United Nations AT/DEC/1310

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1310

Cases No. 1384
No. 1399

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Dayendra Sena Wijewardane, Vice-President, presiding; Mr. Kevin Haugh; Mr. Goh Joon Seng;

Whereas, on 24 November 2004, Applicant X, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an Application containing pleas which read, in part, as follows:

"**II PLEAS**

7. With respect to competence and procedure, … Applicant [X] respectfully requests the Tribunal:

…

c) *to decide* to hold oral proceedings on the present application …;

8. On the merits, … Applicant [X] respectfully requests the Tribunal:

a) *to rescind* the decision of the Executive Director to separate [him] from service with one month compensation in lieu of notice;

b) *to find and rule* that the report of the ad hoc Joint Disciplinary Committee [(JDC)] erred on a number of factual and legal issues;

c) *to find and rule* that the disciplinary penalty imposed by the Respondent was unduly harsh and disproportionate to the offense, in light of all the attending circumstances;

d) *to order* that … [he] be reinstated in service with effect from 29 September 2004;

e) *to fix* pursuant to article [10], paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three years' net base pay;

f) *to award* … additional compensation to be fixed by the Tribunal for violations of his rights;

g) *to award* … 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 in the case of Applicant X until 31 May 2005 and twice thereafter until 31 July;

Whereas the Respondent filed his Answer in the case of Applicant X on 18 July 2005;

Whereas Applicant X filed Written Observations on 24 March 2006;

Whereas, on 7 July 2006, the Tribunal decided not to hold oral proceedings in the case of Applicant X;

Whereas, on 12 July 2006, the Tribunal decided to postpone consideration of the case of Applicant X until its forthcoming autumn session;

Whereas at the request of Applicant Y, a former staff member of UNICEF, the President of the Tribunal extended to 31 January 2005 the time limit for the filing of an application with the Tribunal;

Whereas, on 28 January 2005, Applicant Y filed an Application containing pleas which read as follows:

"**II.** ***The Pleas***

6. [Applicant Y] requests the Tribunal to find that:

(i) Based on the circumstances, including mitigating circumstances, the matter did not warrant referral to an ad hoc [JDC].

(ii) The facts on which the disciplinary measures were based did not legally amount to misconduct or serious misconduct.

(iii) The Respondent misinterpreted the Staff Rules and Regulations relating to disciplinary measures; failed to make a distinction between 'misconduct' and 'serious misconduct' and charged … Applicant [Y] with both 'misconduct' and 'serious misconduct' for the same alleged offence.

(iv) The Respondent failed to explicitly advise the ad hoc JDC that it also had the option of not recommending any of the disciplinary measures listed under staff rule 110.3 (a).

…

(vi) The ad hoc JDC erred by yielding to the Respondent's request not to grant [her] request for an oral hearing.

…

(viii) The ad hoc JDC also erred in concluding that … Applicant [Y] had acted in contravention of UNICEF's Financial Circular No. 28, paragraph 3.

…

(x) The ad hoc JDC's recommendation … was contrary to the facts and circumstances of the alleged offence, and inconsistent with its observation that … Applicant [Y] had acted in good faith with 'UNICEF's interest in mind'.

(xi) The Respondent abused his discretionary powers by imposing an unjustifiably severe penalty on [Applicant Y] for the alleged offence, a decision which was inconsistent with the Respondent's acknowledgement that there was no criminal intent on her part …, and that her actions may have been well-meaning. …

(xii) The disciplinary measure imposed by [the] Respondent for the alleged offence was arbitrary, unjustified and disproportionate to the facts and circumstances …

7. [Applicant Y] prays that the Tribunal:

Orders a rescission of the disciplinary measure imposed on her, and order[s] her reinstatement in her P-5 post.

8. Should the Respondent determine that reinstatement would not be in the interest of the Organization, [Applicant Y] prays that the Tribunal:

(a) Find that [she] is entitled to compensation …

(b) Order compensation assessed at eighteen (18) months' … net base salary at the rate in effect on the date of the Tribunal's judgement in the present case.

(c) Order the payment of full termination indemnity … less the 50% indemnity she received ..."

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 in the case of Applicant Y until 5 September 2005 and twice thereafter until 30 November;

Whereas the Respondent filed his Answer in the case of Applicant Y on 8 November 2005;

Whereas Applicant Y filed Written Observations on 9 January 2006, and requested the Tribunal to have the Respondent provide certain information regarding other UNICEF projects;

Whereas the facts in both cases are as follows:

Applicant Y entered the service of UNICEF on 7 April 1994, at the P-5 level as the UNICEF Representative, Niger, on a fixed-term contract for a period slightly in excess of two years. She served as

Representative in Niger until 14 September 1998, when she was reassigned to the Conakry Office in Guinea, as Representative. On 25 July 2001, she was reassigned to Cote d'Ivoire, as Representative.

Applicant X entered the service of UNICEF on 25 January 2000, as a P-3 level Operations Officer, Conakry Office, on a fixed-term contract pursuant to an inter-agency transfer. His fixed-term contract was subsequently extended and, on 26 September 2002, he was promoted to the P-4 level and transferred to the UNICEF office in Baghdad.

