



ADMINISTRATIVE TRIBUNAL

Judgement No. 1456

Case No. 1537

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Sir Bob Hepple; Mr. Agustín Gordillo;

Whereas, on 20 November 2006 and 21 March 2007, 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 4 June 2007, the Applicant, after making the necessary corrections filed an Application containing pleas which read, in part, as follows:

“II: PLEAS

10. ...[T]o find:

....

b) [that] the present Application is receivable under Article 7 of its Statute.

11. ...[T]o find:

a) [that the Applicant’s due process rights were violated]

b) [that] the preliminary investigations [c]onducted by the [United Nations Office in Nairobi (UNON)] Administration as mandated by Staff Regulation 110.2 of the United Nations, [was] unsatisfactory, inadequate and biased

c) [that the Applicant] was wrongfully separated from service without notice as a result of the injustice, inadequacy, imprudence, and partiality of the preliminary investigations that were carried out by the UNON Administration, the Nairobi JDC and subsequently the honourable Secretary-General. Both the recommendation and order separating [the Applicant] from service were wrongful....

12. ...[T]o order:

(i) [that] the decision of the Secretary-General separating [the Applicant] from service without notice be quashed

(ii) [that] the case be heard afresh and relevant witnesses be called

(iii) [that] based on the merits and outcome of the Tribunal's findings, [the Applicant] be reinstated to active duty in her previous duty station at UNON, with the attendant rights and benefits being accorded to her as were accorded before she was separated from service without notice....

(iv) [that] after [the Applicant's reinstatement] to service, the Tribunal compels the UNON Administration to award [the Applicant] the promotion to the G-6 level that was due to her before this case occurred.

(v)in addition.... payment of compensation for psychological torture, strain and stress suffered by [the Applicant] and the ensuing stigma caused by social unacceptability, embarrassment and humiliation endured

....

Or failing that:

The payment of compensation to [the Applicant] in the amount of 100,000 USD [for among others, the denial of an opportunity to advance her career within the Organization, given that she had been short-listed and selected to join the United Nations Operations in Côte d'Ivoire (UNOCI) in August 2006]

....”

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 9 November 2007, and once thereafter until 10 December;

Whereas the Respondent filed his Answer on 10 December 2007;

Whereas the Applicant filed Written Observations on 28 May 2008;

Whereas, on 16 July 2009, the Tribunal decided not to hold oral proceedings in the case;

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

“II. Employment History

The [Applicant] entered the services of the United Nations Environment Programme on 11 July 1994 at the G-4 level as a Junior Library Assistant on an initial short-term contract for a period of one month.

On 25 August 1994, her short-term appointment was converted to a fixed-term appointment and [subsequently, she received fixed-term contract extensions ranging in duration and in July 1997, was promoted to the G-5 level.]

....

In February 2000, [the Applicant] was reassigned to UNON/HRMS [Human Resources Management Service] and her functional title changed to Recruitment Assistant

In August 2004, her functional title changed to Human Resources Assistant. [The Applicant's] current contract, renewed in November 2005 for eleven months [was] due to expire on 31 September 2006.

[On] 17 October 2005 ... the Director, Division of Administrative Services, UNON [informed] the [Applicant that she] was placed on suspension with full pay effective [the same day.]

III. Events leading to the disciplinary charges:

On 14 October 2005, the Chief, Human Resources Management Service, UNON informed the Director, Division of Administrative Services, UNON that two staff members in the Recruitment and Classification Section of HRMS, UNON had, on or about 6 October 2005 tampered with the list of applicants that was forwarded for the position of Administrative Clerk, GS-4,VA GS-05-06 with UN HABITAT.

The Chief, HRMS, UNON instructed, the Chief, Recruitment and Classification Section to carry out investigations into the alleged misconduct. She obtained three written statements from the Supervisor of the staff members and from the staff members themselves. She at the same time conducted interviews in order to clarify some of the statements that were contained in the written declarations. From the written and documentary evidence, it appeared that the applicant's list for the position originally forwarded to UN-HABITAT contained the name of Ms. H. [K.] as applicant and that this list was then returned to the Recruitment and Classification Section and the name of Ms. [K.] was replaced with the name of Ms. [L.] [N.] and sent back to UN-HABITAT.

