



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2012/030

Judgment No.: UNDT/2013/076

Date: 17 May 2013

Original: English

Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

MBOYA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Martin Maina, Maina & Maina Advocates

Counsel for Respondent:

Susan Maddox, ALS/OHRM

Cristiano Papile, ALS/OHRM

Introduction

1. The Applicant contests the decision of the Under-Secretary-General of Management, taken on behalf of the Secretary-General, to dismiss her from service for submitting falsified payslips, in order to apply for and obtain loans.

Procedural History

Allegations of misconduct

2. On 30 April 2012, the Applicant filed the present Application with the Tribunal contesting the decision, dated 11 January 2012, dismissing her from service with the United Nations Human Settlements Programme (UN-HABITAT).

3. The Respondent filed a Reply on 8 June 2012.

4. The Tribunal issued Order No. 090 (NBI/2012), on 5 July 2012, setting the matter down for a hearing from 11 September 2012 to 13 September 2012. It also ordered that it was the responsibility of the parties to ensure the availability of their witnesses at the hearing.

5. On 10 September 2012, the Applicant filed a motion for adjournment of the hearing stating that her counsel was unable to locate her. On the same day the Respondent applied for leave to file additional documents.

6. On 2 November 2012, the Tribunal issued Case Management Order No. 136 (NBI/2012), directing the parties by 30 November 2012 to: advise the Tribunal if an oral hearing was necessary; if so to submit their respective witness lists and the summary of their statements; to submit a concise statement of agreed facts, areas of factual dispute and the remedies sought; to identify the legal issues and; to notify the Tribunal if they intended to submit additional documents.

7. On 20 November 2012, the Respondent filed a motion to dismiss and a response to Order 136 (NBI/2012), for want of prosecution.

8. The Applicant's Counsel filed a response to the Respondent's motion to dismiss on the same date in which it was submitted that an oral hearing may not be necessary, there was still a communication breakdown with the Applicant, and that the Tribunal would be in a position to address the issues based on the Application and documents filed with it and the Respondent's reply. The Respondent agreed to the proposal and urged the Tribunal to determine the matter on the pleadings filed by both parties.

9. On the basis of these submissions the Tribunal decided to determine the case on the papers without a hearing.

Issues

10. The Applicant argues that the decision to impose on her the disciplinary measure of dismissal was improper because it was allegedly *ultra vires* with regard to the decision-maker; contrary to the "rules of natural justice"; motivated by "discrimination and/or victimization"; and disproportionate.

11. In light of these allegations the Tribunal has to decide:

- a. Was the decision to dismiss taken *ultra vires*?
- b. Was due process accorded to the Applicant during the investigations into her conduct?
- c. Were the findings of misconduct by the Applicant based on well-established facts?
- d. Did the established fact legally amount to misconduct under the Staff Regulations and Rules; and

- e. Was the disciplinary measure imposed on the Applicant proportionate to the misconduct?

Facts

12. The Applicant is a former United Nations staff member who was dismissed from service on 2 February 2012 for reasons of misconduct. At the time of the contested decision, she worked with UN-HABITAT in Nairobi, under a Fixed-Term Appointment at the G-6 level, step 5, as an Administrative Assistant in the Research and Monitoring Unit.

13. The alleged misconduct was that the Applicant used falsified pay slips to apply once for a loan with the Nairobi Staff Union (NSU) and five times for loans with the United Nations Cooperative Savings and Credit Society (UNSACCO).

14. The facts considered by the Administration when it reached the decision to dismiss the Applicant were provided in an investigation report, dated 31 March 2010, prepared by the Office of Internal Oversight Services (OIOS).

15. In summary, the report demonstrated that in late March or April 2009 the Applicant had used a falsified payslip in support of a loan application to the NSU. A payslip for the 2009 payroll period attached to her loan application showed, among other things, a falsely inflated net salary of KES (Kenya Shillings) 54,791.85.

16. A member of the NSU committee responsible for approving NSU loans, told investigators that, when she received the Applicant's loan application, she noticed various internal discrepancies in the Applicant's payslip, for example the three "earnings" figures on the payslip did not add up to the "total earnings" figure.