In 2000, to facilitate the availability of iodised salt in Guinea, Applicant Y promoted the involvement of the private sector in the production and distribution of such salt, and supported the attendance of salt production firms at a workshop. Thereafter, Mr. S., the owner of SELGUI, a privately owned company in Guinea, approached the Office with a proposal to import and distribute iodised salt. Mr. S. initially proposed that UNICEF financially support his project but, on the advice of Applicant X (who had indicated that such support would be inappropriate for UNICEF), sought financing for his operation from a commercial bank. On 20 November, Applicant X advised Applicant Y that the bank had negatively assessed the project and had proposed that UNICEF provide a guarantee. Applicant X noted that in the event that SELGUI defaulted on its debt, the bank would then consider UNICEF liable and drew attention to the fact that, absent a separate guarantee by SELGUI or its owner, UNICEF would have no assurance regarding repayment of the loan. The same day, Applicant Y determined that support for SELGUI should be limited to the provision of equipment.

On 21 December 2000, the bank wrote to UNICEF offering to loan SELGUI the funds on the condition that UNICEF deposit US$ 100,000 as a loan guarantee. The bank indicated that it expected the funds to be repaid by SELGUI within six to eight months, at which time the guarantee would be returned to UNICEF, and claimed to have received, as security, the title to Mr. S.'s home as well as ownership documents relating to warehouse equipment. Pursuant to oral instructions from Applicant Y, on 20 February 2001 Applicant X and a colleague executed a payment request, transferring US$ 100,000 to the bank. The file does not contain the loan agreement between SELGUI and the bank and there is no evidence that a written agreement was concluded between UNICEF and the bank as to the administration of the funds or their application in case of default. On 28 March, Applicant Y informed Mr. S. and the Minister of Health of Guinea that UNICEF had deposited the guarantee.

On 19 April 2001, Applicant X approved the payment voucher for the transaction and recorded it as accounts receivable, attributing it to the Private Sector Division of UNICEF rather than to the Country Office. He subsequently adjusted this entry, reclassifying the guarantee as a programme expenditure.

On 17 May 2001, an agreement between UNICEF and Mr. S. was concluded and, on 20 June, the bank provided him with the equivalent of US$ 100,000, establishing in its documentation its right to claim reimbursement from his assets in the event of default.

In July 2001, Applicant Y was reassigned to Cote d'Ivoire.

On 12 October 2001, Applicant X wrote to the bank, noting that SELGUI had encountered delays in the repayment of the loan and asking the bank to permit an additional period of six months before the

loan came due. In May 2002, however, the bank informed UNICEF that the loan had been defaulted upon and that it was taking possession of the guarantee. Soon afterwards, Mr. S. abandoned his efforts to market the salt, leaving more than half of the unsold salt in the warehouse. On 3 June, Applicant X, who was in Baghdad on mission, advised the Office that the bank should be required to take possession of the salt as well as the property which Mr. S. had offered as security, in order to minimize UNICEF's liability in the matter. Thereafter, on 12 September, the newly-appointed UNICEF Representative requested the bank to recover funds by selling the remaining salt as well as the collateral.

On 17 February 2003, the UNICEF Representative instructed that the case be reported to the Office of Internal Audit (OIA), for assistance in recovering the funds. Following an investigation into the matter, OIA issued an Investigation Report in October, concluding that, while there was no evidence of intention to defraud UNICEF, established UNICEF procedures were not followed and the actions of the Applicants had exposed the Office to foreseeable risk. OIA recommended that UNICEF "establish the responsibilities of the involved staff, and implement appropriate actions". On 18 November, the Applicants were each provided with a copy of the Investigation Report for their comments and Applicant X was suspended with full pay. Pursuant to their comments, an amended Investigation Report was issued in February 2004.

On 11 March 2004, Applicant X was formally charged with:

> "repeatedly engag[ing] in acts of grossly negligent conduct, acting with reckless disregard for UNICEF's best financial interests, sound management of its financial resources and its related business procedures … [compounded by] … failing to put in place measures that would have safeguarded and/or provided a measure of protection against the financial loss that UNICEF suffered …[;] repeatedly violat[ing] UNICEF Financial Rules … result[ing] in a significant financial loss …[; and, making] false certifications in official documents and accounting records".

Applicant X was advised that his actions constituted serious misconduct; that he could be found personally and financially liable for the loss suffered by UNICEF; and, that he would remain on suspension with pay, pending the completion of disciplinary proceedings. He responded to the charges on 26 March.

Also on 11 March 2004, Applicant Y was formally charged with:

> "repeatedly engag[ing] in egregious mismanagement and acts of grossly negligent conduct, acting with reckless disregard for UNICEF's best financial interests, sound management of its financial resources and its related business procedures … [compounded by] … failing to put in place measures that would have safeguarded and/or provided a measure of protection against the financial loss that UNICEF suffered … [and] violat[ing] UNICEF Financial Rules by failing to receive authorization from the Comptroller [of UNICEF] to use UNICEF funds to secure SELGUI's loan … result[ing] in a significant financial loss …"

She was advised that her actions constituted serious misconduct; that she could be found personally and financially liable for the loss suffered by UNICEF; and, that she was being placed on suspension with pay. Applicant Y responded to the charges on 15 April, admitting a lapse of managerial responsibility and expressing her remorse. She offered to refund UNICEF US$ 5,000, the amount she calculated as

outstanding as UNICEF had already recovered US$ 50,000 from the bank, and the estimated proceeds from the sale of the equipment and inventory seized from SELGUI were US$ 45,000. In fact, the full amount of US$ 100,000 was eventually recovered by UNICEF.

