



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1422

Case No. 1499

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. Goh Joon
Seng;

Whereas, on 13 July 2006, a former staff member of the United Nations, filed an application that
did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 28 September 2006, the Applicant, after making the necessary corrections, filed an
Application requesting the Tribunal, inter alia:

“3. [To order that]:

- a. I ... be reinstated ... as ... recommended by the Joint Disciplinary Committee [(JDC)].
- b. I ... be compensated [for] the moral and material damage inflicted by [my] summary dismissal.
- c. [The staff] members who [were responsible for] the biased and prejudicial proceedings ... [are] severely reprimanded and held accountable.”

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 4 March 2007, and twice thereafter until 4 April;

Whereas the Respondent filed his Answer on 9 March 2007;

Whereas the Applicant filed Written Observations on 18 May 2007;

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 the Economic Commission for Latin America and the Caribbean (ECLAC) in Santiago, Chile, on 6 February 2001 under a fixed-term appointment as Secretary at the GS-4 level. Her fixed-term appointment was extended several times. [The Applicant] was separated from service on 13 July 2005. [The Applicant] had been in receipt of [a] special education grant (SEG) for her son ... since 2001.

Background

... In February 2004, [the Applicant] requested and received an advance SEG of US\$ 2,450.00 to cover the special education sessions for her son ... from January ... to June 2004. In July ..., upon extension of her contract with ECLAC, [the Applicant] requested and received an advanced SEG of another US\$ 2,450 to cover July to December ... In October ..., [the Applicant] requested an additional advance of US\$ 1,216, stating that the number of sessions of her son’s treatment needed to be increased from four to eight per week. The request was accompanied by a statement of the specialist treating her son, that the number of sessions would be increased to eight per week, as of 30 September ... The cumulative advance SEG for 2004 issued to [the Applicant] amounted to US\$ 6,116.

... On 27 January 2005, the [Applicant] submitted her 2004 claim to the Human Resources Section, ECLAC, consisting of eight invoices in the total amount of CLP 3,424,000.00 (equivalent to US\$ 5,607). According to the preliminary report, while the claim was being processed, the reviewing officers noticed the following irregularities:

- a) most invoice numbers were consecutive, while the specialist had other clients;
- b) the periods covered by the invoices were not evident;
- c) information on the invoices seemed to have been added at different times; and,
- d) the invoices reflected that the costs per session varied from CLP 18,965.00 to CLP 19,230.00,

... On 9 February 2005, [the Applicant] was requested to ... explain the above-mentioned irregularities. At that time, ECLAC found her explanations reasonable and proceeded by processing the claim.

... According to the Administration, due to the rising number of SEG claims, ECLAC decided to review the SEG entitlements and procedures in early March 2005. [The Applicant]’s claim drew attention because her SEG claims for 2004 were the highest within ECLAC: 69% higher as to cost than the second highest claim and 98% higher as to the number of sessions than the second highest claim. Upon reviewing the claim for final processing, ECLAC noticed that invoice Number 00361 in the amount of CLP 500,000.00 which [the Applicant] submitted to certify her SEG claim for 2004, appeared to have been manually altered. Pursuant to this finding, ECLAC decided to investigate the matter further.

... [The Applicant] was requested to provide evidence that could substantiate her SEG 2004 claim, but she stated that it was not possible because a substantial amount of the payments had been settled in cash. Accordingly, the [Applicant] prepared a schedule that listed all the invoices filed to certify her claim and the alleged payments made. According to the preliminary report, the

schedule prepared by [the Applicant] indicated that 50% of all payments were settled in cash, but the investigators concluded that 'no evidence that could reasonably justify her payments effected in cash was provided'.

... On 31 March 2005, [ECLAC officials] met with [the specialist], who was treating [the Applicant]'s son. The specialist stated that she had issued invoice No. 00361 for CLP 300,000.00 and that [the Applicant] had requested her to sign a statement prepared for ECLAC reflecting a total expenditure on sessions that was inflated by CLP 200,000.00 (equivalent of USD \$350) to CLP 500,000.00. The specialist further stated that she had refused to sign such document and that the words 'August' and 'September,' which appeared on invoice No. 00361, were not written by her.