Further investigations revealed that in February 2005 ... PMO [Project Management Office] in UN-HABITAT requested [Ms. R. G.], Recruitment clerk to assist [Ms. L. N.], a temporary assistant, in UN-HABITAT, with applying for a vacancy at the G-4 level. [Ms. R. G.] assumed that the position for which [Ms. L. N.] later applied was Administrative Clerk - GS-05-06. It later transpired that HRMS registered no application from [Ms. L. N.] for that post but for another secretarial post VA-G-4 Secretary GS-05, in the same branch, WSID [Water, Sanitation & Infrastructure Branch], of UN-HABITAT. The applications for the respective VAs were forwarded to the PCOs [Programme Case Officers] under [the Applicant's supervisor's] signature on 18 May and 23 August 2005.

At the conclusion of the investigations, the Administration concluded as follows:

- a) The Programme Case Officer at UN-HABITAT had not requested that any applications should be added to the signed list;
- b) The staff member was advised by Ms. [R. G.] to falsify an official document to remove a valid candidate's application;
- c) The staff member defied her supervisor's instructions by altering a signed list of candidates and removing a valid candidate's application.

IV. The Charges

The panel considered the case in the light of the charges against the [Applicant] contained in the memorandum of the Director, Division of Administrative Services, UNON dated 17 October 2005, to the Assistant Secretary-General, Office of Human Resources Management [OHRM] namely:

1. On the advice of a colleague, Ms. [R. G.], the [Applicant], on 7 October 2005, altered a signed list of applicants for the GS-4 position of Administrative Clerk, UN-HABITAT by removing the name of Ms. [H. K.], a candidate who had validly applied for the position, and inserted the name of Ms. [L. N.], a candidate whose application had not been received within the time-limit specified in the vacancy announcement.

2. The [Applicant's] action was in direct contravention of instructions given to her by her supervisor, ... in a meeting held on 6 October 2005. During this meeting, [the supervisor] had instructed the staff member that the list of applicants for the vacancy and the relevant files for the applicants should be submitted, unchanged to the PCO on the morning of 7 October 2005. [The supervisor] also informed the [Applicant] that she would not be in the office on 7 October 2005 and would return on 10 October 2005.

3. In a statement submitted to the [Applicant] by [the supervisor], the [Applicant] acknowledged that she received explicit instructions from [the supervisor] on 6 October 2005 to the effect that the list of applicants was to be returned without alterations. The [Applicant] admitted that, regardless of these instructions, she altered the list on 7 October 2005 by removing Ms. [H. K's] name and replacing it with Ms. [L. N's] name.

By memorandum dated 24 February 2006, the Officer-in-Charge [OIC], Division for Organizational Development, [OHRM] at Headquarters, addressed a memorandum to the [Applicant] summarizing the allegations contained in the previous investigation report and requesting the [Applicant] to provide a written statement or explanations that she might wish to give in response. At the same time the [Applicant] was informed of her right to counsel.

[On 12 April 2006, the case was referred to the JDC in New York.]

By memorandum dated 16 March 2006, the [Applicant] responded to the allegations [On] 12 April 2006 ... the case was referred to the [JDC], UNON[,], by the [OIC], Administrative Law Unit, [OHRM], New York.

[On] 5 May 2006, the [Applicant] was informed by the Secretariat JDC of the referral, advised as to her right to defense and to counsel, given the entire JDC file and a two week deadline to submit her observations to the [JDC].

[On] 22 May 2006, the [Applicant] submitted her defense to the [JDC]."

On 23 June 2006, the JDC adopted its report. Its considerations, conclusions, and recommendations read, in part, as follows:

“VII. Considerations:

The panel based its findings on the evidence gathered during the preliminary investigations.