On 1 June 2004, UNICEF submitted the Applicants' cases to the ad hoc JDC for advice as to the appropriate disciplinary action to be taken and, on 3 September, the JDC submitted two separate reports. With respect to each Applicant, the JDC concluded:

> "The Committee having carefully reviewed the documentation submitted on this case and noting that the staff member did not have criminal intentions and acted in good faith, and that the amount was fully recovered, unanimously concluded that the staff member failed to perform in accordance with the highest standard of efficiency and competence[,] which constitute[s] misconduct as described in … Chapter 15 of the Human Resources Policy and Procedure Manual, paragraph 15.2.3."

With respect to Applicant X, the JDC recommended the disciplinary measure of "[w]ritten censure by the Executive Director with a statement that the staff member's performance be closely monitored to ensure that he has learnt from this experience". With respect to Applicant Y, the JDC recommended the disciplinary measure of "written censure by the Executive Director; and … deferment of eligibility for within-grade increment for two years".

On 27 September 2004, the Executive Director transmitted a copy of his JDC report to Applicant X and informed him as follows:

> "It is my conclusion that you have engaged in serious misconduct. Therefore, I agree with the Committee's unanimous conclusion that you 'failed to perform in accordance with the highest standard of efficiency and competence which constitute misconduct as described in the Chapter 15 of the Human Resources Policy and Procedure Manual, paragraph 15.2.3'.
>
> While I have given careful consideration to the Committee's reasoning, I cannot accept the disciplinary measures as recommended.
>
> In arriving at my decision, I have taken into account all of the circumstances of the case. I have given particular weight to your responsibility and accountability as Operations Officer to protect the financial interests of the Organization by, inter alia, ensuring the proper application of financial rules and regulations, as well as the accuracy of any and all certifications of financial transactions. As a result, it is my conclusion that your actions constitute a serious violation of the highest standards of conduct and integrity expected of all international civil servants. Such misconduct is incompatible with continued service with the Organization.
>
> Therefore pursuant to my discretionary authority as Executive Director to impose appropriate disciplinary measures for misconduct, I have decided that you be separated from service in accordance with staff rule 110.3 (a) (vii) with one (1) month's compensation in lieu of notice with effect from the date of receipt of this letter."

Also on 27 September 2004, the Executive Director transmitted a copy of her JDC report to Applicant Y and informed her as follows:

"It is my conclusion that you have engaged in serious misconduct. Therefore, I agree with the Committee's unanimous conclusion that you 'failed to perform in accordance with the highest standard of efficiency and competence which constitute misconduct as described in the Chapter 15 of the Human Resources Policy and Procedure Manual, paragraph 15.2.3'.

While I have given careful consideration to the Committee's reasoning, I cannot accept the disciplinary measures as recommended.

In arriving at my decision, I have taken into account all of the circumstances of the case. I have given particular weight to your responsibility and accountability as Country Representative to protect the financial interests of the Organization by ensuring that funds are used for appropriate projects, and in a manner compliant with established business processes and financial rules. As a result, it is my conclusion that your actions constitute a serious violation of the highest standards of conduct and integrity expected of all international civil servants. Such misconduct is incompatible with continued service with the Organization.

Therefore pursuant to my discretionary authority as Executive Director to impose appropriate disciplinary measures for misconduct, I have decided that you be separated from service in accordance with staff rule 110.3 (a) (vii) with three (3) months' compensation in lieu of notice with effect from the date of receipt of this letter."

On 24 November 2004, Applicant X filed his above-referenced Application with the Tribunal.

On 28 January 2005, Applicant Y filed her above-referenced Application with the Tribunal.

Whereas Applicant X's principal contentions are:

1. The JDC erred in characterising his actions as misconduct.

2. The disciplinary sanction imposed was disproportionate and unduly harsh and should be rescinded.

3. The decision to suspend him for an extended period of time violated his rights.

4. He should be compensated for the violations of his rights of due process as well as the humiliation and emotional stress he endured.

Whereas the Respondent's principal contentions in the case of Applicant X are:

1. The Secretary-General has broad discretion with regard to disciplinary matters: the decision to separate Applicant X from service for failing to meet the requisite standards of conduct and integrity was a valid exercise of that discretionary authority.

2. Applicant X's misconduct cannot be excused by the alleged absence of intent to achieve a wrongful result.

3. The Executive Director's decision not to follow the recommendation of the JDC but to impose a more severe disciplinary measure on Applicant X was a proper exercise of her discretion.

4. Applicant X's suspension from duty was in accordance with due process.

Whereas Applicant Y's principal contentions are:

1. The case did not warrant disciplinary proceedings, and should not have been referred to the JDC.

2. The Respondent failed to make a distinction between misconduct and serious misconduct.

3. The facts on which the disciplinary measures were based did not legally amount to either misconduct or serious misconduct.

4. The Respondent abused his discretionary powers and imposed a disciplinary measure that was disproportionate to the alleged offence.

Whereas the Respondent's principal contentions in the case of Applicant Y are:

1. The Secretary-General has broad discretion with regard to disciplinary matters, and this includes determination of what constitutes serious misconduct warranting separation from service. The decision to separate Applicant Y from service for failing to meet the requisite standards of conduct and integrity was a valid exercise of that discretionary authority.

2. Applicant Y's misconduct cannot be excused by the alleged absence of intent to achieve a wrongful result or by other mitigating circumstances.

3. The Executive Director's decision not to follow the recommendation of the JDC but to impose a more severe disciplinary measure on Applicant Y was a proper exercise of her discretion.