...

... On 12 April 2005, [the Applicant] submitted her statement on the facts. In summary, she ... stated that:

- An amount of CLP 1,718,000.00 (equivalent to US\$ 2,859) was paid in cash;
- Payments were made with checks, electronic transfers and cash because her husband did not maintain a checking account;
- She passed the responsibility of payments on her husband. It was her husband who dealt with the specialist and made the payments directly to her throughout the year, as he was home with their children;
- The specialist would normally bring the invoices prepared in advance.

... By memorandum dated 10 May 2005, [the] Chief, Division of Administration, ECLAC, submitted to [the] Executive Secretary of ECLAC ... [a report on the] 'preliminary investigation on the altered invoice [submitted by the Applicant] for special education grant expenses ...'.

... The preliminary investigation report concluded[, inter alia, that] ... the case [fell] under the provisions of paragraph 2.c of [administrative instruction ST/AI/371 of 2 August 1991] on 'misrepresentation or false certification in connection with any United Nations claim or benefit, including failure to disclose a fact material to that claim or benefit', which constitutes serious misconduct and should therefore be referred to the Office of Human Resources Management [(OHRM)]'.

... By memorandum dated 11 May 2005, [the Executive Secretary of ECLAC] referred the case of [the Applicant] to [the] ... Assistant Secretary-General for Human Resources Management, for her consideration and appropriate action.

... By memorandum dated 19 May 2005, ... OHRM ... [presented the Applicant with] ... allegations of misconduct [and requested her] to provide within two weeks of receiving said memorandum any written statement or explanations she might wish to offer ...

... By memorandum dated 3 June 2005, [the Applicant] replied to [OHRM's] memorandum ... [The Applicant] disputed the allegations against her person.

...

... By letter dated 11 July 2005, [OHRM] informed the [Applicant] of the Secretary-General's decision to summarily dismiss her for serious misconduct. ...

..."

On 2 September 2005, the Applicant requested the JDC to review the decision of the Secretary-General. The JDC adopted its report on 2 June 2006. Its considerations and recommendation read, in part, as follows:

“Considerations

...

(i) Whether the facts on which the disciplinary measures were based have been established

40. First, the Panel noted that invoice No. 00361 was handwritten, as were all the other invoices. The Panel also noted that some of the invoices, No. 00364 and No. 00365, had information added to them at different times, specifically with regard to the number of sessions, that these changes had been signed and dated by the Specialist, and that these changes were not in question. The Panel found that invoice No. 00361 also had information added to it at different times that were signed and dated, similar to invoices No. 00364 and No. 00365, and that it also had other changes or alterations. The alterations in question related to the total amount of CLP 500,000.00 and the words ‘August’ and ‘September’. The Panel considered the [the Applicant]’s request for a hand-writing expert who would undertake the necessary examination in order to confirm, as the [the Applicant] claims, that she did not change or alter the invoice in question. The Panel found that the Representative of the Secretary-General did not heed this request.

41. Second, the Panel further found that invoice No. 00361 had been updated to reflect 26 sessions, similar to the way in which invoices No. 00364 and No. 00365 had been updated, and that the specialist’s signature and date of the updated information on invoice No. 00361 were not questioned and were not an issue. The Panel noted that the 26 sessions were equivalent to CLP 500,000.00. The Panel further noted that if as the specialist claimed, the invoice was correct regarding the 26 sessions but the correct amount was the CLP 300,000.00 the specialist declared with the Chilean tax authority, this would represent an absolute contradiction to the specialist’s invoicing as previously submitted to the Organization, as the cost per session varied between CLP 18,965.00 and CLP 19,230.00.