17. On 2 April 2009, another member of the NSU committee, Ms. O sent the Applicant an e-mail, requesting her to submit her original payslip. When the Applicant did not provide it, Ms. O obtained a copy of the Applicant's genuine payslip from the Chief, Accounts Section, Budget and Financial Management Service, UNON Payroll Unit. She

noticed that the genuine payslip did not correspond to the one that the Applicant had submitted in support of her loan application.

18. According to Ms. O, the Applicant verbally admitted to her that she had “forged” the payslip out of “desperation”. Ms. O told the Applicant that she was “doing something wrong”. Ms. O told the investigator that the Applicant asked her to “cover her”.

19. Investigators interviewed the Applicant on 30 September 2009. She admitted to the investigators that she altered her March 2009 payslip and that she submitted her altered payslip in support of her NSU loan application. She also confirmed that, after the NSU rejected her loan application, she admitted to Ms. O that she had falsified the payslip in question.

20. The Applicant explained that she altered the March 2009 payslip by manually cutting pieces out of an earlier payslip with a higher income and pasting them onto her March 2009 payslip. She said that she had falsified the payslip because she knew that in order to qualify for a loan with the NSU she needed a minimum income of KES10,000 on her payslip. She stated that, at the time she submitted the loan application, she was in a “desperate situation” because she needed funds to pay her children’s school fees, including one who was at university in the United States.

Loan applications to UNSACCO (August 2007- March 2009)

21. Investigators established that, between August 2007 and March 2009, the Applicant attached falsified payslips to five loan applications that she submitted to UNSACCO, each of the loans was granted. Details of these five transactions are:

UNSACCO loan application for 6 August 2007

22. This application included a copy of a falsified payslip of July 2007, which had been altered to show an inflated net salary payment.

23. During her interview, the investigator showed the Applicant the loan application, the falsified pay slip for July 2007 submitted with her application and her genuine pay slip for July 2007 from the UNON Payroll Unit. The Applicant admitted that she had falsified her July 2007 payslip by altering the net pay. She stated that she did this because she “wanted to get the loan”. She stated that she altered the payslip by cutting and pasting portions of previous payslips.

UNSACCO loan application of 2 October 2007

24. This included a copy of a falsified pay slip for September 2007 which had been altered to show an inflated salary payment.

25. During her interview, investigators showed the Applicant a copy of the loan application that she submitted to UNSACCO on 2 October 2007, the falsified payslip for September 2007 that she submitted with her loan application and her genuine pay slip for 2007, provided by the UNON Payroll Unit. The Applicant admitted that she had falsified her September 2007 payslip by altering the net pay.

UNSACCO loan application of 31 March 2009

26. This application included a copy of a falsified pay slip for March 2009 that had been altered to show an inflated net salary payment.

27. During her interview, the Applicant denied that she attached a falsified March 2009 payslip to her 31 March 2009 loan application with UNSACCO, while admitting that she had submitted a falsified March 2009 payslip to her loan application with the NSU. She explained that at the time she applied for the loan with UNSACCO, she did not yet have her March 2009 payslip. She speculated that the falsified March 2009 payslip might have been provided to the UNSACCO by the NSU.

28. The General Manager, UNSACCO, stated that, in April 2009, one of his staff, informed him that she had received the payslip “directly” from the Applicant and. sent the

Applicant's payslip to the Payroll Unit for verification, which confirmed that it was not genuine.

Applicant's admission to misconduct

29. During her interview with investigators on 30 September 2009, the Applicant repeatedly admitted that she submitted falsified payslips in support of loan applications with the NSU and UNSACCO.

30. The interviewer recorded that during her interview the Applicant stated that she "really appreciated the fact that she could speak freely to investigators. At the conclusion of her interview, she stated that she "appreciated the dignity" with which the investigators conducted the interview and that, although she felt "remorseful about the situation", investigators "did not terrify her" and she "appreciated their professional approach".