The Tribunal, having deliberated from 7 to 12 July 2006, in Geneva, on the case of Applicant X, and from 30 October to 22 November, in New York, on both cases, now pronounces the following Judgement:

I. These two Applicants have brought separate proceedings against the Respondent relating to disciplinary measures arising from the same set of events. Their conduct had been the subject matter of an investigation by OIA concerning a sum of money made available to a commercial bank by the UNICEF Country Office in Guinea where the Applicants had served, so as to guarantee a loan advanced by the bank to a Mr. S. and his private company SELGUI. The disciplinary charges subsequently levelled against them were, in the main, similar and overlapping; the disciplinary measures ultimately imposed were broadly the same; and, their respective proceedings raise similar issues so that the Tribunal has decided to consolidate or join both cases and to deal with them in the same Judgement.

II. The disciplinary allegations made against the Applicants arise from a time in late 2000 through 2001 when Applicant X served as Operations Officer and Applicant Y as the Representative in the UNICEF Country Office in Conakry, Guinea. They arise from a venture whereby the sum of US$ 100,000 was made available by the said UNICEF office to a local commercial bank, in order to secure monies advanced by the bank to Mr. S. and his private company SELGUI so that they might provide and distribute iodised salt in Guinea, a project which, had it been successfully implemented, should have resulted in significant health benefits to the people of Guinea and, in particular, to the children of the area. It should

be emphasized from the outset that this project was conceived with the most laudable intentions and the most worthy of motives and it has never been contended that either Applicant participated with any ulterior - let alone criminal - intention or that either sought or expected to make any financial gain or to enjoy any personal benefit from its implementation. That each Applicant played a significant or pivotal role in the advancement and promotion of the project is not an issue in either case. Neither Applicant raises any substantial issue of primary fact so that the basic facts have not proved to be a troublesome issue in either case. The main issues arising are whether the acts or omissions of the parties can be properly found to constitute misconduct or serious misconduct and whether the sanctions or measures ultimately determined by the Respondent's delegate, the Executive Director, were permissible or were so disproportionate as to amount to an abuse of discretion on her part.

III. When the iodised salt venture involving Mr. S and SELGUI was first proposed, it was to be implemented in a somewhat different format to that which was later undertaken. Nonetheless, Applicant X recognized it as a risky venture and advised Applicant Y that the Organization's money would be improperly exposed to risk. In due course, it was agreed that a somewhat modified scheme should be undertaken and that the sum of US$ 100,000 would be lodged by UNICEF as security for money to be advanced by the bank to Mr. S. and SELGUI and this was duly arranged by Applicant X with the knowledge and approval of Applicant Y. The Tribunal should add that whilst the format for implementation had been changed from that which had been originally contemplated, the Tribunal is satisfied that the change in format did not materially alter or reduce the Organization's exposure or the risk that its funds, or part thereof, might be lost. The allegations or charges of misconduct subsequently made against the Applicants after the project had failed and the venture had come to the attention of Applicant Y's successor and to Head Office, were basically that they had behaved in an unauthorized and highly negligent manner in embarking on the scheme and in putting the Organization's funds at improper risk and that the entire venture had been executed without the knowledge or approval of the Comptroller or of Headquarters and in a casual fashion without adequate formal agreements identifying the rights, duties and obligations of the various parties vis-à-vis each other having been put in place. In addition, there were charges levelled against Applicant X that he had, without good cause or reason, proceeded with the project when he had initially identified the unacceptable risk and that he had later engaged in false certification when, in October 2001, he adjusted an entry which had originally been made the previous April so that the sum which had been deposited by the Organization with the bank was made to appear as if it were a programme expenditure of the office rather than accounts receivable to the Private Sector Division. It was not alleged that Applicant Y had been privy to this transaction or in any way involved therein and she had, in fact, by the time this matter was executed, ceased to occupy the position of Representative of the Guinea Country Office and had been transferred on to another post.

IV. Whilst the particulars of what had been alleged against both Applicants have been summarized above, the specific charges were phrased in a different manner and the majority shares the trenchant criticism thereof expressed so eloquently in the dissenting opinion. It had been alleged against Applicant X that he had engaged in grossly negligent conduct with reckless disregard for UNICEF's best financial interests in making the said security available to the bank and in arranging for UNICEF to act as guarantor in respect of the advances made by the bank to SELGUI and Mr. S.; that he had failed to put measures in place to adequately safeguard or to protect UNICEF against the risk of loss; that he had violated UNICEF's financial rules by promoting, or assisting in promoting, the said guarantee scheme; and, that he had made false certification in official records and account documents. When it came to pass that the bank refunded to UNICEF that part of the guarantee which it had originally drawn down against its losses arising from SELGUI's default in the repayment of money which had been advanced, and it became apparent that UNICEF would not ultimately suffer any significant financial loss as a result of the transaction, the charges initially made against Applicant X were amended or modified so that instead of an allegation that he had caused UNICEF to suffer financial loss it was alleged that he had acted in violation of the standards of conduct required of an international civil servant.