42. Third, the Panel noted that the Administration relied on the information offered by the specialist in its decision to summarily dismiss [the Applicant]. The Panel further noted that the specialist was not bound by the Rules and Regulations of the Organization; that she normally does not issue formal invoices and receipts for her services unless the client requires so and that in 2004, out of the 10 to 11 children she treated, she invoiced only two families; that she reported taxation only for the invoiced services; that she provided ‘conflicting accounts and as to who bears the taxation burden’ with regards to the services rendered to [the Applicant’s son], and then ‘claimed confusion and changed her account so that the tax burden was wholly born by her’, that she admitted to being careless with her invoicing, that after declaring to have a 2004 agenda detailing the sessions held with [the Applicant’s son], when asked to produce it, she stated it had been lost. Additionally, the specialist criticized the [the Applicant] for the ‘late pattern of payments’. The specialist further stated that she was constantly after the [the Applicant] and her husband for the corresponding payments. The Panel considered that the specialist might have had tax-related and personal motives for maintaining that the correct amount for the invoice No. 00361 was CLP 300,000.00.

43. Fourth, the Panel found the Administration’s reliance on the specialist’s assertions disturbing in light of her questionable statements and the plausible tax motivations behind them. The Panel further found that the Administration based its decision to summarily dismiss [the

Applicant] on a ‘preliminary investigation’ conducted by ECLAC’s Administration. The Panel was disturbed by speculation within said preliminary investigation which without foundation reflected negatively on [the Applicant] ...

44. Fifth, the Panel observed that all prior and subsequent invoices to invoice No. 00361 were similar in form and content and deemed acceptable by the Administration as substantiating documentation pursuant to paragraph 9.2 of ST/AI/2004/2. The Panel further observed that before the audit which led to the inquiry of invoice No. 00361, the Administration had reviewed said invoice twice and accepted it. Based on the foregoing, the Panel does not understand why this matter was not forwarded to the [JDC] for its advice, before a decision to take disciplinary action was taken, when certain aspects of essential facts were still in dispute.

45. Sixth, the Panel reviewed the Administration’s declaration regarding [the Applicant]’s overall SEG claims representing ‘the highest within ECLAC... The Panel considered that [the Applicant] was eligible to receive the SEG and that the total amount she submitted for 2003 and 2004 were well within the allotted annual amount pursuant to [administrative instruction ST/AI/2004/2 of 24 June 2004 on ‘Education grant and special education grant for children with a disability’]. The Panel further considered that the statistics cited by the Representative of the Secretary-General should not have been utilized as an aggravating factor in charging [the Applicant] with fraud and/or other wrongdoing because [the Applicant] was entitled to the SEG and the cost and quantity were well within the allotted amount. The Panel found that the total cost of the SEG claims and the cost of the individual sessions were not at issue and were never questioned or investigated during the preliminary investigation conducted by the ECLAC Administration, and that therefore the amount at issue in the case was CLP 200,000, equivalent to US\$ 350.

46. Based on the foregoing, the Panel concluded that the Representative of the Secretary-General failed to establish that there was *prima facie* evidence to conclude that [the Applicant] had altered the invoice in question. The Panel further concluded that the findings upon which the Secretary-General based his decision to summarily dismiss [the Applicant] (for alteration of an invoice for SEG, falsely certifying and misrepresenting a [United Nations] claim and attempt to fraudulently obtain Organization monies not due her) were not established by the Administration.

(ii) Whether the established facts legally amount to misconduct or serious misconduct

47. First, the Panel reviewed whether according to the [United Nations] Rules and Regulations, the Representative of the Secretary-General characterized the [Applicant]’s actions as amounting to misconduct or serious misconduct. As cited ... above, the Panel found that the facts leading to the summary dismissal had not been established.

