



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1391

Case No. 1456

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Dayendra Sena Wijewardane, Vice-President, presiding; Ms. Brigitte Stern; Sir  
Bob Hepple;

Whereas on 23 December 2005, a former staff member of the Economic Commission for Latin  
America and the Caribbean (ECLAC), filed an Application requesting the Tribunal, inter alia:

“[To find that]

- a. The disciplinary measure recommended by the Joint Disciplinary Committee [(JDC)] ... is not proportiona[te] to the misconduct committed, as the fraud on [the] part of the [Applicant] has not been established and it does not preserve the princip[le] of equal treatment of United Nations staff.
- b. The disciplinary procedures in this case are in violation of [administrative instructions ST/AI/371 [of 2 August 1991 on ‘Revised Disciplinary Measures and Procedures’] and ... ST/AI/292 [of 15 July 1982 on ‘Filing Adverse Material in Personnel Records’].]

... [and] to recommend to the Secretary-General the following remedial action:

- a. Reinstatement of ... the [Applicant].
- b. Application of a less serious disciplinary measure, proportionate to the fault committed ...

- c. Recommend accountability measures against officers responsible for violation of rules and failure to comply with provisions in administrative instructions and for not keeping staff abreast on rights and obligations ...”

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 13 June 2006, and once thereafter until 13 July;

Whereas the Respondent filed his Answer on 13 July 2006;

Whereas the Applicant filed Written Observations on 21 September 2006;

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

***“Employment history***

... [The Applicant] joined ... ECLAC in Santiago, Chile, on 22 August 1988 under a short term contract as Bilingual Typist at the GS-4 level. [At the time of the events that gave rise to the present Application, the Applicant was serving as a Secretary at the GS-5 level in the Electronic Information Services Section. She] separated from service on 1 February 2005. ...

***Background***

... In March 2003, [the Applicant] applied for a [special education grant (SEG)] advance for a total amount of 2,640,000 [Chilean pesos (CLP)] (3,616.00 USD) ... established in reference to a report from [her son’s] special education teacher ... (the specialist) ... for a 10-month period], from March to December ... The application was accepted by the Human Resources Section of ECLAC; an advance for the whole amount was issued ... on 26 April ...

... At the end of the year 2003 and before filing the special education grant claim for 2003, [the Applicant] approached [the] Finance Assistant, ECLAC, in charge of preparing education grant claims, and enquired as to whether ECLAC would accept photocopies of invoices in lieu of lost originals. [The Finance Assistant] replied that on an exceptional basis, [the] Financial Services Section was willing to accept some photocopies provided that the claim was mostly substantiated by original invoices.

... On 30 December 2003, [the Applicant] submitted a fully signed 2003 SEG claim to the Human Resources Section, ECLAC. Her claim consisted of 10 invoices under the name of the specialist for the amount of CLP 264,000 each. According to ECLAC ..., four invoices out of ten were submitted in the form of photocopies.

... At the end of January 2004, while the 2003 claim was being processed by ECLAC, [the Applicant requested] ... a 2004 SEG advance for her son ... for an amount of CLP 2,700,000 (4,756.00 USD). She indicated as [a] reason [for this] that the specialist insisted [on] the full amount up front in order to guarantee the attention to her son. The 2004 advance was issued on 4 February ...

... In May 2004, ... [it was] noticed that the invoice numbers and the dates of two of the four photocopied invoices submitted by the [Applicant] seemed to have been manually altered. The two photocopied invoices otherwise resembled in all other respects two other invoices also submitted within the same claim. In detail, the invoice number 000006 resembled the original invoice 000008 and the invoice number 000018 resembled the invoice 000017.

... On 10 May 2004, [the Applicant] was requested by [the] Chief, Financial Services Section of ECLAC ... to submit the originals for the invoices initially filed as photocopies. She was also given the option of submitting the copies retained by the specialist.

... [During a meeting, held on] 18 May 2004, ... [the Applicant] admitted that she committed an error in submitting the false photocopied invoices 000006 and 000018. She specifically admitted that these invoices were not *bona fide* and had been created by her. ... The meeting was documented through a confidential interoffice memorandum dated 21 May 2004 ... whereby [the Applicant] was also requested to confirm and submit further evidence. ...

... In her reply dated 27 May 2004 ..., [the Applicant] ... admit[ted] ... submitting the non *bona fide* invoices 000006 and 000018. [The Applicant] reiterated that she had spent the 2003 advance of CLP 2,640,000 in its entirety and that the treatment was completed in February 2004. [The Applicant] put forward as reason for her false claim her misunderstanding that she had to submit claims for services rendered within the prescribed period of March to December 2003...