The first question the panel had to address was that of the standard of proof required in order to assess whether the [Applicant] is indeed guilty of the charges brought against her.

The panel recalled the jurisprudence of the Administrative Tribunal on this issue in its Judgment No. 897 (Jhuthi) and Judgment No. 484 (Omosola).

....

In determining the alleged acts of misconduct, the [JDC] noted that the charges lodged against the [Applicant] are well-founded and supported by the findings of the investigation into this matter, namely, that she acted in a manner unbecoming of her status as an international civil servant and failed to follow the directions and instructions properly issued by her supervisor, in that she altered a signed list of applicants for the GS-4 position of Administrative Clerk, UN-HABITAT, by removing the name [of] an eligible candidate and replacing it with the name of a candidate whose application had not been received within the time limit specified by the vacancy announcement.

Regarding the allegation of misconduct, the JDC has been provided with a memorandum from the Chief, [HRMS], UNON addressed to the Director, Administrative Services, UNON dated 14 October 2005, which indicates that the [Applicant] is working as Recruitment Clerk whose very core duty is to ensure that the integrity of the recruitment process is safeguarded and that applications are treated correctly, in accordance with recruitment guidelines and instructions of supervising officers and therefore the acts of misconduct she stands accused of, are in direct and grave breach of that obligation. In the said memorandum, the Administration noted that in addition to the damage that had already been caused, the [damage to the] credibility and reputation of the Service needs to be taken into account as [an] aggravating factor.

Further, the comments submitted by the [Applicant] concerning the charges against her contradict the written statement provided by [the Applicant] to [her supervisor] in certain key respects, and are not credible. They represent an attempt by the [Applicant] to present a version of events which is more favourable to her cause, and do not in any way displace the findings of [her supervisor] with regard to the [Applicant's] conduct.

In particular, the [Applicant's] claim that she did not physically alter the list of applicants is in direct conflict with the detailed contents of her earlier written statement, which contains the following explanation:

'Later in the day, Friday 7 October 2005, Ms. [L. N.] came into [Ms. R. G's] office with her application[.] Ms. [R. G.] called me and explained that the post now has more complications and we must include Ms. [L. N's] name in the list of applicants. I reiterated and explained that this would contradict our submission list, which indicated sixteen applicants unless we have a new submission. I actually printed out the list for her to verify. [Ms. R. G.] told me that that will not be necessary as she further told me that we have to remove one applicant's name (Ms. [H. K.]) and replace it with Ms. [L. N.]. I did not argue as I felt pushed, under duress, but just followed her instructions. All this time, Ms. [L. N.] was standing there and watching though I never talked with her myself. Ms. [R. G.] also told me to replace the number on the applicant's CV. I did all this and gave her the new list.'

The [Applicant] expressed regret regarding the incident by stating:

'In all, I can only say that I sat back on the whole issue as I felt I am not yet at grip with

the running of the GS desk. I felt bad when [Ms. R.G.] explained that we had discussed and agreed on the course of action to take on the posts. We did not discuss, I only changed the list and did everything at her instructions. My apologies for not strictly adhering to my immediate Supervisor's instructions and or better seek leading from my Second Reporting Supervisor in [my supervisor's] absence.'

By virtue of the level of detail contained in the original statement, including particulars of the [Applicant's] emotional state during the course of the incident and her expressions of remorse, the absence of any reference to the alteration of the lists in the subsequent comments submitted by the [Applicant] is suspicious, and casts doubt upon the veracity of this version of events. Further, it seems unlikely that Ms. [R. G.] would have called the [Applicant] into her office to meet Ms. [L. N.] and to explain that the list needed to be altered unless she required the [Applicant's] assistance. Had Ms. [R. G.] intended to make the alteration herself, it is doubtful that she would have drawn attention to the matter by alerting another staff member. In sum, the explanation contained in the [Applicants] subsequent comments does not seem credible.

