather lenient disciplinary measures" recommended by it. Instead, the Secretary-General found that the Applicant's actions "showed a clear and repeated intention to defraud the Organization for financial gain". Therefore, the Secretary-General decided to separate the Applicant from service with compensation in lieu of notice.

V. The Tribunal first turns to the issue of whether the sanction imposed by the Secretary-General is disproportionate to the misconduct. The Tribunal has long recognized that the Secretary-General has broad discretion in regard to disciplinary matters, including the determination of the appropriate disciplinary measures for misconduct. (Judgement No. 1187, *Igwebe* (2004), citing Judgement No. 436, *Wiedl* (1988).) The taking of disciplinary measures, however, also involves the exercise of a quasi-judicial power, and therefore, must be exercised, *inter alia*, with due regard to the proportionality of the disciplinary measure imposed. (See Judgements No. 897, *Jhuthi*

(1998) and No. 941, *Kiwanuka* (1999).) Thus, where the sanction is found to be disproportionate, the sanction can be vitiated. (See Judgements No. 1011, *Iddi* (2001); No. 1090, *Berg* (2002); and, No. 1244 (2005).)

VI. In the instant matter, the Tribunal finds that the sanction imposed by the Secretary-General was not disproportionate. The Tribunal notes that the Applicant defrauded the Organization on more than one occasion and also lied about how many times she had engaged in such misconduct. The Applicant violated the position of trust in which the Organization placed her; she had unsupervised access to compensation records of herself and others, and the Organization had every reason to expect that she would use that access honestly and in the best interests of the Organization. While the Tribunal is sympathetic to the unfortunate circumstances in which the Applicant found herself, it cannot condone such fraudulent conduct. If the Applicant had financial or emotional troubles, she could, and should, have sought help from her supervisors or others in the Organization. She did not. The Tribunal finds that the Secretary-General

“is clearly entitled to take the view that a person who engages in the perpetration of fraud against the Organization is unfit to remain in service. Such conduct is quite incompatible with the high standards which the Respondent is entitled to expect from a staff member of the United Nations”. (Judgement 1222, *Othigo*, (2004).)

Thus, the Tribunal concludes that the Secretary-General’s decision to separate the Applicant from service with compensation in lieu of notice was an appropriate exercise of his discretion. (See generally Judgement No. 1175, *Ikegame* (2004).)

VII. With regard to the Applicant’s allegations that her rights to due process were violated because she did not have adequate time to consult with her counsel, the Tribunal finds no merit to her claim. The record indicates that as early as October 2003, the Applicant was advised with respect to obtaining counsel, and the JDC hearing was not held until January 2004, two and one half months later. The Applicant should have had sufficient time to prepare her defence. In addition, there is no evidence that the Applicant or her counsel requested a postponement of the JDC hearing, for any reason, let alone because the Applicant needed to consult with her counsel or prepare her case. Moreover, at no time during the hearing did the Applicant or her counsel allege that the Applicant lacked sufficient time to consult with counsel; the Applicant only raises it after the fact. In light of the above, the Tribunal finds that

the Applicant had sufficient time to consult with her counsel and that her rights to due process were not violated in this respect.

VIII. For the foregoing reasons, the Tribunal rejects the Applicant's claims in their entirety.

(Signatures)

Julio Barboza
President

Jacqueline R. Scott
Member

Goh Joon Seng
Member

New York, 23 November 2005

Maritza Struyvenberg
Executive Secretary