



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/007

Judgment No.: UNDT/2014/052

Date: 14 May 2014

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

JAFFA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-Represented

Counsel for Respondent:

Susan Maddox, ALS/OHRM

Kevin Browning, ALS/OHRM

Introduction

1. The Applicant is a former member of staff of the United Nations Mission in South Sudan (UNMISS). He joined the Organization on 5 June 2000 and at the time of his separation he was serving as a Finance Assistant on a fixed-term appointment at the FS-5 level in Juba, South Sudan.

2. He was separated from service on 18 January 2013 and on 25 February 2013, he filed the current Application with the Tribunal contesting the decision to impose on him the disciplinary measure of separation from service. He submitted that all the grounds upon which the decision to separate him from service were based were not justified.

3. The Respondent filed his Reply on 12 April 2013 stating that it had been established that the Applicant abused his position of authority and took steps to grant himself an interest free loan. By doing so he had acted contrary to the Staff Rules and as such, the disciplinary measure imposed on him was proportionate to the misconduct committed.

Facts

4. The Applicant worked in the Payroll Unit in Juba as a Finance Assistant from May 2007 until May 2010.

5. The Payroll Unit in Juba used two software systems namely the 'SunSystem' and the 'Progen Payroll Unit' ("Payroll System Software") to which the Applicant had login access in his position as a Finance Assistant.

6. On 13 April 2010, Mr. Ricardo Ramirez-Garcon, Chief, Accounts Unit, and Mr. Joseph Brent, Chief, Payments Unit, of the then United Nations Mission in Sudan (UNMIS) conducted a review of the accounts payable and receivable. In the course of the review it was found that the Applicant had received three overpayments on 25 August 2009, 29 October 2009 and 13 March 2010, for a total of USD4,500.

7. At the time of the review, none of the overpayments had been recovered by the Organization. These concerns were forwarded to Mr. Abdul Wahab, Chief Finance Officer of UNMIS.

8. Mr. Wahab contacted Mr. Nicolas Von Ruben, Director, Mission Support, on 26 April 2010 stating that he had spoken to both the Applicant, and his immediate supervisor, in regards to the overpayments.

9. It was alleged that the Applicant admitted to having increased the payment in his favour without prior authorization from his supervisor or from the Human Resources Section. Secondly he had manually entered a “W” (for withheld) into the Payroll System Software. The effect of such an entry would be to prevent automatic recovery of the overpayment from his subsequent monthly remuneration, until it is removed manually.

10. Mr. Wahab recommended that a reprimand letter be placed in the Applicant’s Official Status File. The Applicant was also transferred with immediate effect from the Payroll Unit to the Accounts Unit and his access to the *Progen Payroll System* and *Sun Systems* was suspended.

11. Before the discoveries came to light, it had been recommended that the Applicant be made an approving officer in the Payroll Unit and the request was being processed. Following the discovery of the overpayments, Mr. Wahab recommended that the Field Budget and Finance Division withdraw the processing of his delegation of approving authority.

12. The Applicant was then reassigned from the Payroll Unit and served as Secretary to the Board of the Local Contracts Committee which oversaw procurement functions for the Mission.

13. After about 9 months, following a review of the Applicant’s performance, his access to *Sun Systems* was restored and he was placed in charge of the Accounts Unit and the Archive Unit in Juba. He served in this capacity up until his separation from service in January 2013.

14. On 18 May 2010 the Special Investigations Unit (“SIU”) of UNMIS was instructed to conduct an investigation into allegations of financial irregularities and potential fraud involving the Applicant.

15. The Applicant’s First Reporting Officer, Mr. Shamsul Haque, on 21 September 2010, told investigators that his duties and responsibilities, as the Regional Finance Officer, included the supervision of the Payroll, Payments and Cash Units of the regional office in Juba; and the review and approval of expenditures, staff entitlements, monthly subsistence allowances, among other functions. He also told investigators that the Applicant was in charge and responsible for the payroll and payments including Monthly Payment Order (“MPO”) reconciliations.

16. The findings of the SIU investigator submitted on 13 February 2011 established that:

- a. During the period of July 2009 - February 2010, the Applicant made two unauthorized adjustments of the amounts of his local salary portion (August 2009 and February 2010) in the Payroll System which resulted in the occurrence of two overpayments of USD1,000 and USD2,000 respectively. For these two months, the investigation found and concluded that UNMIS Finance Section never received any Salary Distribution Form F.248 from the Applicant which was a violation of the applicable rules.
- b. With respect to the month of October 2009, the investigation found and concluded that the amount of the Applicant’s local salary portion was authorized through a duly approved Salary Distribution Form but that the amount reflected in his UNMIS MPO was higher than the amount reflected in the UNHQ MPO and resulted in another overpayment of USD2,000 to his account.