In her comments, the [Applicant] makes reference to the written statement she provided to [her supervisor] during the investigation, describing it as 'my own-written explanation at short notice at the request of my supervisors following interviews with them at a distressful moment following the turn of events in this matter.' However, the [Applicant] makes no attempt to explain the anomalies between the two statements, including her admission that she was the one who had physically altered the list (albeit upon the instructions of Ms. [R. G.]).

Given the above matters, the [Applicant's] claim that she did not physically alter the list of applicants is implausible. Rather, the available evidence supports the findings made by [her supervisor], namely that the [Applicant] defied [her supervisor's] express instructions and altered the list of candidates by removing a valid candidate's application.

In view of the above, the [JDC] therefore unanimously agreed that the [Applicant] had committed a serious act of misconduct and that the charges lodged against her are well-founded and supported by the findings of the investigation into this matter, namely, that she acted in a manner unbecoming of her status as an international civil servant and failed to follow directions and instructions properly issued by her supervisor, in that she altered a signed list of applicants for the GS-4 position of Administrative Clerk, UN-HABITAT, by removing the name of an eligible candidate and replacing it with the name of a candidate whose application had not been received within the time limit specified by the vacancy announcement.

The question before the [JDC] then was whether the seriousness of the proven misconduct warranted a disciplinary sanction ending the employment relationship with the Organization or whether it was defensible to keep the [Applicant] in the services of the UN, albeit imposing a severe disciplinary sanction on her.

In deciding on a disciplinary sanction to recommend to the Secretary-General, the [JDC] took into account aggravating factors. The [JDC] considered that the [Applicant] had been

instructed by her supervisor... on 6 October 2005 to return the two UN-HABITAT cases as they were originally submitted (no applicant added) to the substantive office, first thing on Friday, 7 October 2005 morning. On 10 October 2005, when her supervisor asked her if she returned the cases as instructed by her, the [Applicant] responded by saying that '[Ms. R. G.] did not agree with my decision to return the cases in their original form. [Ms. R. G.] insisted that the list of applicants for GS-05-06, G-4, Administrative Clerk be amended and [Ms. L. N's] name and CV be included.' The above instruction by her supervisor should have put the [Applicant] on high alert and should have led her to impress upon her colleague the serious consequences that could ensue in case she submitted the altered list.

The [JDC] also took into account the fact that the [Applicant's] core functions as Recruitment Clerk is to ensure that the integrity of the recruitment process is safeguarded and that applications are treated correctly, in accordance with recruitment guidelines and instructions of supervising officers. The [Applicant's] behaviour directly contravenes those obligations.

In this context, the [JDC] felt that a wrong message would be sent to staff at large if despite the gravity of the misconduct the [Applicant] would be allowed to continue working as Recruitment clerk.

In view of the aforementioned factors, the [JDC] unanimously came to the conclusion that the only adequate sanction in the present case is to separate the [Applicant] from the organization.

VIII. Recommendations:

In the light of the foregoing considerations and conclusions, the [JDC] recommends to the Secretary-General that the staff member be separated from service without notice."

On 31 July 2006, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her as follows:

"The Secretary-General has examined your case in the light of the JDC's Report, as well as the entire record and the totality of the circumstances. He agrees with the JDC's conclusions and considers that your conduct amounted to a serious violation of the standards of conduct and integrity expected of staff members of the Organization, and that this misconduct is incompatible with your continued service with the Organization. In view of the seriousness of your misconduct, and in accordance with the JDC's recommendation, you will be separated from service without notice pursuant to Staff Rule 110.3 (a) (vii), with effect from close of business on the day you receive this letter."

On 4 June 2007, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. Her due process rights were violated in various ways, in particular during the investigative stage. The investigation was inadequate and biased.
2. She was asked to resign in lieu of filing her case before the JDC during the preliminary investigation stage, in violation of her due process rights.
3. She was not informed of her rights to counsel and was only afforded such an option after she elected to appear before the JDC.
4. She was punished twice by the denial of a deserved second promotion and by the recommendation that she be summarily dismissed.
5. The Secretary General's decision to separate her from service without notice should be quashed and the case should be heard anew.
6. She should be compensated for loss of income, psychological torture, strain, and stress.
7. She should be reinstated to service and promoted to the G-6 level that was due to her before this case occurred.
8. The claims regarding the non-implementation of the promotion and the non-selection for a post with UNOCI after she had been separated from service are receivable.