As to the charge that Applicant X violated UNICEF's financial rules, the Tribunal observes that this allegation might have been more appropriately phrased had it been alleged that he had acted outside the scope of acceptable financial parameters or practices or that he had acted with serious financial imprudence for, since the framers of the UNICEF financial rules had apparently never even contemplated that the Organization might engage in such an unusual financial adventure, no rules had been made to deal with such an eventuality. To put it briefly, UNICEF funds should be directed to programmes and operations for the benefit of women and children. Whilst UNICEF cooperates with private entities in order to promote and enhance its activities (in the words of the Investigation Report, private sector involvement was "consistent with the wider [West and Central Africa Region] strategy"), such cooperation should not extend to UNICEF acting as a lender or guarantor of third-party debts for to do so would expose the Organization to serious financial liabilities and risks which would be outside the established business processes of the Organization. However, since the Tribunal is satisfied that the thrust of the allegation must have been well understood by all, it is therefore satisfied that no injustice, confusion or disadvantage arose from the wording so that no point of substance arises from the manner in which this charge was phrased.

The concept of *misconduct* as understood by UNICEF and as set out in the Human Resources Manual on Policy and Procedures is flexible and wide. It provides that actions constituting unsatisfactory performance might, in egregious cases, constitute misconduct and provides that mismanagement, which includes, for example, "any unreasonable failure of a staff member to perform efficiently, competently and with the best interests of the organization in mind, all tasks, duties and management responsibilities in connection with UNICEF programmes and its related operations, contracts and resources", might be encompassed thereby.

The charges of misconduct levelled against Applicant Y broadly followed the pattern of the allegations which had been made against Applicant X, alleging that she engaged in egregious mismanagement and/or grossly negligent conduct in

(a) authorizing the guarantee although aware that the bank had negatively assessed the project;

(b) proceeding with the project without putting proper safeguards and agreements in place; and,

(c) violating the financial rules by failing to notify and obtain approval from the Comptroller.

It was alleged that by these activities, Applicant Y violated the highest standards of integrity expected of an international civil servant as set forth in the Charter and in staff regulation 1.2 (b), and she was thereby charged with serious misconduct.

V. In the case of Applicant X, the JDC concluded that he had been guilty of misconduct *simpliciter* and, having identified matters it considered as mitigating circumstances, recommended that he be disciplined by way of a written censure and that his performance be monitored to ensure that he had learned from his experience. In the case of Applicant Y, the JDC concluded that she had failed to perform in accordance with the highest standards of efficiency and competence and that she, likewise, was guilty of misconduct and recommended that she be subjected to a written censure and deferment of within-grade increments for two years.

On consideration of the JDC reports and recommendations, the Executive Director re-categorized or re-characterized the Applicants' activities, determining that each was guilty of serious misconduct. In the case of Applicant X, she determined that he should be separated from service in accordance with staff rule 110. 3 (a) (vii) with one month's compensation in lieu of notice and, in the case of Applicant Y, that she be likewise separated from service under the said staff rule with three months' compensation in lieu of notice.

These proceedings are by way of Applications for review against the said decisions of the Executive Director of UNICEF. In each case, the principal thrust rests on submissions that her conclusions were unsustainable in light of the evidence and, in particular, having regard to the absence of criminal or wrongful intent or ulterior motive on the part of either Applicant; that the complaints alleged against the Applicants were, at worst, matters suitable for administrative action appropriate to performance issues rather than to allegations of misconduct let alone serious misconduct; and, that the ultimate sanction of separation determined by the Executive Director was so excessive and disproportionate as to amount to an abuse of discretion.

VI. As the Tribunal held in Judgement No. 1244 (2005), it "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". This discretion is not without limit, however. In Judgement No. 941, *Kiwanuka* (1999), the Tribunal held that:

> "In reviewing this kind of quasi-judicial decision and in keeping with the relevant general principles of law, in disciplinary cases 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. This listing is not intended to be exhaustive."

VII. In the opinion of the Tribunal, the JDC was well justified in concluding that each particular Applicant had been guilty of misconduct. What had been found against each Applicant was a series of grossly negligent decisions and, in the opinion of the Tribunal, the evidence to support such findings was compelling. In the view of the Tribunal, Applicant X has not advanced sound reason as to why he determined to proceed with the venture when he had initially recognized that such a scheme, albeit with a somewhat different format for implementation, had been unwarranted and would have placed the funds of UNICEF at unjustifiable risk. In the view of the Tribunal, he never made a satisfactory explanation or established a sufficient change of circumstances which would have justified a change from the advice originally tendered. Whilst it is true that the bank erroneously claimed to have obtained some security from Mr. S. and/or from SELGUI, it had nonetheless maintained its position that it would not proceed with loans to finance the operation without the lodgement of US$ 100,000 from UNICEF as security for the loan. Applicant X, although he occupied a position of financial responsibility, decided to go ahead with the project in an extremely casual way. He did not seek to make independent investigations on the solvency or financial reliability of SELGUI or of Mr. S. He did not check as to what agreement, if any, they had with the Bank. He did not check as to the nature of the security allegedly made available to the bank or as to its accessibility in the event that the loan was not repaid. He did not put in place any proper agreements defining the rights and obligations of the respective parties' vis-à-vis each other. He did not inform or seek approval from either Headquarters or the Comptroller. These matters were, in the opinion of the Tribunal, fundamental precautions or safeguards which would and should have been recognized by any prudent or diligent Operations Officer, independent of any financial rules, and, in the opinion of the Tribunal, the Executive Director was entitled to conclude that they constituted serious misconduct, notwithstanding the conclusions which had been reached by the JDC in his case. In addition, perhaps the most serious of all of his actions took place in October 2001, when he altered the April entry to make the payment of US$ 100,000 appear as programme expenditure rather than accounts receivable. In the opinion of the Tribunal, the only logical explanation for this alteration was to obfuscate or wipe over the traces of what had actually occurred and to remove the transaction from the sphere of ongoing monitoring which would have been

expected were the records to have remained unaltered, as there would have been tracking to see when the money was restored to the UNICEF accounts.