... On 3 June 2004 ... [t]he specialist confirmed [to ECLAC] that she had not issued the invoices 000006 and 000018, that all payments had been made in cash and that the 2003 treatment had continued until February 2004, though January and February are summer vacation months in Chile. She also confirmed the authenticity of invoices 000005, 000019 and 00002. ... As to the status of the 2004 treatment, she confirmed that it was temporarily discontinued as of March ... Contrary to the assertion of [the Applicant], [the specialist] admitted that for 2004, even though the treatment had not begun, she received an advance payment equivalent of three months of treatment and only at the insistence of [the Applicant] to ensure her continued services. No invoice had been issued yet for such amount.

... The preliminary investigation report undertaken by ECLAC concluded that there was undisputed evidence and admission from [the Applicant] that she had intentionally created and submitted non *bona fide* invoices in order to justify and substantiate her 2003 SEG claim provided to her for the needs of her son ... Her submission of non *bona fide* invoices was in direct contradiction with her certification on form P.45 (7.99)-E, ...

... It was noted in the report that [the Applicant] had expressed ... confusion on filing claims for the first time during the meeting of 18 May 2004[, but that she] did not approach the Human Resources Section or the Finance Section of ECLAC to dispel doubts or request further information on how claims should be submitted.

...

... By memorandum dated 21 July 2004, [the Office of Human Resources Management (OHRM), presented the Applicant with] allegations of misconduct. ...

... [The Applicant] replied to [OHRM's memorandum on 20 August 2004 ...

... By letter dated 25 January 2005, [OHRM] informed the [Applicant] of the Secretary-General's decision to summarily dismiss her for serious misconduct. [The Applicant] received the said letter on 1 February 2005.

...”

On 27 March 2005, the Applicant requested the JDC to review of the decision of the Secretary-General. The JDC adopted its report on 20 September 2005. Its considerations, conclusions and recommendation read, in part, as follows:

***“Considerations***

...

25. The Panel noted that [the Applicant] disputed the interpretation of the facts which led to the summary dismissal. [The Applicant] insisted that all the money she had received had been used to pay for the services included in the SEG claims and that she did not deviate any money from its due destination. [The Applicant] however did not dispute the fact that she had knowingly submitted forged invoices together with her 2003 SEG claim and that she had signed the form confirming that the information provided by her on the form and the attached documentation were true and complete to the best of her knowledge and belief. The Panel noted that the behavior of [the Applicant] contravened staff regulation 1.2 (b) ...

...

33. Finally, the Panel considered the allegation made by the [Applicant] that ECLAC Administration failed to comply with the provisions set forth in ... ST/AI/292 ... Regarding this issue, the Panel found [the Applicant]’s claim [was] without merit as [she] failed to identify and specify which document or documents constituted the alleged adverse material filed in her personnel records. Furthermore, the Panel noted that the last time the [Applicant] reviewed her personnel file was 9 March 2001.

***Conclusion and recommendation***

34. In light of the foregoing, the Panel *unanimously concluded* that the actions of [the Applicant] constituted misconduct under the Staff Regulations and Rules, actions which should be penalized. The Panel *also concluded* that the Administration observed the established procedure and the due process rights of [the Applicant] were adhered to.

35. However, the Panel ... *also unanimously believed* that the disciplinary measure of summary dismissal, with the loss of the benefits to which the [Applicant] was entitled by virtue of her years of service, was not proportional to the misconduct committed.

36. In light of the foregoing, the Panel *unanimously agreed to recommend* to the Secretary-General that separation of service with entitlements would be a fair and proportionate sanction in this case.”

On 2 November 2005, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her as follows:

“The Secretary-General ... is unable to agree with the JDC that the sanction of summary dismissal was disproportionate. ... Summary dismissal for serious misconduct is appropriate in those cases where the misconduct is patent and obviously incompatible with continued service. Your misconduct was determined to be serious not only because it entailed the falsification of invoices and the submission of a fraudulent claim, but also because it was a deliberate scheme which required careful forethought and planning. The Secretary-General therefore considers that the sanction of summary dismissal is fully in keeping with and proportionate to the gravity of your misconduct. ...

The Secretary-General has thus decided not to accept the JDC’s recommendations to change the sanction for your misconduct from summary dismissal to separation from service with entitlements.”