Whereas the Respondent's principal contentions are:

1. The Applicant did not meet the standard of conduct required of an international civil servant.
2. The Administration carried out the investigation properly and there is no evidence of bias or other extraneous factors that vitiated the investigation.
3. The Secretary-General properly exercised his discretion in the decision to separate the Applicant for misconduct.
4. The Applicant's due process rights were not violated.
5. The Applicant's claim as to the non-implementation of her promotion is not receivable by the Tribunal.
6. The Applicant's claim regarding her non-selection to serve with UNOCI after she was separated from service is not receivable.
7. The Applicant is not entitled to compensation.

The Tribunal, having deliberated from 29 June to 31 July 2009, now pronounces the following Judgement:

- I. The first issue is whether the Respondent was entitled to summarily dismiss the Applicant on grounds of serious misconduct. In reviewing the Secretary-General's exercise of discretion to impose disciplinary sanctions, the Tribunal has consistently followed the guidance in Judgement No. 941, *Kiwanuka* (1999), para. III:

“In reviewing this kind of quasi-judicial decision and in keeping with relevant general principles of law, in disciplinary cases the Tribunal generally examines (i) whether the facts upon 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.” (See also Judgement No. 898, *Ugla* (1998), para. II).

II. The Tribunal notes that in establishing the facts, the JDC made a careful evaluation of the evidence, having correctly directed itself in accordance with the jurisprudence of the Tribunal as stated in Judgement No. 484, *Omosla* (1990) and Judgement No. 897, *Jhuthi* (1998), that “once a prima facie case of misconduct is established, the staff member must provide satisfactory proof justifying the conduct in question”. There was clear and convincing evidence that the Applicant had altered the list of applicants on 7 October 2005. In the proceedings before the JDC she claimed that she did not physically alter the list of applicants, but this was in direct conflict with her earlier written statement. In her Explanatory Statement to this Tribunal (paras. 28 and 29), the Applicant herself admitted that she did remove Ms. H.K.’s name and replaced it with Ms. L.N.’s name. It is not now disputed that the Applicant had been instructed by her supervisor the day before, i.e., 6 October, that the list of applicants for the vacancy and the relevant files for the applicants should be submitted *unchanged* to the PCO on the morning of 7 October. Her supervisor also informed the Applicant that she would not be in the office on 7 October and would return on 10 October. The justification which the Applicant puts forward for her conduct is that her senior colleague, Ms. R.G., had asked her to remove Ms. H.K.’s name and to replace it with Ms. L.N.’s name. In her original statement, written soon after the events in question, the Applicant stated: “I did not argue as I felt pushed, under duress, but just followed her instructions”. She added: “[W]e did not discuss, I only changed the list and did everything at her instructions”. She also expressed remorse. In her later evidence, the Applicant claimed that Ms. R.G. had told her that UN-HABITAT had called her in relation to Ms. L.N.’s application and that her application should be included in the list of applicants. The JDC rejected this evidence as lacking credibility in all the circumstances. In her Explanatory Statement to this Tribunal (para. 28) the Applicant presents yet another version of events, stating, among other things, that she had “voiced her reservations” at Ms. R.G.’s request. These inconsistent statements by the Applicant support the findings of the JDC that her evidence lacks credibility and should be rejected.