- c. The Applicant intentionally excluded all the three overpayments aggregating to USD4,500 from automatic recovery by placing a “W” remark against each of them.
- d. The Applicant never informed the Regional Finance Officer in Juba or anyone else in UNMIS Finance Section about the occurrence of the overpayments or his action of withholding their recovery.
- e. The manipulation of the finance payroll system by the Applicant consisted of deliberate and repetitive acts perpetrated with clear intention to temporarily misappropriate funds credited to his account through unauthorized Salary Distribution Form adjustments.
- f. There was a lack of direct supervision over the Applicant’s activities. The Regional Finance Officer failed to thoroughly analyse and scrutinize his activities and final work products before approving them for further processing.
- g. On three separate occasions the Applicant had created and received three overpayments and failed to report said overpayments to his supervisor. It was further ascertained that the Applicant had taken such steps as to prevent the subsequent automatic recovery of the overpayments from his next month salary.

17. The report was then forwarded to the Office of Internal Oversight Services (“OIOS”) for a review of the SIU investigation.

18. OIOS concluded that SIU had conducted a full and through investigation of the Applicant’s conduct. On 22 September 2011, Mr. Michael Stefanovic, Director, Investigations Division, OIOS, forwarded the SIU report to Ms. Susana Malcorra, Under-Secretary-General, Department of Field Support (USG/DFS).

19. On 22 March 2012, Mr. Anthony Banbury, Assistant Secretary-General, DFS, referred the findings of the SIU investigation to Ms. Catherine Pollard, Assistant Secretary-General, Office of Human Resources Management (“ASG/OHRM”) concluding that the Applicant violated the Staff Regulations of the United Nations and recommended that he face appropriate disciplinary action.

20. On 6 September 2012, Ms. Martha Helena Lopez, Officer-in-Charge (OIC), OHRM charged the Applicant and invited him to respond to the allegations.

21. The Applicant, through legal counsel, responded to the allegations on 7 November 2012. The Applicant expressed remorse for his actions and admitted that while serving as Finance Assistant and responsible for processing the monthly payroll in the *Progen Payroll System*, he made unauthorized entries into the Payroll System Software. The Applicant admitted to having placed a “W” against the figures, such action having the effect of preventing automatic recovery.

22. By letter dated 18 January 2013, the ASG/OHRM informed the Applicant that there was sufficient evidence to indicate that he had on three occasions created overpayments.

23. The ASG/OHRM concluded that there was clear evidence that he failed to inform his superiors of the overpayment and subsequently took steps to prevent the recovery of said overpayments. By said failure the Applicant clearly violated the rules relating to recovery of overpayments made to staff members and acted contrary to expected standards of integrity and conduct. The Under-Secretary-General for Management considered the established misconduct was serious in nature and gravity and the disciplinary measure of immediate separation from service was arrived at.

24. On 25 February 2013 the Applicant submitted an Application to the United Nations Dispute Tribunal requesting a review of the management decision to terminate his employment contract.

Applicant's case

25. The Applicant's case as deduced from his pleadings and oral testimony is summarized below.

26. The Applicant claims that he was not the supervisor of the Payroll Unit in Juba when the overpayments occurred. He had previously been requested to process payroll and act as OIC of the Regional Finance Unit pending the arrival of Mr. Shamsul Haque; a position he held from May 2007-April 2009.

27. From May 2009, Mr. Haque took over control of the entire Regional Finance Unit and the Applicant performed payroll, payment and account functions under Mr. Haque's supervision. All of the Applicant's work in finance was reviewed and approved by Mr. Haque including entries made in the Payroll Software System.

28. One of Mr. Haque's functions as OIC of the Finance Section was payroll supervisor. The Applicant was not an approving officer and it was not possible for an overpayment to be recorded in his account without prior review and approval by the approving officer.

29. During the period of July 2009 up until his reassignment from the Payroll Unit in May 2010 the Applicant's duties included MPO reconciliations. This involved the reconciliation of the local portion payroll of the Mission against the authorized payroll from headquarters in New York.

30. The Applicant would review any overpayments and underpayments raised by the reconciliation with Mr. Haque. Although he did not point out each overpayment he received, Mr. Haque could not have had any doubt that the Applicant had received overpayments as his name was clearly indicated in the MPO reconciliation statements.

