



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1403

Case No. 1471

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Jacqueline R. Scott, Vice-President, presiding; Ms. Brigitte Stern; Mr. Agustín Gordillo;

Whereas, on 10 and 17 February 2006, a former staff member of the United Nations Development Programme (hereinafter UNDP), filed applications that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 24 March 2006, after making the necessary corrections, the Applicant filed an Application requesting the Tribunal, inter alia:

“- To find and rule that the summary dismissal of [the Applicant] without due process was too severe;

...

Concerning the principal pleas:

- To find that [the Applicant] acted pursuant to orders from his supervisor;
- To withdraw the proceedings against [the Applicant];
- To order that [the Applicant] be reinstated in his post, and subjected to one of the penalties other than summary dismissal or separation from service with or without notice provided for in paragraph 9.1.6 of [the UNDP Circular on Accountability, Disciplinary Measures and Procedures, of 1 January 2004];

Concerning the subsidiary pleas:

- To order that [the Applicant] be separated from service with notice;
- To order the payment to [the Applicant] of his termination entitlements ...”

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent’s answer until 31 August 2006;

Whereas the Respondent filed his Answer on 31 August 2006;

Whereas the Applicant filed Written Observations on 30 October 2006;

Whereas the statement of facts, including the employment record, contained in the report of the UNDP/United Nations Population Fund/United Nations Office for Project Services Disciplinary Committee (DC) reads, in part, as follows:

**“EMPLOYMENT HISTORY**

... [The Applicant] joined UNDP Gabon in 1990 as a [General Service] staff member. He became Operations Manager at NO-C level in 1996.

**EVENTS LEADING TO DISCIPLINARY CHARGES**

... After receiving information that unauthorized bank accounts had been opened in the UNDP office in Gabon, the Office of Audit and Performance Review (OAPR) sent an investigation team to look into the matter. The report (of the investigation) revealed that [the Applicant] and [his supervisor], the Resident Representative/Coordinator, had opened two unauthorized bank accounts and had improperly diverted funds from the Government of Gabon amounting to 300 million CFAF into those private accounts. The funds were originally earmarked for UNDP country activities. The investigators also found that both individuals withdrew funds from the unauthorized accounts and spent the money on private activities. On 5 May 2004, OAPR issued its findings from the investigation ...

...

[On 8 April 2004, the Applicant was suspended with full pay. He was suspended without pay as of 1 June.]

... On 14 June 2004, [the] Assistant Administrator and Director, Bureau of Management, advised [the Applicant] that ... UNDP had found “sufficient *prima facie* evidence” to charge him with three counts of serious misconduct ...

... After further review of the extant evidence and [the Applicant]’s inability to produce countervailing evidence to rebut the charges, the Administrator decided to summarily dismiss [the Applicant] from service: he was subsequently notified of that decision in a letter dated 8 July 2004. The Administrator’s decision to dismiss [him] was justified by the following factors: (a) [the Applicant] benefited personally from the ‘fraudulent encashment of the checks’, (b) he bore personal responsibility from the ‘irregularities’ associated with his acts of misconduct given his ‘capacity as the Operations Manager’, (c) his failure to refrain from participating in the ‘illicit activities’ and, [(d)] for causing embarrassment and discrediting UNDP by illegally diverting host Government funds earmarked for UNDP activities. The combined effect of the listed factors amounted to serious misconduct as defined in staff rule 110.1.

... [The Applicant] then made a request of the Administrator on 24 August 2004 to have the decision of summary dismissal reviewed. He was subsequently informed on 30 August ... that his case would accordingly be submitted to the [DC] for the necessary review. [The Applicant's case was formally submitted to the DC] ... on 16 November 2004.”

The DC issued its report on 11 November 2005. Its conclusion and recommendation read, in part, as follows:

**“CONCLUSION AND RECOMMENDATION**

26. [The Applicant] emphatically argued that no matter how irregular his actions or the role he played in the offence in question, he cannot be personally held responsible for the ultimate acts of misconduct in question because (a) he acted under superior orders he was obliged to obey and (b) ... the financial losses UNDP initially incurred were reimbursed by the departing Resident Representative who accepted full responsibility for the unauthorized transactions. The Committee however believed that [the Applicant], as an experienced and relatively senior [United Nations] staff member, had an independent duty (...) ‘to report any suspicions of wrongdoing and mismanagement ...’ This obligation is a matter of crucial importance from the Committee’s standpoint because it is conceivable that had [the Applicant] done his duty in the Gabon Office, the acts of misconduct at issue might have been averted altogether. Thus the obverse side of [the Applicant’s] failure to the Organization could be said to have actually brought about the very acts of misconduct in question. Having regard to the fact that [the Applicant’s] dereliction of duty had a negative impact on the finances and reputation of UNDP, the Committee felt that he could not be allowed to evade his personal responsibility no matter what the beneficial actions of others might have been. Thus the Committee determined that [the Applicant’s] role in the enterprise cannot be put down to a *harmless error* because of its far reaching and deleterious outcome. ... The Committee could ... not accept the validity of [the Applicant’s] rationale for violating UNDP financial regulations - i.e. the dubious objective of collecting long overdue financial obligations of the host Government due to UNDP. Thus, in the process, [the Applicant] discredited UNDP by his unauthorized actions and brought the reputation of UNDP into disrepute in the host country .... [The Applicant]’s deliberate acts of misconduct had a direct impact on his pleas for *leniency* and his promise to refrain from repeating such acts of misconduct in the future. The Committee was simply not persuaded by his plea to the DC to have his sanction mitigated largely because (a) he acted intentionally (b) he sought to mislead UNDP about his fraudulent actions when he was given the opportunity to redeem himself and (c) despite 13 years experience in the service and the requirement of a solemn duty to report wrongdoing and acts of mismanagement - especially entailed in his position as the Operations Manager - he conspicuously failed to perform his duty and violated the standard of conduct expected of him as an International Civil Servant. [The Applicant] clearly abused the trust that UNDP had reposed in him as the Operations Manager in the Gabon Office and thereby vitiated whatever acts of sympathy his extended service in the Organization might have engendered for him. ...

27. IN CONCLUSION, the Disciplinary Committee finds that UNDP has convincingly proven the charges brought against [the Applicant] and fully supports the decision of the Administrator to summarily dismiss him. The Committee therefore has no further recommendation to make in the matter.”

On 21 November 2005, the UNDP Administrator transmitted a copy of the report of the DC to the Applicant and informed him that, based on the DC’s conclusions, he confirmed the Applicant’s summary dismissal effective 8 July 2004.

On 24 March 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision of the DC was taken 14 months after the case was referred to it, violating his due process rights.
2. He acted in execution of orders from his supervisor, the Resident Representative, who assumed the entire responsibility for the criminal charges.
3. The Resident Representative reimbursed the entire amount of diverted funds.
4. He derived no benefit from the diverted funds.
5. He has no record of misconduct and has incurred no penalties in the past.

Whereas the Respondent's principal contentions are:

1. The Applicant failed to meet the standards of integrity required of staff members as international civil servants, and his actions amounted to serious misconduct.
2. The decision of the Administrator to summarily dismiss the Applicant was a necessary and valid exercise of his discretion to ensure that only staff who meet the United Nations Charter requirement of the highest standards of integrity are retained for service.
3. The Applicant was accorded due process.
4. The penalty imposed was not disproportionate to the offence.

The Tribunal, having deliberated from 30 June to 25 July 2008, now pronounces the following Judgement:

I. The Applicant entered the service of the Organization in September 1990 as an Accounting Assistant. On 1 October 1995, he was appointed Operations Manager in Gabon. An investigation leading to a report by OAPR dated 5 May 2004, revealed that, in December 2003, the Applicant and his supervisor opened two bank accounts without authorization and diverted funds totalling CFAF 300 million (US\$ 543,126.37 at the exchange rate in effect in December 2003) which the Gabonese Government had intended for UNDP activities. The OAPR report states that on 22 December 2003, when the Administration asked the Applicant about the balances in UNDP accounts, he concealed the existence of the two unauthorized accounts. The investigation also showed that, between December 2003 and March 2004, the Applicant and his supervisor signed cheques and withdrew large sums of money from the unauthorized accounts to pay for private activities.

The Applicant was suspended with full pay on 8 April 2004. He was suspended without pay starting on 1 June. On 14 June he received a letter charging him with serious misconduct for misappropriation of UNDP funds. On 8 July, the UNDP Administrator notified him that he had been summarily dismissed. On 24 August, the Applicant wrote to the Administrator requesting a review of the summary dismissal. On 30 August, the Administrator referred this request to the DC.

II. In its report of 11 November 2005, the DC found that the Administration had provided ample evidence to support the charges against the Applicant. It recommended that the summary dismissal be upheld since the Applicant had acted intentionally and had sought to conceal his misdeeds when the Administration asked him to justify the balances in the UNDP accounts, breaching the standards of conduct expected of an international civil servant.

III. In the present case, the Applicant claims, first, that the report of the DC is null and void because of procedural irregularities and, second, that summary dismissal was a disproportionate punishment given his actual responsibility for the misconduct perpetrated.