On 23 December 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The penalty imposed was disproportionate to the offence.
2. The Respondent failed to comply with the provisions of administrative instructions ST/AI/ 371 and ST/AI/292.
3. She was unfairly treated.

Whereas the Respondent's principal contentions are:

1. The Applicant failed to meet the standards of conduct required of staff members as international civil servants, and her actions constituted serious misconduct.
2. The decision of the Secretary-General to separate the Applicant was a necessary and valid exercise of his discretion.
3. The Applicant's due process rights were fully respected.
4. The decision to separate the Applicant was not vitiated by bias, improper motive, or other extraneous factors.
5. The penalty imposed on the Applicant was fair and not disproportionate to the offence she committed.

The Tribunal, having deliberated from 26 June to 25 July 2008, now pronounces the following Judgement:

I. The Applicant was a GS-5 level Secretary in the Electronic and Information Services Section in ECLAC, Santiago, when she was summarily dismissed on 1 February 2005, after "sixteen years of unblemished service". There is no doubt concerning the events leading to her dismissal, in particular that she falsified two invoices and fell short of the standards required of her as a staff member. But, it is important to delve into the details of exactly what she did - whether or not she truly attempted to fraudulently obtain funds from the Organization for her personal gain - in order to conclude whether the sanction of summary dismissal was proportionate under the circumstances.

II. The material facts are not in doubt. The Applicant had a child with a disability requiring special training. She had been in receipt of an SEG since 1999, which rolled over from year to year but was based on her actually incurring the special education expenses within a specific time frame. It was an entitlement which commenced from the date on which such special teaching or training was required and was expected to continue until the child was awarded the first recognized post-secondary degree or up to the end of the academic year in which the child reached the age of 28, whichever was earlier. Of course, each year a claimant is required to justify the request for reimbursement of expenses. The SEG is in a sense related to

the normal education grant which follows the academic year but is not strictly linked to the latter in that, if a child does not attend a school, it is computed on the basis of the calendar year. It pertains also to teaching and training which can be given at home and outside of school. In Chile, the academic year runs from March through December.

III. In March 2003, the Applicant had obtained an advance for the purpose of giving her child necessary special education training for the period March through December 2003. The commencement of the therapy was delayed that year due to a necessary evaluation of the child and was also interrupted in December for various personal reasons, including a family relocation under rather stressful circumstances. The result was that the therapy in fact slipped into a part of the summer holidays in Chile, i.e. January and February 2004. However, given her understanding of the time requirements of the grant, the Applicant lodged a claim for reimbursement on 30 December 2003, producing ten invoices purporting to show that all of her expenses were in fact incurred during the period March through December 2003. In order to do this, she falsified two invoices by photocopying two of the very same invoices she was submitting with her claim and manually altering the dates to give the impression that the payments had been made in 2003 when, in fact, the expenses would be, and ultimately were, incurred in early 2004.

IV. There is no doubt, therefore, that the Applicant ultimately incurred the expenses in question. Indeed, the total payments she made up to and including February 2004 were nominally more than the advanced amount. There is also no doubt that the Applicant foolishly and improperly sought to attribute the expenses incurred in early 2004 to the March through December 2003 period. Clearly, what the Applicant should have done was to approach the Administration with the true story of the difficulties she had had in completing the course of therapy in the 2003 calendar year, reimburse the remaining portion of the 2003 advance, and request authorization to obtain an advance of the 2004 grant on an exceptional basis. There was flexibility in the system which may well have been exercised in her favour had she been open and correct about her actions in 2003. Indeed, she could have asked for clarification in the application of the rules to her particular situation and there is an indication in the record that she could have claimed the expenses at least in 2004. Instead, the Applicant chose to provide two falsified invoices.

V. The Applicant's action was discovered in May 2004 when her 2003 claim was finally being processed, and she was confronted with the perceived irregularities. She immediately admitted tampering with the invoices but by that time she had incurred the expenses and readily provided details including access to the specialist, with whom representatives of the Administration met without the Applicant being present. On 25 January 2005, the Secretary-General decided to summarily dismiss the Applicant for serious misconduct under staff regulation 10.2. On 27 March, the Applicant requested review of this summary dismissal by the JDC, under staff rule 110.4 (c). The JDC characterized the Applicant's actions as "misconduct". Finding other examples of similar misconduct which had resulted in disciplinary

measures less severe than summary dismissal, the JDC applied the principle of equal treatment of staff members and unanimously concluded that summary dismissal constituted a disproportionate sanction for the Applicant's actions.