31. His supervisor was aware of overpayments that occurred in every payroll batch including those received by other staff members. Mr. Haque reviewed and approved all overpayments, as evidenced by his signature and individual ticks on the reconciliation forms.

32. The Applicant does not deny placing a “W” sign against the three overpayments. He however stated that there was no intention to hide any of the overpayments or prevent eventual recovery of said sums by the Organization.

33. As part of his official duties, he was responsible for ensuring appropriate action was taken to recover overpayments made to staff members. Overpayments can only be automatically recovered by the Organization once manually moved to staff members’ ‘accounts payable’ from their ‘accounts receivable’.

34. In April 2010, he moved a batch of overpayments, including those issued to other staff members, to accounts payable by creation of a Journal Voucher.

35. Having moved the overpayments to accounts payable, he contacted Ms. Carol Joseph, Chief of Payroll in Khartoum. He informed her that he had three pending overpayments and requested that they be recovered from his May and June payroll. She told the Applicant to ensure they were recovered in those two months and it is at this point that the Applicant placed a “W” against the three overpayments.

36. On 10 April, he received a call from Mr. Wahab asking for recovery to be made immediately. He repeated his request for the overpayments to be recovered at a later date, a request which Mr. Wahab turned down as the overpayments had been due for repayment for over six months. The Applicant then borrowed the necessary sums and repaid the overpayments he had received.

37. The absence of an intention to conceal the overpayments is evidenced by the fact that they were clearly recorded in the mission’s financial statements which were reviewed, and signed by both the Chief Finance Officer (“CFO”) and the Director of Mission Support (“DMS”). Further confirming that the Applicant did not fail to inform his supervisors about the overpayments, and in fact both the CFO and DMS knew of the overpayments before they were recovered.

38. He had no intention to commit fraud. The Payroll System Software contains audit trails and all transactions will eventually be recovered by payroll

as long as they are present in the system. There is simply no way that the overpayments could not have been recovered.

39. The Applicant did not take unauthorised or fraudulent steps to increase his salary. In line with proper practice he filled out Salary Distribution Forms which set out what he required his local portion of salary to be and the remainder to be deposited in New York.

40. He served the United Nations with all honesty, dedication, integrity and sacrifice. He had been the OIC of the Payroll Unit in Juba for a period of two years from 1 May 2007 to 31 March 2009, when Mr. Haque took over the Regional Finance responsibilities. At no time during this period as OIC did he attempt any fraudulent act. Never having engaged in any misconduct while OIC, he would not have attempted to defraud the Organization at a time when he had a supervisor who checked his work and that of other payroll staff.

Respondent's case

41. The Respondent's case is summarized as follows.

42. In August 2009, the Applicant received an overpayment of USD1,000. He then manually entered a "W", in the Payroll Software System, for "withheld" to prevent the automatic recovery of the overpayment that should have been affected the following month.

43. Again, in October 2009, and while the overpayment of August 2009 had not been yet recovered by the Organization, the Applicant received an overpayment of USD2,000. Again, the Applicant placed a "W" in the Payroll Software System to prevent the recovery of this second overpayment.

44. In the month of February 2010, and while the two previous overpayments had not yet been recovered by the Organization, the Applicant again received an overpayment of USD1,500. Again, he entered a "W" in the Payroll Software System to prevent the automatic recovery of the last overpayment.

45. The overpayments and the actions the Applicant took to prevent their recovery were hidden until discovered by Mr. Ricardo Ramirez-Garcon, Chief, Accounts Unit, and Mr. Joseph Brent, Chief, Payments Unit, UNMIS, in April 2010 in the course of an accounts review.

46. In his comments on the allegations of misconduct, the Applicant explained that he was “sometimes flexible when processing the payroll,” only to “help himself in managing his funds”. The Respondent considered that the Applicant did not provide a satisfactory explanation to justify his conduct, which was serious in nature and gravity.

47. The Applicant acted knowingly and not from negligence, in that he manually entered a “W” in the Payroll Software System on three different occasions to prevent the automatic recovery of the overpayments. When he did so for the second and the third overpayment, the Applicant knew that previous overpayments had not yet been recovered. By such actions the Applicant was granting himself financial benefits. Such actions were highly inappropriate for a Finance Assistant, who should have known, given his position, that he could not grant himself financial advantage because of his position and his access to the Payroll Software System. The relationship of trust had been breached and the Applicant's actions amounted to serious misconduct, and the sanction imposed was proportionate.