IV. As regards the first point, the Applicant refers to paragraph 2.7.1 of Annex I to the UNDP Circular on Accountability, Disciplinary Measures and Procedures, entitled “Rules of procedure for [the DC]”, arguing that the fact that the DC issued its report 14 months after receiving the case instead of four weeks, as the rules call for, renders its recommendations null and void. The rule in question states: “Pursuant to staff rule 110.7 (a), in considering a case, the Panel shall act with the maximum dispatch and shall make every effort to provide its advice and recommendation to the Administrator within four weeks from submission of the case”.

V. As regards the second point, the Applicant essentially repeats the arguments he put to the DC. He claims that he cannot be punished as severely as the chief perpetrator of the misconduct since, on the one hand, he was merely acting on the orders of his supervisor, whom he was not in a position to contradict, and, on the other hand, he had derived no personal advantage from the conduct for which he was blamed. He also considers that the decision to summarily dismiss him was disproportionate given his previous record of 13 years’ exemplary service with the Organization.

VI. The Respondent contends that the report of the DC was submitted in accordance with the rules and that the summary dismissal of the Applicant was a proportionate response to the severity of his wrongdoing.

VII. In particular, the Respondent argues that the DC cannot be held to have breached the legal safeguards that accompany disciplinary proceedings since the length of time taken to adopt the report was due to the complexity of the case and the need to clarify some points after initial discussion in the DC. The rule which the Applicant invokes states, the Respondent points out, that the DC “shall make every effort” to report within four weeks, but when the facts require thorough examination, the DC can hardly be criticized for taking longer to arrive at an appropriate decision.

VIII. The Tribunal must now evaluate these arguments in order to determine whether the summary dismissal and the report of the DC need to be reviewed.

IX. First, regarding respect for the legal safeguards accompanying disciplinary proceedings, the Tribunal notes that the Respondent rightly emphasizes the DC's obligation to *make every effort* to arrive at a decision within four weeks of a case being submitted. This is not a binding deadline. Clearly, when - as in the present instance - the particular features of a case require more thorough, and thus longer, consideration, exceeding the recommended deadline, the longer time frame for decision constitutes no grounds for challenging the DC's report. On several occasions, the Tribunal has emphasized that it will challenge the length of time the Administration has taken to act only if this appears extraordinary or excessive (see for example Judgements No. 1275 (2005), para. XIV and No. 1397 (2007), para. IX). That is not the case here.

X. Second, regarding the severity of the sanction of summary dismissal, the Tribunal must point out that in its case law it has always allowed the Respondent extensive discretion in disciplinary matters. It confines itself to considering (i) whether the facts on which the disciplinary measures were based have been established, (ii) whether they legally amount to serious misconduct or misconduct, (iii) whether there has been any substantive irregularity, (iv) whether there has been any procedural irregularity, (v) whether there was an improper motive or abuse of discretion, (vi) whether the sanction is legal, and (vii) whether the sanction imposed was disproportionate to the offence. (See Judgement No. 897, *Jhuthi* (2000), para. II.)

XI. In the present case, the reality and gravity of the Applicant's offences are not open to challenge and the Applicant cannot seek to evade responsibility since he himself admitted to the misappropriations. The mitigating circumstances which the Applicant invokes cannot be entertained: the Respondent rightly points out that, pursuant to staff rule 102.2 (b), staff need not blindly follow the orders of their superiors but are expected to "follow the directions and instructions *properly* issued by the Secretary-General and their supervisors" (emphasis added). Accordingly, the Applicant's argument that he was not an "active accomplice" since he was following his supervisor's orders is completely untenable. Neither is the argument that the Applicant derived no personal advantage from the misappropriations persuasive: the facts remain just as serious. Lastly, the Tribunal points out, as it has on several previous occasions, that "a past record of good service may become irrelevant if specific charges of wrongdoing are proved" (see Judgements No. 445, *Morales* (1989), para. XIV and No. 563, *Khan* (1992), para. XVIII). Hence the Applicant's third argument is no more persuasive than the other two.

XII. For the foregoing reasons, the Tribunal considers that the DC's report was not adopted in a manner which violated the Applicant's rights and that the summary dismissal of the Applicant, given the serious offences which he had committed, was not disproportionate.

XIII. The Tribunal thus dismisses the Application in its entirety.

*(Signatures)*



Jacqueline R. **Scott**  
Vice-President

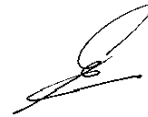


Brigitte **Stern**  
Member



Agustín **Gordillo**  
Member

Geneva, 25 July 2008



Maritza **Struyvenberg**  
Executive Secretary