VI. Although the Tribunal agrees with the JDC that summary dismissal is inappropriate in this case, it reaches this conclusion differently. In particular, the Tribunal notes that the JDC avoided entering into an analysis of the Applicant's conduct with the care and precision that the case justified. The JDC first noted that the staff member "insisted that all the money she had received had been used to pay for the services included in the SEG claims and that she did not deviate any money from its due destination". But, rather than analyzing this issue in detail, it focused on the fact that the Applicant had "knowingly submitted forged invoices". Accordingly, the JDC did not come to a clear finding as to whether the Applicant had an intent to defraud the Organization for her personal gain. As to this critical issue, the Tribunal believes the answer must be in the negative. The Applicant has repeatedly stated that she believed she was surmounting a simple logistical hurdle in order to receive money to which she had a legitimate claim. In light of the available evidence, the Tribunal is satisfied that there was no intent on the Applicant's part to defraud for her personal gain and that the summary dismissal was disproportionate. In this respect, the Tribunal agrees with the conclusion of the JDC, even if for different reasons. Indeed, taking into account the JDC's final conclusion, the Tribunal reads the JDC report itself as proceeding on the basis that there was no fraudulent intent. Otherwise, in the Tribunal's view, the JDC could not have made the recommendation that it did.

VII. The present case closely resembles Judgement No. 1244 (2005), where the JDC found a staff member had been negligent and had failed to exercise due care, but did not go so far as to find an intent to defraud. The Respondent decided, nevertheless, that the staff member had intended to defraud the Organization, and demoted the staff member without possibility of promotion for an unlimited time. When the issue of proportionality was raised before the Tribunal, it emphasized that in determining whether a staff member was guilty of fraud, "a determination of intent must be made". The Tribunal therefore concluded that because

"the fact of intent, as found by the Respondent, is not reasonably justified or supported by the evidence, ... the Respondent's characterization of the Applicant's conduct as misconduct, and in particular, serious misconduct is legally incorrect and constitutes an abuse of the Respondent's discretion".(para. V)

This same situation presents itself in the instant case. The Tribunal also recalls its Judgement No. 1175, *Ikegame* (2004), concerning a D-1 level staff member who falsified a cheque in connection with a claim for rental subsidy. In that case, the JDC concluded that the Administration had failed to substantiate its charge of rental subsidy fraud, but had substantiated the second charge of falsification of documents. Based on the JDC's finding of falsification of documents and lacking any finding of fraud, the Secretary-General

considered the appropriate disciplinary measure to be a demotion by two grades, a decision which was subsequently upheld by the Tribunal. (See also the dissenting opinion to Judgement No. 1310 (2006).)

VIII. Whilst not condoning in any way the actions of the Applicant, the Tribunal agrees with the conclusion arrived at by the JDC. Under the circumstances, it is appropriate for the Administration to have recognized that the element of culpability involved was significantly lower than in those cases where a staff member steals or fraudulently obtains funds of the Organization to which the staff member has no semblance of a claim, thereby acting with clear intent to obtain funds from the Organization for personal gain. The Applicant processed a claim which she would be ultimately entitled to make, but she did so in an improper manner. Instead of entering into a dialogue with the Administration as to the correct way to handle her claim, she took unilateral and improper action, but she had no intent to obtain funds of the Organization to which she was not entitled. Moreover, the expenditure had been fully incurred at least by the time her claim was finally processed and there is no question that the monies had become claimable by her, irrespective of the year to which it may have been correctly assigned. She believed that she was navigating a bureaucratic obstacle by doing what she did, not obtaining an unlawful gain.

IX. It is revealing that in conveying the Respondent's rejection of the JDC's recommendation, the Respondent avoids the use of the usual terminology of "serious misconduct", instead describing the Applicant's conduct as "misconduct ... determined to be serious". There is here, the Tribunal believes, some implied acknowledgement that serious as the failure is of the Applicant to uphold the required standard of conduct, her case sits uneasily in the highest category of fault and, therefore, ought not in law to have attracted the maximum punishment. This was the case, for example, in *Ikegame (ibid.)*, in which the JDC concluded that the Applicant had falsified documents but had not committed fraud, and it therefore spoke of the "serious nature of the misconduct" rather than using the term of art "serious misconduct". (See also the dissenting opinion to Judgement No. 1310 (*ibid.*)).