48. The sanction imposed on the Applicant was based on the following facts:

(a) He did not inform his supervisor or the Finance Section of the overpayments he had received on three separate occasions, which were not recovered until they were discovered by the Finance Section in Khartoum.

(b) The Applicant, without authorization, used his login access to the Payroll Software System to manually place a “W” in the system in order to postpone the recovery of each of the three overpayments he knew he had received.

49. In his statement to the SIU, his statement to OIOS and in his memorandum to the DMS, the Applicant admitted that he prevented the overpayments from being automatically recovered the month following each such overpayment by manually placing a “W” in the Payroll System Software against the overpayments.

50. The facts on which the disciplinary measure was based had been established by clear and convincing evidence.

51. The Respondent also took into consideration the fact that the Applicant failed to duly inform his supervisor at a time when he was responsible for the Payroll Unit in Juba, which fact made the Applicant’s failure all the more serious.

52. Mr. Haque, who was the Applicant’s First Reporting Officer, stated in his witness statement that the Applicant was, from May 2009 to 15 April 2010, “in charge of the Payroll Unit at the Regional Finance Office”. His statement was corroborated by Mr. Wahab.

53. The Applicant did not contest, in his Application, that he manually entered a “W” in the *SunSystem* to prevent the recovery of the overpayments he had received. Rather the Applicant contends that it was proper for him to do so since he had been granted the full login access by the CFO, and, as such, any transactions recorded in the system was a “normal official transaction”.

54. The Applicant used knowledge he gained from his official functions to grant himself financial advantage, in the form of *de facto* interest-free loans, from August 2009 to April 2010 regarding the first overpayment and for shorter periods for the subsequent two overpayments. The Applicant did not grant himself something he would have been entitled to under the Staff Rules and Regulations. Instead, the Applicant granted himself a financial advantage no staff member is entitled to.

55. In determining the appropriate disciplinary measure in the Applicant’s case, the Respondent took due consideration of the position and responsibilities the Applicant had at the time of the established misconduct.

56. Considering the Applicant's position at the time of the established misconduct; the Applicant's actions were aimed at obtaining a personal pecuniary benefit; the Applicant acted knowingly and not from negligence in that he manually entered a "W" in the *Sun System* on three different instances; and he failed to inform his supervisor or the Finance Section, his actions amounted to serious misconduct warranting dismissal.

57. In deciding the sanction to be imposed, the Respondent took into account the fact that the Applicant reimbursed the Organization, although he did so only after having been asked to do so. Further, the Applicant's conduct during the investigation, his sincere remorse, and his unblemished service record were taken into consideration as mitigating circumstances. Lastly, the Respondent took into account the delay in bringing the matter to a close (the facts occurred from July 2009 to April 2010, and the case was only referred to OHRM on 22 March 2012), as a mitigating factor.

58. The Applicant's contention that Mr. Haque should have been aware of the overpayments he received and the actions he took to prevent their recovery, because Mr. Haque was an Approving Officer does not render the Applicant's conduct more tolerable, nor does it mitigate the Applicant's conduct.

59. The Applicant's contention that he did not intend to defraud the Organization because the overpayments would have been, eventually, recovered, does not provide a satisfactory explanation to justify his conduct. Had the overpayments not been discovered by Khartoum, the Applicant could have had, until the end of his contract, entered unauthorized changes to grant himself financial advantage. By his actions, the Applicant temporarily misappropriated the Organization's resources, and the fact that the overpayments would have been recovered, at some point, does not negate the fact that, at the relevant time, the Applicant used knowledge gained from his position for private purpose.

60. In light of the above, it is established by clear and convincing evidence that the Applicant engaged in the actions as alleged against him, and that such actions amounted to misconduct. The Respondent requests that the Application be rejected in its entirety.

Issues

61. Having reviewed the case record, the Tribunal identifies the following issues for consideration:

- a. Whether the Applicant failed to inform his supervisors that he had received overpayments on three separate occasions.
- b. Whether the Applicant was supervisor of the Payroll Unit at the relevant time.
- c. Whether the Applicant, without authorization from his superiors, took such steps as to delay or prevent recovery of the overpayments he had received.
- d. The proportionality of the disciplinary sanction imposed on the Applicant.

Consideration

Did the Applicant fail in his duty to inform his supervisors that he had received overpayments on three separate occasions?