VIII. The Tribunal takes a broadly similar view as to the conduct found to have been engaged in by Applicant Y. Whilst her position was, in a sense, vicarious, having managerial responsibility for the actions engaged in when she was the Representative, she was nonetheless actually involved in the decision-making process in a crucial way. In the view of the Tribunal, she must take personal as well as vicarious responsibility for having approved the implementation of the guarantee, when she knew that the bank would not advance money without a UNICEF guarantee because of the risks involved; for doing so without ensuring that any appropriate agreements were in place as between the parties which might have safeguarded the position of UNICEF or at least reduced its risks; and, for having authorized the project without seeking approval from the Comptroller or Headquarters. In the view of the Tribunal, any prudent or diligent Representative would have seen these steps as fundamental, notwithstanding what might be contained in the UNICEF financial rules.

IX. The Tribunal now comes to the troublesome issue as to whether the disciplinary measures adopted by the Executive Director in relation to the Applicants were so disproportionate as to amount to an abuse of discretion. The measures adopted were undoubtedly severe and, in the view of the Tribunal, were harsh, particularly when one views them in the light that both Applicants acted with the most worthy and laudable of intentions without expectation or prospect of gaining any personal benefit. Be that as it may, the question for decision is not to ask what sanction or punishment the Tribunal might have considered fair and appropriate, but whether the sanction as determined by the Executive Director was a lawful and permissible exercise of the undoubtedly wide discretion entrusted to her in such matters or was so disproportionate or unfair as to have amounted to an abuse of her power or an abuse of her discretion. In that regard, the Executive Director was entitled to consider the degree of irresponsibility or recklessness demonstrated by the acts and omissions of both parties and the extent of their departure from common safeguards or practices which UNICEF was entitled to expect by reason of the fact that each Applicant occupied a post with particular financial responsibility.

The Tribunal has carefully considered the said issue and, whilst it does consider that the sanction imposed against each Applicant was harsh in all of the circumstances, it cannot find that it amounted to an abuse of discretion. Whilst in the vast majority of cases coming to the Tribunal where serious misconduct has been found to have occurred and the staff member has been separated from service, the staff member was found to have engaged in dishonest activity or activity designed to advance his or her situation or financial position, the absence of such a motive does not automatically remove a case from the realm of serious misconduct. One must also consider matters such as the degree of departure from the norm; whether it was a one-off decision or a course of conduct; and, of course, the potential such conduct may have had on the welfare or wealth of the employer organization. On a consideration of these matters, the

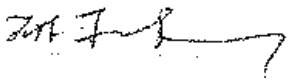
Tribunal is satisfied that the conduct of the Applicants was reasonably characterized as serious misconduct and that the sanctions imposed upon them did not amount to abuse of discretion or abuse of power.

X. Finally, Applicant Y raises claims that her rights of due process were violated by the JDC's decision not to grant her request for an oral hearing, which decision favoured the position of the Respondent that her plea be rejected. These contentions cannot be sustained. The decision on whether or not to conduct oral proceedings falls within the discretion of the JDC. It was neither inappropriate nor impermissible for the Administration to express its view on the Applicant's request and the Tribunal is not persuaded that the Administration's position improperly influenced the JDC or that its discretion was otherwise vitiated with respect to this issue.

XI. In view of the foregoing, the Applicants' claims are rejected.

(*Signatures*)

Kevin **Haugh**
Member



Goh Joon Seng
Member

New York, 22 November 2006

Maritza **Struyvenberg**
Executive Secretary

DISSENTING OPINION BY MR. DAYENDRA SENA WIJEWARDANE

I. It is with regret, and after a great deal of consideration, that I must disagree with my colleagues and dissent from the majority opinion.

II. The role of the Tribunal in disciplinary matters, and the responsibility it bears in evaluating the accuracy and appropriateness of findings of fact and law as well as the proportionality of the sanction

imposed, are well-established in its jurisprudence. In *Kiwanuka*, *ibid.*, the Tribunal traced the evolution of its judicial oversight of such cases in the following terms:

> "As early as 1953 (Judgement No. 29, *Gordon*) the issue of disciplinary measures engaged the attention of the Tribunal. The jurisprudence on the subject has developed considerably since then. The Tribunal has made a variety of general statements. Many of these have been determined by the issues arising in the case before the Tribunal. For example, in Judgement No. 583, *Djimbaye*, paragraph VI (1992), it was said that '... in disciplinary matters the Secretary-General has a broad power of discretion. Its exercise can only be questioned if due process has not been followed or if it is tainted by prejudice or bias or other extraneous factors.' (Cf. Judgements No. 351, *Herrera*, para. VII (1985); No. 529, *Dey*, para. V (1991); No. 582, *Neuman*, para. III (1992); and No. 584, *Adongo*, para. I (1992)). 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, e.g. in cases of failure to accord due process to the affected staff member before reaching a decision.' (Judgements No. 300, *Sheye*, para. IX (1982); and No. 210, *Reid*, para. III (1976)).
>
> In Judgement No. 479, *Caine*, paragraph III (1990), the Tribunal clarified and expanded this somewhat. The Tribunal will intervene when the administrative action is 'vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake of fact.' (Cf. Judgement No. 641, *Farid*, para. IV (1994))."