48. Second, the Panel found that [the Applicant] was somewhat negligent in submitting invoice No. 00361 ... because she should have been aware that said invoice had been changed and altered. Additionally, the Panel observed that [the Applicant] admitted that it was her husband who primarily handled the SEG monies and made payments to the specialist. This also represented a non-transferable responsibility. However, the Panel concluded that such negligence did not amount to misconduct which would warrant [the Applicant]’s dismissal. Aside from a finding that the [Applicant] was somewhat negligent, the Panel further concluded that the Representative of the Secretary-General did not establish that [the Applicant]’s actions and/or omissions amounted to misconduct, let alone serious misconduct.

(vi) Whether the sanction was legal

49. The Panel recognized the discretion of the Secretary-General to summarily dismiss a staff member when the facts have been established and credible evidence points to serious misconduct.

...

51. Based on the foregoing ... the Panel concluded that the sanction was not legal.

(vii) Whether the sanction imposed is disproportionate to the offence

52. Based on the above, the Panel found that the decision to summarily dismiss [the Applicant] was disproportionate to the alleged offence.

(viii) As in the case of discretionary powers in general, whether there has been arbitrariness

53. Finally, the Panel noted that the Administration was inconsistent in its regulation of the SEG. The Panel further noted that all invoices prior to No. 00361 were accepted by the Organization as substantiating documentation and to request that [the Applicant] supply the Administration with additional documentation was incompatible with paragraph 9.2 of ST/AI/2004/2 [of 24 June 2004] which established that substantiating documentation include entries 'such as invoices, receipts, cancelled cheques and bank statements documenting expenditures.' (...). It was only after the audit that [the Applicant] was requested to submit further documentation besides the invoice previously provided. Additionally, the ECLAC Administration had previously accepted that [the Applicant] made her SEG payments to the specialist in cash. The Panel found that such inconsistency deprived [the Applicant] of attaining a clear understanding of which methods of documentation were acceptable or unacceptable. The Panel further found that this inconsistency could lead to widespread confusion within ECLAC regarding the SEG. The Panel reflected that in the interest of fairness and consistency, if the ECLAC Administration required stricter documentation for one invoice, it should require it for all invoices.

Conclusions and recommendation

54. In summary, the Panel had given due consideration to the weight of evidence submitted by both the [Applicant] and the Representative of the Secretary-General. In the Panel's view, the Secretary-General's decision to summarily dismiss the [the Applicant] on the grounds that she had committed serious misconduct within the meaning of staff rule 110.1 was incorrect. The Panel also concluded that the [Applicant] succeeded in providing credible explanations to set aside the evidence gathered against her and the conclusion reached by the Secretary-General. ... Therefore, the Panel did not agree that the decision of the Secretary-General was based on patent facts or was proportionate to the seriousness of the charges.

55. At the same time, the Panel noted that the [the Applicant] was somewhat negligent in submitting invoice No. 00361 because it was her duty to check that every invoice was fully in order. The Panel further noted that the number of sessions mentioned in the invoice (26), handwritten by the specialist ... was not in question. After its examination of prior and subsequent invoices, the Panel found that the altered amount, CLP 500,000.00, corresponded to the unchallenged number of sessions (26).

56. Based on the foregoing, the Panel recommends that the decision of 11 July 2005 to summarily dismiss the [Applicant] be rescinded and that the [Applicant] be reinstated.

57. The Panel made no further recommendations."

On 22 June 2006, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her that:

"The Secretary-General ... regrets that he is unable to agree with the JDC's conclusions. Firstly, the JDC erred when it noted that the specialist claimed the invoice was correct regarding 26 sessions. In fact, the specialist stated that she wrote the number of sessions to be 26 without

verifying the sessions against her agenda and that the number of sessions actually given was 16. Secondly, you have not comprehensively explained how it came about that you submitted to ECLAC an altered invoice, knowing that when submitting a request for payment of special education grant, staff members shall ensure 'the accuracy and completeness' of the information being provided to the [United Nations]. Thirdly, irrespective of the specialist's invoicing practices, her account is more credible than yours and yet, you are the one who is accountable to the Organization for the details of the special education grant and who self-certified that your claim was correct, which is a non-transferable responsibility. Accordingly, the Secretary-General regrets to inform you that he has decided not to accept the JDC's recommendation for rescinding your summary dismissal and reinstating you."