31. At the end of her interview, the Applicant prepared and submitted a handwritten statement in which she admitted her conduct. She wrote:

This is to state that I ... presented falsified payslips to the UNSACCO and UN-Staff Union for purposes of obtaining loans to assist me to pay school fees between 2007 and March 2009.

I did confess to the committee members the circumstances that led me to this, and I do regret that it contravenes the UN-Ethics. It was due to adverse financial situations I was facing that I did this, which once again, I sincerely regret.

32. The Applicant was afforded and took the opportunity to review her interview statement and to make amendments. None of these amendments related to her admission of misconduct. On 29 October 2009, the Applicant signed her interview statement to certify its accuracy.

33. By memorandum dated 18 June 2010, the then Executive Director (ED), UN-HABITAT, referred the OIOS investigation report concerning the Applicant to the Assistant Secretary-General for Human Resources Management (ASG/OHRM) for possible disciplinary action.

34. At the same time, the ED also referred a second investigation report concerning the allegations that the Applicant had falsely claimed overtime for disciplinary action. However, as indicated in the decision letter sent to the Applicant in this matter, the allegation concerning improper overtime claims was dropped.

35. On the basis of the evidence and the findings contained in the investigation report and supporting documentation, the Applicant was charged with misconduct by memorandum dated 23 February 2011, delivered to the Applicant on 1 March 2011. She was charged with submitting falsified pay slips issued by UNON in order to acquire loans from the NSU and UNSACCO. She was informed that, if established, her conduct would constitute a violation of staff regulations 1.2(b) and 1.2(f), as well as former staff rule 101.2(g).

36. The Applicant was requested to provide, within four weeks of receipt of the charges memorandum, any written statement or explanations she might like to give in response to the allegations against her. She was informed of her right to avail herself of the assistance of the Office of Staff Legal Assistance, or of other counsel at her own expense.

Applicant's comments on the allegations of misconduct

37. The Applicant's comments on the allegations of misconduct were due on 29 March 2011. By e-mail dated 24 March 2011, the Applicant requested an extension of time until the second week of May 2011. The Chief, Human Resources Policy Service (HRPS), granted the Applicant an extension of time until 15 April 2011. The Applicant responded by e-mail on the same day, requesting that the deadline be extended to 29 April 2011. The Chief, HRPS, responded to the Applicant, denying her requests and noting the comments remained due on 15 April 2011.

38. By e-mail dated 21 April 2011, six days after the extended deadline, the Applicant provided a first set of comments on the allegations of misconduct. By e-mail dated 26 April 2011, the Applicant provided what she described as "very important additional information concerning her case."

39. In her comments, the Applicant said that she had already “confessed” and “apologised” for her conduct to several parties, including the Treasurer of the NSU, OIOS investigators, the UNSACCO manager and her supervisor. She emphasised that she had “voluntarily requested” OIOS to “put in writing her confession” in her statement of 30 September 2009. The Applicant reiterated that she falsified her payslips in “desperation” to acquire loans to pay school fees for her children.

Respondent’s findings that the allegations were established

40. The Under-Secretary-General for Management, on behalf of the Secretary-General, concluded that the allegation against the Applicant was established. This conclusion was informed by the following evidence:

- a. The statement of the witnesses interviewed by the investigators; and
- b. The Applicant’s multiple admissions that she had repeatedly used falsified pay slips to apply for loans from the NSU and the UNSACCO, including:
 - i. Her interview statement on 30 September 2009;
 - ii. Her signed confession on 30 September 2009; and
 - iii. Her comments on the allegations on 21 April 2011.
- c. Copies of the various loan applications submitted by the Applicant, which included copies of her falsified payslips.
- d. Copies of the Applicant’s original payslips.

41. On this basis, and as set out in the decision letter to the Applicant, the Under-Secretary-General for Management, on behalf of the Secretary-General, concluded that the Applicant’s actions amounted to a violation of “both the letter and the spirit of staff regulations 1.2(b) and (f) and former staff rule 101.2(g).”