62. Section 2.4 of ST/AI/2009/1 (Recovery of Overpayments Made to Staff Members) defines overpayments as:

Payments made by the Organization to a staff member in excess of his or her entitlements under the Staff Regulations and Rules and relevant administrative issuances. Overpayments may occur in conjunction with periodic payments (for example, salary, post adjustment, dependency allowance, rental subsidy and mobility, hardship and non-removal allowance) or settlement of claims (for example, education grant, tax reimbursement and travel expenses).

63. Section 2.4 provides that when a staff member discovers that an overpayment has occurred, he or she shall advise the organisation immediately.

64. ST/AI/2009/1 makes no mention of what form of advice or notification would be sufficient to discharge this responsibility. It is necessary therefore to

objectively assess the actions a staff member has taken to advise the Organization of an overpayment.

65. There is evidence that salaries for UNMIS staff members were calculated at the United Nations Headquarters in New York (“UNHQ”) and could be distributed between a local bank in the mission area, and the balance sent to the staff member’s international bank account.

66. Due to banking restrictions at the time, MPOs were prepared for UNMIS staff using the salary distribution on record from the previous month. The official MPOs were then received from UNHQ 10-15 working days after. Overpayments and underpayments occurred as a result of differences between the salary distribution approved by UNHQ and the distribution followed by the Payroll Unit in Juba when preparing MPOs.

67. In order to vary the distribution of salary, a staff member was required to submit a Salary Distribution Form (“SDF”) to UNHQ setting out the new proportions of his or her international and local salary portions. Accordingly any SDF submitted would only be reflected in the official MPO issued by UNHQ. Overpayments and underpayments were a relatively common occurrence at UNMIS necessitating a monthly reconciliation between the MPO followed by the Payroll Unit in Juba and that issued by UNHQ to clear all discrepancies and institute any recovery or reimbursement procedures.

68. It was the Applicant’s case that he did not hide from his supervisors the overpayments he had received. He processed payroll for the Mission which he forwarded to Mr. Haque for approval. These payroll batches contained the overpayments he had received. Further to this, he also forwarded the MPO reconciliations he prepared to Mr Haque for approval and sat down with him to review them.

69. Counsel for the Respondent argued that the Applicant failed to immediately inform his supervisors of the overpayments he received as required by ST/AI/2009/1. He argued further that neither the submission of payroll batches

nor the submission of MPO reconciliations sufficed to discharge the Applicant's responsibility in that regard.

70. The Applicant testified that Mr. Haque knew his name and must have been aware that he had received overpayments as per both the payroll batches as well as the MPO reconciliation statements.

71. Counsel for the Respondent submitted that the Applicant entered inaccurate information into the MPO reconciliation statement he prepared in reference to the August 2009 payroll, when he knew he had received the first overpayment. He argued that this misrepresentation was tantamount to saying that the overpayment no longer existed.

72. It was further argued that the subsequent MPO reconciliation statements for the months of October 2009 and February 2010 made representations as to their proposed recovery. As the recovery did not occur in the subsequent months, due to the Applicant's own illegal actions, he had a responsibility to inform the Organization that these sums remained outstanding.

73. Did the Applicant's preparation and subsequent submission of the UNMIS payroll batches and/or the MPO reconciliation statements discharge his obligation under section 2.4 of ST/AI/2009/1?

74. Mr. Haque testified that he did in fact sign and approve both the payroll batches as well as the MPO reconciliation statements. These showed that the Applicant had received overpayments and that these overpayments had not been recovered by the Organization.

75. It was argued by the Respondent's Counsel that Mr. Haque could not be reasonably expected to have been made aware of the overpayments as he was limited in his examination of the contents of the payroll batches prepared for approval by the Applicant due to time constraints and the size of the batches.

76. This argument does not detract from the fact that Mr. Haque was the approving officer and must take responsibility for the accuracy of the payroll and the due recovery of all overpayments. He evidently failed in this responsibility.

77. However, Mr. Haque's failure to carry out his supervisory duties did not in any way validate the failure of the Applicant to make the Organization aware of the overpayments he had received. He simply failed to discharge the burden placed upon him by ST/AI/2009/1.

78. As a Finance Assistant, the Applicant was aware of the Organization's finance policies and practices. He knew how overpayments were processed and who to report the said overpayments to within the Organization.

79. The submission to Mr. Haque of the Payroll batches and MPO reconciliations, as he was required to do in the course of his official duties, which on a careful scrutiny would have revealed the Applicant's overpayments, did not discharge the Applicant's duty under ST/AI/2009/1.