On 28 September 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The allegations of misconduct have not been sustained.
2. The sanction of summary dismissal is not proportionate to the offense.
3. Some staff members involved in these proceedings acted wrongfully thereby affecting her health, reputation and psychological stability.
4. She suffered financial damage.

Whereas the Respondent's principal contentions are:

1. The decision to summarily dismiss the Applicant for failing to meet the standards of conduct required of an international civil servant was proportionate to the misconduct, and a valid exercise of the discretionary authority of the Secretary-General.
2. The Applicant failed to meet the standards of conduct required of an international civil servant.
3. The Applicant was afforded due process, she was given fair treatment, and the process was not improperly motivated.

The Tribunal, having deliberated from 7 to 26 November 2008, now pronounces the following Judgement:

I. The Applicant joined the United Nations on 6 February 2001 on a fixed-term appointment with ECLAC, which was renewed several times. She received a special education grant for her son starting in 2001.

II. On 27 January 2005, the Applicant provided supporting documentation for the grant for 2004 - eight invoices for a total amount of US\$ 5,607 - to the Human Resources Section, ECLAC. At that time, several irregularities were found but the Applicant, when asked to explain them, provided explanations deemed satisfactory by the ECLAC Administration. When in March 2005, because of the large number of claims for special education grants, the ECLAC Administration decided to review the entitlements and

procedures for awarding the benefit, the Applicant's claims again attracted attention because they were far higher than the average for other claims. The Administration also found that one of the invoices, for an amount of CLP 500,000 had been modified by hand. The Administration then decided to investigate the Applicant's claims.

III. During this investigation, the Applicant was unable to provide proof of the amounts she was claiming, since most of the payments had been made in cash to the specialist who was treating her son. The investigators interviewed the specialist, who assured it that the disputed invoice was for CLP 300,000 and not CLP 500,000 (i.e. a difference of CLP 200,000 or about US\$ 350). The specialist also stated that she had refused a request by the Applicant and her husband asking her to sign a document for the ECLAC Administration, verifying the amount owed as CLP 500,000.

IV. On 10 May 2005, the investigators prepared a preliminary report stating that the Applicant had deliberately inflated one of the invoices submitted to the ECLAC Administration. Accordingly, on the basis of paragraph 2 (c) of ST/AI/371, the Panel considered that the Applicant had committed serious misconduct, rendering her liable to disciplinary measures. On 13 July 2005, the Applicant was informed by letter that the Secretary-General had decided to summarily dismiss her.

V. On 2 September 2005, the Applicant requested a review by the JDC of the Secretary-General's decision. In its report dated 2 June 2006, the JDC stated that the Administration had not provided *prima facie* evidence of misappropriation. The JDC found that the Applicant had been negligent, since she was responsible for verifying the accuracy of all the information submitted to the Administration. However, the JDC concluded that this did not justify the gravity of the sanction. It therefore recommended that the Secretary-General should rescind the summary dismissal decision and reinstate the Applicant. The Secretary-General declined to follow the JDC's recommendations and confirmed the summary dismissal.

VI. The Applicant contends that the allegations of misconduct made against her are unfounded, and requests that the summary dismissal decision be rescinded and that she be reinstated.

VII. She also believes that she was subjected to unfair, arbitrary and discriminatory treatment. In particular, she criticizes the Administration for having given credence to a person outside the United Nations Administration - the specialist who was treating her son - even though the specialist's credibility was questionable. She further criticizes the Administration for not having agreed to a handwriting analysis that she had been requesting from the outset of the proceedings. In her view, the treatment to which she was subjected had caused moral and financial damage for which reparation should be made.

VIII. The Applicant also alleges that certain staff members behaved in a biased and inappropriate manner towards her and requests that those persons are disciplined.