42. The letter said:

After a thorough review of the entire dossier in this case, including the Investigation Report and supporting documentation, your comments on the charges, and the evidence detailed above, the Under-Secretary-General for Management, on behalf of the Secretary-general, has concluded that you engaged in the conduct described in allegation (1) of the charges [...]

Accordingly, the Under-Secretary-General for Management, on behalf of the Secretary-General, has decided to impose on you the disciplinary measure of dismissal from service pursuant to staff rule 10.2(a)(ix), effective as to the date of your receipt of this letter.

Applicant's submissions

Decision was ultra vires

43. The decision to terminate the Applicant's contract is reserved to the Secretary-General and has never at any one time been delegated to the author of decision, Ms. Catherine Pollard, in contravention of ST/AI/234/Rev. 1 ("Administration of Staff Regulations and Rules").

Rules of Natural Justice

44. The entire process was orchestrated on dubious and non-existent evidence. It was politically motivated and a knee-jerk reaction to the stand taken by the NSU in solidarity against the unfair removal of the Director General of UNON.

45. A specific request for representation during her interview was ignored by OIOS.

46. Failure to furnish her with any evidence, in this instance, the alleged altered payslips, was contrary to ST/AI/371 ("Revised Disciplinary Measures and Procedures").

47. She was not allowed to take any notes during the said interviews.

48. She was never informed of her right against self-incrimination and that any alleged confessions and/or admissions made would be used against her.

49. The Investigation Report came out skewed reflecting the fact that the investigators focused more on irrelevant matters and ignored the Applicant's side of the story.

50. The mode of questioning was geared to suit a particular result, or to meet a certain end, as the Applicant was not allowed to give a full and accurate account of what transpired concerning the allegations that were levelled against her.

51. The purported investigators asked a series of yes and no questions that were framed more or less like a questionnaire specifically designed to bring out the negative aspects and obscure and/or ignore any exculpatory evidence that the Applicant may have had.

Discrimination and/or victimization

52. This action can only be said to arise due to the position taken by the Applicant and other employees in opposition to the plot to remove the former ED from office as the Director General of UNON.

53. Other staff engaged in clear, provable criminal activities against both the United Nations and domestic jurisdiction, have escaped sanction either on the basis of race or their relation to the higher echelons of the Organization.

54. In the event that the finding on the alteration of the payslips was justified, which is denied, fair, proportionate, procedural and equal treatment should have then been accorded the Applicant.

Remedies

55. Compensation for lost earnings and/or reinstatement to duty: The Applicant has been denied a basic right and has been dismissed unfairly. She was dismissed without following the proper procedure and has thus lost her right to earn a living like any other hardworking individual. Under this head, the Applicant is seeking compensation for the equivalent of her salary for the period that she has been out of employment.

56. General damages for unfair and procedural irregularity in terminating her contract.

57. General damages for discrimination, ridicule, loss of personal integrity and harm to professional reputation and career prospects.

58. Benefits accruing and due to the Applicant.

59. Severance pay to be calculated.

Respondent's submissions

Was the decision to dismiss the Applicant ultra vires?

60. The author of the decision to dismiss the Applicant was the Under-Secretary-General for Management, who took the decision on behalf of the Secretary-General consistent with para. 9 of ST/AI/371/Amend.1 (Revised Disciplinary Measures and Procedures"). It was not *ultra vires*.

Did the decision to dismiss the Applicant contravene the rules of natural justice, or was it motivated by discrimination or victimization?

(i) Alleged political motivation and alleged lack of evidence

61. There is no evidence to support this contention.

62. The investigative and disciplinary processes were not tainted by politicisation and victimisation. "Due to the position taken by the Applicant ... in opposition to the plot to remove the ED from office as Director-General of UNON." It was the ED who referred the Applicant's case to OHRM for disciplinary action.

63. The Applicant always admitted that she had submitted falsified payslips in support of loan applications, and never denied this, not even in her Application.