Moreover, in Judgement No. 1011, *Iddi* (2001) para. VII, the Tribunal confirmed that

"[e]ven in cases of serious misconduct, the Administration does not always proceed to summary dismissal of its guilty employee, together with the loss of terminal benefits. The Tribunal recalls here the principle of equality of treatment which should be applied to all United Nations employees in conformity with the Staff Regulations and Rules and with previous decisions of the United Nations Administrative Tribunal."

The Tribunal decided in that case that the disciplinary measure which had been adopted, summary dismissal, was disproportionate to the applicable facts, and proceeded to award compensation.

X. The Tribunal recalls its Judgement No. 941, *Kiwanuka* (1999), in which it emphasized that it has consistently upheld the Secretary-General's broad discretion in disciplinary matters, including the



determination of what actions constitute serious misconduct and what attendant disciplinary measures may be imposed. The Tribunal recognized, however, that

“unlike other discretionary powers, such as transferring and terminating services, [the imposition of disciplinary sanctions] is ... a special exercise of quasi-judicial power. For these reasons the process of review exercised by the Tribunal is of a particular nature. The Administration’s interest in maintaining high standards of conduct and thus protecting itself must be reconciled with the interest of staff in being assured that they are not penalized unfairly or arbitrarily.” (para. IV)

The Tribunal remains reluctant to lightly intervene in the judgement of the Respondent. It recognizes that the facts in this case give rise to difficult and complex considerations of fault and response. On balance, the Tribunal takes the view that the response on the part of the Respondent was highly disproportionate and, therefore, as a matter of law, incorrect. In the view of the Tribunal, the appropriate penalty would have been demotion for a fixed period. The failure to calibrate the different levels of disciplinary action available to the Respondent to the specific facts of this case introduced an element of arbitrariness and serves to vitiate that decision. Accordingly, the Tribunal is of the view that the decision should be rescinded.

XI. Finally, with respect to the Applicant’s claim that she should have been given certain documents which she considered to be adverse material under ST/AI/292, the Tribunal notes that the documents were not placed in her personnel file but rather were handled with discretion and kept in a separate, confidential file. The language quoted by the Applicant - to the effect that any adverse information going in any confidential file must be shown to the staff member concerned - is not the language of ST/AI/292, but rather language used by the Secretary-General which is quoted in the administrative instruction’s opening paragraph. The actual terms of ST/AI/292, implementing the Secretary-General’s decision, do not refer to the placement of adverse material in confidential files but rather to adverse material placed in a staff member’s “personnel file”. In the view of the Tribunal, the only provision of ST/AI/292 which could be read as relevant to the placement of adverse material in files outside of the personnel file states:

“It is noted, however, that some organizational units, for their own convenience, maintain files on individual staff members which contain ... correspondence internal to the organizational unit concerned. Such files may be kept only as working files for a limited period of time and shall not include any material reflecting unfavourably on a staff member’s performance or conduct that has not been brought to his or her attention and communication to the Office of Personnel Services.”

The Tribunal cannot read this provision as being so broad as to prevent the actions of the Respondent in this case. While the Tribunal generally tries to accord the highest respect for an Applicant’s right of access to adverse material, it has determined that the material at issue in this case cannot be considered adverse. The only documents which were not provided to the Applicant were preliminary documents forming part of an initial investigation and, once this investigation matured, these documents were duly provided to the Applicant. The Tribunal does not interpret ST/AI/292 as barring the Respondent from keeping such

documents confidential for a short time, until the investigation has developed to a point where a decision can be made as to what should be done with them. In this case, the documents at issue, dated 18 and 21 June 2004, were kept until 21 July, at which point the Applicant was formally notified of the charges against her and provided with copies of these documents. Accordingly, the Tribunal does not view such documents as adverse material under ST/AI/292, and is not convinced that the temporary withholding of these documents while the investigation developed constituted a violation of the Applicant's rights.

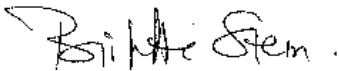
XII. In view of the foregoing, the Tribunal:

1. Orders rescission of the decision to summarily dismiss the Applicant;
2. Fixes the compensation to be paid to her, should the Secretary-General decide, in the interest of the Administration, not to perform the obligation to rescind the decision, at eighteen months' net base salary at the rate in effect on the date of the Applicant's separation from service, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,
3. Rejects all other pleas.

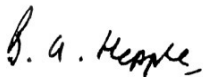
*(Signatures)*



Dayendra Sena **Wijewardane**  
Vice-President




Brigitte **Stern**  
Member



Bob **Hepple**  
Member

Geneva, 25 July 2008



Maritza **Struyvenberg**  
Executive Secretary