IX. The Respondent, on the other hand, points out that, under ST/AI/2004/2, it is the responsibility of the person requesting benefits to provide complete and accurate information. As the Applicant was not able to explain clearly the reason for the difference between one of the invoices submitted by her and the copy of the same invoice provided by the specialist, the Respondent considers the falsification to be deliberate. The Respondent argues that the Secretary-General's decision to summarily dismiss the Applicant was within his discretionary authority, necessary and proportionate to the seriousness of the misconduct.

X. In addition, the Respondent replies to the Applicant's allegations that she was subjected to unfair and unjustified treatment. The Respondent recalls that, at every stage of the proceedings leading to the summary dismissal, the Applicant was invited to express her views and was given time to respond to the various reports, findings and decisions of the Administration. Regarding the other allegations of unfair or discriminatory treatment, the Respondent notes that the Applicant provides no evidence of such treatment.

XI. Prior to any consideration of the merits, the Tribunal considers it useful to recall, firstly, the findings contained in the preliminary investigation report, as a result of which the Secretary-General summarily dismissed the Applicant, and, secondly, the findings of the JDC, which the Secretary-General declined to follow by confirming the summary dismissal.

XII. The findings of the preliminary investigation are as follows:

- The Applicant provided no evidence that could reasonably justify her cash payments;
- When she was interviewed, the specialist who was treating the Applicant's son stated that the amount of the disputed invoice should be CLP 300,000 and not CLP 500,000. This statement is corroborated by the specialist's tax return, which shows the amount of CLP 300,000;
- The sum of CLP 300,000 corresponds to 16 sessions (in fact amounting to CLP 304,000, the specialist having admitted that she wrote an incorrect amount). It is true that the specialist wrote the figure of 26 sessions on the invoice, but she did so at the request of the Applicant, without first checking whether that figure was correct. Although it was not possible to verify the exact number of sessions provided by the specialist as she alleged that her calendar had been destroyed, the Panel considered that the figure of 16 sessions was more plausible than 26;
- The specialist stated that the Applicant and her husband had asked her to sign a statement for 2004 for ECLAC which gave a total figure that was CLP 200,000 higher than what her records showed. The specialist then refused to sign the document;
- The specialist further stated that, on the disputed invoice, the words "August" and "September" had not been written by her;

- The specialist indicated that the Applicant and her husband did not pay their bills on time;
- The Applicant's claims were the highest submitted to ECLAC.

XIII. On the basis of these various findings, the investigators concluded that there was sufficient evidence that the figure of CLP 300,000 was "more credible" than the figure stated on the invoice. The investigators also considered that the facts showed that the Applicant was aware of, and had been responsible for, the irregularity of the situation (particularly as the specialist had declared only CLP 300,000 on her tax return, as the child had "probably" had only 16 sessions during the period concerned, and as the Applicant and her husband had tried to make her endorse an incorrect invoice). The investigators believed that the Applicant had committed serious misconduct meriting a disciplinary sanction.

XIV. With regard to the findings and conclusions of the JDC, it considered that the facts on the basis of which the disciplinary sanction had been adopted had not been verified. In reaching that conclusion, the JDC took into account the following factors:

- The representative of the Secretary-General ignored the Applicant's request that a graphologist be consulted;
- There is an obvious contradiction in the fact that the specialist invoiced 26 sessions for only CLP 300,000. This bears no relation to the calculation provided by the specialist (one session invoiced at CLP 19,000);
- The Secretary-General gave too much credence to the testimony of the specialist, who was not in the least credible, with her contradictions, errors and approximations. The JDC noted, in particular, that the specialist might have had good reasons, for example tax reasons, to claim that she had invoiced only CLP 300,000. Yet the specialist put her initials under the words "26 sessions" and orally acknowledged that it was indeed she who had indicated that number of sessions on the invoice;
- The disputed invoice was identical in form to the other invoices and the Administration had previously accepted the invoices provided by the Applicant;
- The fact that the claims submitted by the Applicant were the highest can have no effect on the processing of her case, since they were within the limits of what the Applicant was allowed to claim.