(ii) Alleged request for representation during the investigative interview

64. The record of interview shows that the Applicant did not request counsel at any time during the investigation interviews and that she had no objections to how the interview was conducted.

iii. Alleged failure to furnish the Applicant with evidence

65. The allegations of misconduct memorandum, delivered to the Applicant on 1 March 2011, annexed copies of the investigation report and of all supporting documentation, including copies of the Applicant's various loan applications and copies of her falsified payslips.

iv. Not being permitted to take notes during her interview; not being informed of her "right against self-incrimination"

66. The interview record does not reflect any request, on her part, to be permitted to take notes. Even if the Applicant had made such a request, the Respondent rejects the assertion that there exists a right to take notes during an investigative interview. The nature of the Applicant's statement indicates that she was fully aware that she was making the statements in the context of an investigation into allegations that she had submitted falsified payslips in support of loan applications.

v. The alleged "skewed" nature of the investigation report

67. The Applicant has failed to point to any evidence supporting her contention that "the investigation report came out skewed reflecting the fact that the investigators focused more on irrelevant matters and ignored the Applicant's side of the story."

vi. Alleged improprieties in the mode of questioning

68. The records of interview indicate that she was asked numerous open-ended questions directly related to the allegations against her.

69. The Respondent notes that the Applicant was provided the opportunity to submit comments on the allegations of misconduct. In those comments, she confirmed what she had previously told investigators.

vii. Alleged discriminatory treatment

70. The Applicant has proffered no evidence in support of her contention.

Proportionality

71. The misconduct for which the Applicant was dismissed involved the use of falsified payslips. Her actions went directly to her integrity. A review of the information circulars concerning the Secretary-General's practice in disciplinary matters shows that cases of theft, fraud and misappropriation usually attract the most severe sanction.

Considerations

Was the decision to dismiss taken *ultra vires*?

72. ST/AI/371/Amend.1 states in section 6(b) that

Decisions on recommendations for the imposition of disciplinary measures shall be taken by the Under-Secretary-General for Management, on behalf of the Secretary-General. The Office for Legal Affairs shall review recommendations for dismissal of staff under staff rule 10.2(a)(ix). Staff members shall be notified of a decision to impose a disciplinary measure by the Assistant Secretary-General for Human Resources Management.

73. In this case the person who took the decision as recorded in the letter of dismissal was the Under-Secretary-General for Management who took the decision on behalf of the Secretary-General. The facts on the record establish that the decision was not *ultra vires*.

Was due process accorded to the Applicant during the investigations into her conduct?

74. This is a case where the whole investigation was undertaken by OIOS investigators. They presented the decision maker with thorough records of interviews and safeguarded the rights of the Applicant throughout by giving her an opportunity to comment on the drafts before they were finalised and placed in the report. Although the Applicant did make some alterations and even made a handwritten confession, she did not add into the record that she had asked for and been refused representation during the interviews.

75. The same goes for her alleged request to make notes. There is no record of any such request in the interview records and at no time during the interviews did the Applicant make an additional note that she had made such a request.

76. Neither of these two allegations of breach of due process is made out on the facts before the tribunal.

77. The Applicant submits that she was never informed of her right against self-incrimination and that any alleged confessions and/or admissions made would be used against her. In addition, the Applicant claims she was not furnished with any evidence, in this instance, the alleged altered payslips.

78. The Respondent submits that it is only once a staff member has been notified of the allegations against him that the staff member's due process rights come into operation. This is reflected in staff rule 10.3(a) and section 6 of ST/AI/371/ Amend.1. In *Haniya* UNAT/2010/024, a case where a staff member challenged his termination because he gave statements without the assistance of a lawyer during an investigation, the United Nations Appeals Tribunal (the UNAT) ruled that the staff member "had not demonstrated any violation of his due process rights.

79. UNAT concluded in *Molari*¹ that “disciplinary cases are not criminal.” So therefore the right and rules pertaining to self-incrimination are purely associated with criminal procedure and therefore does not apply in this instance which is a disciplinary case. The Tribunal finds that she was provided systematically with the evidence, including the payslips in the course of the interview, in addition to an opportunity to review the record of interview.

Were the findings of misconduct by the Applicant based on well-established facts?