III. The Applicant seeks to justify her actions by stating that Ms. R.G. had longer service and was senior in rank at the GS desk (Level G6, while the Applicant was a G5), that she had been performing her specific functions for a relatively short period of time, that she believed Ms. R.G. was acting under superior instructions from UN-HABITAT, and that there is no evidence that she altered the list of applicants for personal gain. In the Tribunal’s judgement, the JDC was fully entitled to reject all these purported justifications. Firstly, as a staff member with more than ten years’ experience, about half of which was in

HRMS, the Applicant ought to have been aware of the seriousness of altering the list of applicants, contrary to the direct and express instructions of her supervisor. The Tribunal rejects the argument now made by the Applicant that she did not act contrary to the order she was given by her supervisor. Secondly, Ms. R.G. had no supervisory authority over the Applicant, and the Applicant cannot now claim that she was acting under “instructions”, or that she did not understand that the alteration was a “falsification”. The contention that she did not personally gain from her actions does not justify those actions, because she acted contrary to the high standards of integrity expected from an international civil servant. The Applicant’s argument before this Tribunal that the Administration did not prove that she violated any law or rules, as she did not have the requisite “criminal intent” rest on a fundamental misconception. Once the Administration had established a prima facie case of misconduct, the burden was on the Applicant to rebut the allegations. The Tribunal finds that the Applicant has not met this burden.

IV. Based on its review of the record, the Tribunal readily dismisses the Applicant’s contention that the JDC erred in qualifying her conduct as “serious misconduct”.

V. The Tribunal has consistently recognized that the Secretary-General has discretionary power to take decisions in disciplinary matters, including imposing the sanction of termination. In deciding on a disciplinary sanction to recommend to the Secretary-General, the JDC was entitled to take account of a number of aggravating factors, in particular the clear instructions from her supervisor which “should have put [her] on high alert, and should have led her to impress upon her colleague the serious consequences that could ensue if she submitted the altered list”. The JDC was also entitled to take into account that the Applicant’s core function as Recruitment Clerk was to ensure that the integrity of the recruitment process is safeguarded and that applicants are treated correctly, in accordance with recruitment guidelines and instructions of supervising officers. The Applicant has sought to avoid personal responsibility by placing all the blame on Ms. R.G., who subsequently resigned from the Organisation. The conduct of Ms. R.G., who was not the Applicant’s supervisor, in no way exonerates the misconduct of the Applicant, nor does it amount to a mitigating factor.

VI. The Applicant argues that the preliminary investigation carried out by the Administration was inadequate, unsatisfactory, and biased, and that it excluded certain statements and information that were crucial to her case. This and related allegations regarding the preliminary investigation, and criticisms of the inferences which the JDC drew from that investigation, must be rejected. In the Tribunal’s judgement, there were no procedural irregularities in the preliminary investigation and there is nothing in the record to suggest that the investigation was conducted in a way that breached the Applicant’s due process rights.

VII. The Applicant further argues that there was evidence of bias, in particular that the Administration took the Applicant's statement out of context and disregarded Ms. R.G.'s admission that she had "required" the Applicant to alter the list. The Tribunal has consistently stated that the burden of establishing arbitrariness, prejudice, or other improper motive, rests on the Applicant. In the present case, the Applicant has proffered no evidence to support her claims of bias.

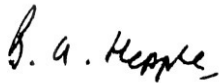
VIII. Finally, the Applicant submits that she was denied a fair hearing before the JDC, in particular, that the JDC should have called for written depositions or personal appearances. The Tribunal notes that, the Applicant was informed by the JDC of the referral of her case and was advised on her right to counsel. She also received her entire JDC file and was given a two-week deadline to submit her observations to the JDC. The Tribunal recalls that it is the JDC's discretion, in the circumstances of a specific case, to call for dispositions or personal appearances. The Tribunal is satisfied that in the instant case, the written statements and documentation gathered during the preliminary investigation were sufficiently clear for the JDC to conduct its consideration on this basis. Therefore, the Tribunal rejects the allegations that the JDC acted arbitrarily or was biased against the Applicant.

IX. For the foregoing reasons, the Tribunal rejects the Application in its entirety.

(Signatures)



Spyridon **Flogaitis**
President



Bob **Hepple**
Member



Agustín **Gordillo**
Member

A handwritten signature in black ink that reads "Tamara Shockley". The signature is written in a cursive style with a horizontal line above the first few letters of the first name.

Geneva, 31 July 2009

Tamara **Shockley**
Executive Secretary