XV. On the basis of all these findings, the JDC decided that the Administration had no *prima facie* evidence for concluding that the Applicant had falsified the invoice and that the disciplinary sanction against her was thus not justified. The JDC did indeed find negligence on the part of the Applicant, but considered that the negligence did not justify the sanction imposed.

XVI. The Tribunal believes that it may also be useful to recall the grounds on which the Secretary-General rejected the JDC recommendations:

- The Secretary-General took into account the fact that the specialist had entered the figure of 26 sessions without confirming that number. However, the actual number of sessions was 16;
- The Applicant was unable to justify having submitted a modified invoice;
- The specialist's calculations were more credible than those of the Applicant;
- Having submitted obviously inaccurate invoices, the Applicant was the only person who should have to suffer the consequences.

XVII. Having regard to the arguments of the parties, the facts of the case and the various findings and conclusions reached previously by the various bodies involved in the case, the Tribunal will consider first whether the finding that the Applicant committed misconduct requiring a disciplinary sanction is justified and second whether, if the answer to the first question is in the affirmative, summary dismissal constitutes a sanction proportionate to the seriousness of the misconduct on the part of the Applicant.

XVIII. Since this case requires the Tribunal to evaluate a disciplinary sanction, reference must first be made to the basic principle that should be followed in reviewing such a sanction. The Tribunal has on very many occasions specified the scope of its power to review such a decision:

“Clearly the Tribunal takes the view that the imposition of disciplinary sanctions involves the exercise of a discretionary power by the Administration. It further recognizes that, unlike other discretionary powers, such as transferring and terminating services, it is also a special exercise of quasi-judicial power. For these reasons the process of review exercised by the Tribunal is of a particular nature.” (Judgement No. 941, *Kiwanuka* (1999), para. IV) (see also Judgements No. 987, *Edongo* (2000) and No. 1011, *Iddi* (2001)).

XIX. The Tribunal clearly described the limits of its review power with regard to disciplinary decisions adopted by the Secretary-General in *Kiwanuka*:

“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”

XX. The Tribunal will therefore consider the summary dismissal decision which it considers the scope of its review. It will first consider whether the facts have been established. If they have, the Tribunal will then proceed to determine whether they amount to misconduct; lastly, it will verify whether the sanction is proportionate to the offense.

XXI. As regards establishment of the material facts, the Tribunal emphasizes that in disciplinary matters it is for the Administration to provide the evidence from which it can be *reasonably* deduced that there has been misconduct (Judgement No. 897, *Jhuti* (1998); Judgement No. 987, *Edongo* (2000)). It should be recalled that the burden of proof is heavier in disciplinary matters than in administrative matters. More specifically, since measures are involved that may jeopardize the career of the staff member concerned, the Tribunal requires that the misconduct must be “patent” (Judgement No. 104, *Gillead* (1967)). The evidence provided by the Administration must therefore be convincing and the staff member, for his part, must not be able to overturn the presumption of guilt in his case. However, in this case, the Tribunal is not at all convinced that the Administration has proved that the Applicant committed any misconduct.

XXII. The conclusions of the investigators are incorrect; there is no evidence that the Applicant had herself made a mistake, let alone a falsification. Admittedly, in light of the obligation for staff members to provide supporting documents for sums claimed from the Administration for social benefits, the fact that the Applicant paid half of her invoices in cash created certain accounting difficulties. However, in this case, the Tribunal finds that it is by no means prohibited. The Applicant always proceeded in this way and the Administration never rejected her claims on the grounds that there was no proof of payments in cash. The Tribunal, therefore, does not see how this factor could enter into consideration in the evaluation of the disputed invoice. The Tribunal can only discourage practices of this kind, which complicate the reimbursement procedure. Further, the Tribunal wishes to emphasize that it is unacceptable for a staff member to shift responsibility to a spouse, as the Applicant did. In such case, if a mistake was made, intentionally or otherwise, the staff member claiming the social benefit must, of course, bear all responsibility, even if he or she did not personally make the payments.