Kiwanuka proceeded to encapsulate the position of the Tribunal by setting out the test it applies to impugned disciplinary decisions, as also cited by the majority:

> "In reviewing this kind of quasi-judicial decision and in keeping with the relevant general principles of law, in disciplinary cases 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. This listing is not intended to be exhaustive."

Since then, the Tribunal has consistently relied upon these principles in disciplinary cases.

III. It is my view that the decisions taken in the instant cases cannot survive the scrutiny of the *Kiwanuka* test, on two essential grounds: I do not consider the established facts to legally amount to serious misconduct; and, I find the sanction imposed to be disproportionate. I will address these matters in sequence in the remainder of this dissenting opinion.

Ultimately, it matters little whether this conclusion is formulated in terms of abuse of discretion or disproportionate response, or both. The well-established and guiding principle is that the Tribunal will not lightly interfere with the exercise of managerial discretion nor will it substitute its judgement for that of the Administration. This cardinal principle is unaffected by a conclusion in any case that the Respondent's

response was disproportionate. The jurisprudence is clear: where the characterization is wrong in law because it is unreasonable or disproportionate in all of the circumstances, or is tainted by extraneous considerations or prejudice, the Tribunal can and should interfere to correct it. Where it is not, the Tribunal does not enter into a detailed examination of nuances or shades of opinion with regard to reasonableness or proportionality. (See Judgement No. 785, *White* (1996).)

As can happen, and is, in fact, highlighted by the cases under consideration, it is sometimes significant that the JDC pitches the appropriate disciplinary response at a very different level to the final decision ultimately appealed to the Tribunal. This disparity brings to the fore the question of proportionality. On the same set of facts, the JDC found misconduct and the Respondent found serious misconduct based on a reckless disregard for the interests of UNICEF. It is not just an issue of discretion; both characterizations cannot be correct. In the absence of improper motive, the failure must be of such a nature that it must be possible to say of the conduct of the Applicants that they simply did not care whether the funds of UNICEF were lost or not. It must, in my view, be established that the Applicants could not care what happened to UNICEF funds. An examination of the facts, in my opinion, does not measure up to such a charge.

IV. Insofar as the finding of the Executive Director that each Applicant was guilty of serious misconduct is concerned, I cannot accept that characterization. As the majority states, there is no suggestion that either Applicant had a financial interest or other improper motive in their support of this project; whilst it is clear that motive by itself is not a conclusive factor, it is an appropriate starting point to examine the several errors of judgement and independent decisions that were made. It appears that the project was entirely in keeping with the laudable goals of UNICEF in the region and one which would have responded to an urgent medical concern affecting children. The fault of the Applicants, then, lies in failing to safeguard the financial interests of UNICEF through a series of decisions which, individually, were procedural shortcomings.

In view of the majority opinion, I do not feel it necessary to go in detail into the several failures on the part of the Applicants in the management of the project, which the report produced by OIA described as “seriously deficient”. The provision of a financial guarantee, albeit an unorthodox transaction for UNICEF, was not prohibited by its internal financial rules and, had the support of the Comptroller been sought, technically could have been authorized by him. Undoubtedly, the Applicants would have better served UNICEF - and themselves - if, instead of taking the initiative and responsibility at the country level, they had sought recourse to the guidance of the Comptroller and Headquarters. As it turned out, the guarantee was not supported by proper security arrangements but, at the time, the Applicants appear to have been lulled into a belief that the security had been provided because of statements made by the bank that ownership documents for a house and warehouse equipment had been forthcoming. Clearly, the Applicants should have made better inquiries and their failure to do so calls their judgement and competence into question.

Equally, they failed to secure an agreement setting out the rights and obligations of all parties. Whilst this illustrates their own shortcomings, it also illustrates the weaknesses in the UNICEF corporate structure which clearly lacked the checks and balances which could have provided guidance on relevant procedures at an early stage. As it was, the system was sufficiently weak that only once there was real cause for concern that UNICEF funds would be lost did Headquarters take an interest in the project. In my opinion, had adequate controls been in place, a project such as this one - involving a relatively large sum of money - would have been flagged from the beginning.

There were also accounting irregularities which the Audit Report describes as not being "the most correct approach". I note here that the majority's conclusion that one of these accounting irregularities amounted to false certification is not borne out by the findings of the auditors and is not, in my opinion, correct under the circumstances. In any event, serious as the Applicants' shortcomings were, they do not, in my view, add up to a "reckless disregard" for the interests of UNICEF or "serious misconduct" as they were later to be categorized.

In these cases, the JDC was not really required to investigate facts, as there seems to be little dispute there, but rather was required to characterize the actions of the Applicants and to recommend the appropriate disciplinary sanction, if any. In Judgement No. 1123, *Alok* (2003), the Tribunal noted that

> "[t]he concept of poor performance is quite different from misconduct. The very essence of misconduct is conduct that is either wilful or reckless or irresponsible and which deserves punishment, rather than conduct arising from innate inefficiency or incapacity. (See Judgement No. 926, *Al Ansari* (1999).)"

In the instant cases, however, in view of the nature of the transaction and the series of inadequate or erroneous actions by each Applicant, I believe that the JDC was correct to label their behaviour as "misconduct", pursuant to paragraph 15.2.3 of Chapter 15 of the Human Resources Manual on Policy and Procedures:

> "Actions that constitute unsatisfactory performance may, in egregious cases, constitute misconduct as described below.
>
> a) mismanagement, which includes, for example,
>
> i) any unreasonable failure of a staff member to perform efficiently, competently, and with the best interest of the organization in mind, all assigned tasks, duties and management responsibilities in connection with UNICEF programmes and its related operations, contracts and resources."