80. In *Molari*² the Appeals Tribunal held that:

Disciplinary cases are not criminal. Liberty is not at stake. But when termination might be the result, we should require sufficient proof. We hold that, when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable.

81. In this case there was substantial and substantiated documentary evidence showing not only that the Applicant had deliberately falsified her pay slips but also evidence that these had been submitted by her with the intention of obtaining loans.

82. In addition, the Applicant freely and repeatedly admitted all allegations put to her on the basis of those documents and even wrote a fulsome confession in her own hand.

83. There can be no doubt on the basis of this evidence that the facts that led to the findings of misconduct were well and truly established by clear and convincing proof.

Did the established facts legally amount to misconduct under the Staff Regulations and Rules?

84. Staff regulation 1.2(b) states: “[s]taff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not

¹ 2011-UNAT-164 at para 30.

² *Molari* UNAT-2011-164, para. 30

limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status”.

85. Staff rule 1.2(h) states that “staff members shall not intentionally alter, destroy, falsify or misplace or render useless any official document, record or file entrusted to them by virtue of their function, which document, record or file is intended to be kept as part of the records of the Organization”.

86. Misconduct is the failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Financial and Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant.³

87. The Applicant admitted her misconduct in her statement she submitted at the end of her interview with OIOS wherein she stated:

This is to state that I [the Applicant] presented falsified payslip to the UN-SACCO & UN-Staff Union for purposes of obtaining loans to assist me pay school fees between 2007 and March 2009. I did confess to the committee members the circumstances that led me to this, and I do regret that it contravenes the UN Ethics. It was due to adverse financial situations I was facing that I did this, which once again I sincerely regret.

88. The Tribunal finds that the Applicant’s conduct in this case, as established by the investigators and her own admission of the falsification of payslips, legally justified the findings of misconduct by the decision maker.

Was the disciplinary measure imposed on the Applicant proportionate to the misconduct?

89. The principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result.⁴ The Tribunal will give

³ ST/AI/371 (Revised disciplinary measures and procedures) Section II (2).

⁴ *Sanwidi* 2010-UNAT-084.

due deference to the Secretary-General unless the decision is manifestly unreasonable, unnecessarily harsh, obviously absurd or flagrantly arbitrary.

90. The action should also be in some measure consistent with other like cases although care should always be taken to assess each case on its own merits.

91. In this case the Respondent provided the following examples of disciplinary measures imposed on staff taken from a review of the information circulars concerning the Secretary-General's practice in disciplinary matters in cases of theft, fraud and misappropriation showing that they usually attract the most severe sanction:

a. A staff member knowingly submitted false information in support of an application for financial assistance from staff mutual funds. Disposition: summary dismissal.⁵

b. A staff member used a falsified payslip in connection with a loan application and misrepresented his educational qualifications in his Personal History File. Disposition: dismissal.⁶

c. A staff member knowingly submitted false information and supporting documentation in support of a claim for medical expenses. Disposition: dismissal.⁷

d. A staff member engaged in forgery, fraud and falsification of official United Nations records with the intent to defraud the Organization. Disposition: summary dismissal.⁸

e. A staff member altered a cheque and forged a signature in order to substantiate a claim for reimbursement of a real estate agency fee, available under

⁵ ST/IC/2009/30.

⁶ ST/IC/2011/20.

⁷ ST/IC/2010/26.

⁸ ST/IC/2009/30.

the rental subsidy scheme, and misled investigators. Disposition: demotion, by two levels, and written censure.⁹

92. It is clear from these examples that cases where it had been established that staff members have knowingly submitted or attempted to submit false information to obtain an advantage have resulted in dismissal, whether summary or on notice.

93. In this case where the Applicant admitted to multiple instances of misconduct. There can be no doubt that the decision to dismiss her was entirely proportionate to the offense.

94. Accordingly, the Application is dismissed in its entirety.

(Signed)

Judge Coral Shaw

Dated this 17th day of May 2013

Entered in the Register on this 17th day of May 2013

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi

⁹ ST/IC/2004/28.