XXIII. The Tribunal further notes that the only facts available to the investigators in reaching the conclusion that there had been serious misconduct are based on the testimony of the specialist who was treating the Applicant’s child. However, too much credence seems to have been placed on this testimony, considering the unconventional practices and carelessness of the specialist, who admits to declaring only some of the patients that she treats (two out of eight); who makes contradictory statements about who is responsible for the tax to be paid for the sessions; who acknowledges having made a mistake on one of the Applicant’s invoices and affirms that she indicated that the number of sessions for the month of September was 26 without having first verified that figure; and, who could not subsequently verify it because her appointment book was destroyed. A finding of misconduct on the part of a staff member of the Organization and her subsequent dismissal without compensation based solely on the testimony of an incredible witness - a person obviously lacking professionalism and who is a self-confessed tax evader - cannot stand.

XXIV. Lastly, the Tribunal does not understand why the investigators and then the Secretary-General considered that 16 sessions for the month of September was a more “credible” number than 26. The number of sessions needed by the Applicant’s son each week was increased from four to eight in the month of September. For the months of October and November, the invoices amount to CLP 550,000, corresponding to 29 sessions a month. The number of 26 sessions is thus not implausible at all, especially as the specialist admits to having written that number on the invoice herself and it was she who asked that the number of sessions be increased because the child’s progress was too slow.

XXV. To the contrary, the Tribunal believes that the conclusions reached by the JDC are based on a much more rigorous analysis of the facts and are much more convincing. The JDC considered that no *prima facie* evidence had been provided by the Administration that it was the Applicant who, deliberately or otherwise, modified the disputed invoice. It also found that the specialist’s testimony lacked credibility and should not have been given so much weight. It emphasized the fact that the Applicant had repeatedly requested a handwriting analysis that could have shown that she had not falsified the invoice. It is clear that the persistence with which the Applicant repeatedly asked for this analysis does not fit the behaviour of a guilty person. The JDC concluded that the Secretary-General’s decision to summarily dismiss the Applicant was a decision that exceeded his discretionary powers, was disproportionate and “illegal”. The JDC then recommended that the Applicant should be reinstated. The Tribunal fully agrees with the analysis and conclusions of the JDC and compliments it on its careful work.

XXVI. In view of the Tribunal’s conclusion that the material facts leading the Secretary-General to decide that the Applicant should be summarily dismissed were not established, the Tribunal is not required to analyze the facts or the proportionality of the sanction.

XXVII. On the subject of the Applicant’s allegations that she was treated in an unfair, arbitrary and discriminatory manner by the Administration, the Tribunal recalls that in the case of such allegations it is for the applicant to prove that the Administration acted inappropriately (see Judgement No. 350, *Raj* (1985); Judgement No. 438, *Nayyar* (1988); Judgement No. 554, *Fagan* (1992)). In this case, the Applicant has provided no proof at all that she was treated inappropriately by the Administration. This request must be rejected, as must her request for a ruling that the behaviour of some members of the Administration towards her had been biased and that for that reason they should be disciplined.

XXVIII. For the foregoing reasons, the Tribunal:

1. Orders that the Secretary-General’s decision to summarily dismiss the Applicant be rescinded;

2. If the Secretary-General decides, in the interest of the United Nations, not to rescind the summary dismissal, the Tribunal orders compensation in the amount of 18 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 .

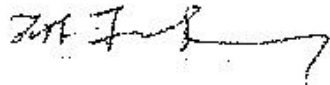
(Signatures)



Jacqueline R. **Scott**
Vice-President



Brigitte **Stern**
Member



Goh Joon Seng
Member

New York, 26 November 2008



Maritza **Struyvenberg**
Executive Secretary