It is my view that the unacceptable risk to which UNICEF was exposed, aggravated by the procedural shortcomings of the transactions, was the catalyst for the Applicants' actions to be considered sufficiently "egregious" as to move from the realm of poor performance to misconduct.

That said, the Executive Director erred in characterizing the Applicants' actions as *serious* misconduct, a quantum leap from the findings of the JDC. As explained in *Kiwanuka*, "the Tribunal judges

whether the characterization of misconduct or serious misconduct is, in its opinion, appropriate, which is a matter of law". The provisions of paragraph 15.2.3 refer to misconduct, and not serious misconduct, and I do not consider that a series of counts of misconduct automatically adds up to serious misconduct. Rather, I consider that the term "serious misconduct" amounts to a term of art. Whilst, understandably, the Staff Regulations and Rules do not provide an exhaustive classification of actions, "staff regulation 10.2 … distinguishes between unsatisfactory conduct and serious misconduct". (Judgement No. 1011, *Iddi* (2001).) For example, staff regulation 10.2 provides that "sexual exploitation and sexual abuse constitute serious misconduct". It is clear, then, that there are acts which automatically amount to serious misconduct and that those acts are extremely serious indeed; to my mind, they would normally involve some element of moral turpitude.

Staff regulation 10.2 also provides that "[t]he Secretary-General may summarily dismiss a member of the staff for serious misconduct". Summary dismissal is the most severe disciplinary measure provided for under staff rule 110.3; written censure, the sanction recommended by the JDC, is the least severe. In finding that the Applicants' conduct amounted to serious misconduct, then, the Executive Director characterized it as conduct which would have been eligible for summary dismissal.

In Judgement No. 1244, *ibid.*, the Tribunal found that "the Respondent's characterization of the Applicant's conduct as misconduct, and in particular, serious misconduct [was] legally incorrect and constitute[d] an abuse of the Respondent's discretion". It took particular note of the fact that the Respondent had radically departed from the findings of fact and characterizations of the JDC, which it referred to as "especially perplexing, given the rather specialized nature of this JDC" (which was established to consider tax cases). The Tribunal then proceeded to find that the sanction imposed upon the Applicant in that case was disproportionate.

In the instant cases, the Tribunal is again faced with a situation where the findings and recommendations of the JDC are significantly more lenient than the ultimate decisions of the Executive Director. As an advisory body, which issues recommendations and not binding opinions, it is clear that the findings and recommendations of the JDC do not bind the Respondent. In *Kiwanuka*, the Tribunal emphasized "that the recommendations and conclusions of the JDC are advisory and need not be accepted by the Administration [as the] Respondent has the discretion to reach a different conclusion after consideration of all the facts and circumstances of the case". Nonetheless, I am troubled by the way in which the JDC's findings were disregarded, and the more serious characterization and sanction imposed, without a reasoned and substantive explanation for such departure. Both the OIA investigation and the JDC proceeded on the basis that the Applicants had acted with imprudence and/or negligence, and had failed to take appropriate steps to safeguard UNICEF's interests. Neither body proceeded on the basis that the Applicants had acted with reckless disregard or wanton indifference to the wellbeing of UNICEF *or* characterised their decision-making as serious misconduct. Except for the final decision of the Executive Director, the only other documents in the file which attempt such classifications are the initial charge sheets which, in my opinion, were totally defective, being verbose, confusing, repetitive, liberally sprinkled with

adjectival material and, frankly, hysterical. I believe they led to the Executive Director's inappropriate and disproportionate response.

V. With respect to the proportionality of the sanction imposed, the jurisprudence of the Tribunal is clear: "where the sanction is found to be disproportionate, the sanction can be vitiated". (Judgement No. 1274 (2005). See also Judgements No. 1090, *Berg* (2002); No. 1151, *Galindo* (2003); and, No. 1167, *Olenja* (2004).) In the circumstances of these cases of staff members with noble goals and no criminal intent, whose misconduct arose from shortcomings in their performance and not from any deliberately fraudulent activity or *mens rea* to commit harm, I cannot but find that the sanction of separation from service was disproportionate and thus vitiated the discretion of the Executive Director.

Moreover, a review of the jurisprudence of the Tribunal in UNICEF cases over several years makes it clear that termination for misconduct or serious misconduct is almost exclusively imposed upon staff members who have committed - or attempted to commit - fraud, rather than for matters of poor performance which amounted to misconduct. I refer, for example, to Judgements No. 1004, *Capote* (2001); No. 1036, *Quddus* (2001); No. 1061, *Ahsan* (2002); No. 1071, *Madueno-Ucar* (2002); No. 1103, *Dilleyta* (2003); No. 1143, *Said* (2003); and, No. 1146, *Fernandez* (2003), each of which involved allegations of personal gain on the part of the staff member.

Thus, I conclude that the decision of the Executive Director to separate the Applicants from service with compensation in lieu of notice was unwarranted and disproportionate under the circumstances of the cases.

VI. For the reasons set out above, I would have rescinded the decision of the Executive Director in each of the Applicants' cases. In view of the fact that this is a dissent and not the Judgement of the Tribunal, however, I am not required to make any further comment on what I consider would have been the appropriate outcome.

(*Signatures*)

Dayendra Sena **Wijewardane**
Vice-President

New York, 22 November 2006

Maritza **Struyvenberg**
Executive Secretary