80. The Tribunal finds and holds that the Applicant failed in his duty to make the Organization aware of overpayments made to him, as provided for in section 2.4 of ST/AI/2009/1.

Was the Applicant supervisor of the Payroll Unit at the relevant time?

81. The Respondent argued that the Applicant was supervisor of the Payroll Unit at the time when he received the overpayments and so abused his position of responsibility, falling below the standards of integrity expected from a staff member.

82. The Applicant denied being supervisor the Payroll Unit at the relevant time.

83. On 7 November 2012, in response to the allegations against him, the Applicant stated that from March 2007 until April 2009 he served as OIC of the Finance Section and from March 2007 to March 2010, he was supervisor of the

Payroll Unit in Juba. The Applicant testified that Mr. Haque was in charge of approving payroll at the times material to this Application.

84. The Applicant testified that his duties included the processing of payroll and MPO reconciliations as well as various accounts and payment functions allocated to him and to other members of the Finance Section. With the exception of his statement on 7 November 2012, he has repeatedly stated that he was not in charge of the Payroll Unit but was only responsible for processing the payroll before submitting it to Mr. Haque for approval.

85. On 8 September 2010, Mr. Haque was interviewed by an SIU investigator, regarding the overpayments the Applicant had received. In a follow-up memorandum dated 21 September 2010, the investigator sought to clarify what Mr. Haque's duties were as Regional Finance Officer. Mr. Haque stated that he was tasked to "review and approve expenditures with efficiency and [in a] timely manner for all vendors, staff entitlement payment including salary."

86. He also testified that the Applicant's duties included the processing and reconciliation of MPOs which would be forwarded to him for approval. This approval is evidenced by Mr. Haque's signature on all the payroll reconciliations submitted in evidence before the Tribunal.

87. Mr. Wahab testified that after discovering the unrecovered overpayments to the Applicant, he recommended to Mr. Von Ruben, that the request for the Applicant to be issued with delegated approving authority be withdrawn. This shows that at the relevant time the Applicant was not an approving officer.

88. Counsel for the Respondent while conceding that the Applicant was not supervisor of the Payroll Unit, submitted that as the only international staff member, he was effectively in charge of the unit. While the Applicant may have been the only international staff member in the Payroll Unit, this did not mean he was in charge of it.

89. The facts clearly show that the Applicant was not supervisor of the Payroll Unit at the relevant time. Mr Haque was the Applicant's supervising officer and

was responsible for approving the accuracy and quality of the work of the Finance Section.

Did the Applicant take unauthorised steps to delay recovery of his overpayments?

90. Counsel for the Respondent submitted that the Applicant abused his access rights to the Payroll System Software. Without authorisation he sought to prevent the recovery of the overpayments owed by him by placing a “W” in the Payroll System Software at various times; not solely in April 2010 as he testified.

91. He also submitted that the Applicant entered incorrect information into the MPO reconciliation statement for August 2009 indicating that this overpayment had already been recovered. This misrepresentation was aimed at delaying recovery.

92. The Applicant stated that he had no intention of permanently preventing the recovery of the overpayments when he placed a “W” in the system. He however responded to the allegations against him stating:

- a. that he sought the authorisation of the Head of Payroll in the Khartoum office, Ms. Carol Joseph, prior to placing a “W” in the Payroll System Software; and
- b. that he only placed a “W” in the Payroll System Software in April 2010, with the intention to recover the sums from his May and June 2010 payroll.

93. Even if the Applicant did take steps to delay the recovery would such action on his part have been illegal?

94. Section 2.2 of ST/AI/2009/1 provides that an overpayment creates on the part of the staff member an indebtedness which shall normally be recovered by means of deductions from salaries, wages and other emoluments.

95. Mr. Peter Griffiths, OIC, Capacity Development Section, DFS, testified that it is expected that overpayments should be recovered from the following month’s payment cycle. The only exception to this being where the staff member

requests the Chief Finance Officer to delay the recovery; authorisation which the Applicant argues he properly obtained.

96. The wordings of ST/AI/2009/1 create a duty for staff members not only to report the receipt of overpayments but also to take steps to ensure their recovery. In other words, it necessarily prohibits the unauthorised prevention of said recovery.

97. It has not been alleged that the Applicant sought to permanently prevent recovery of the sums he received as overpayments from the Organization, rather the Respondent submitted that it was the Applicant's intention to obtain financial advantage in the form of a *de facto* interest-free loan.

98. In his testimony, Mr. Wahab stated that Ms. Carol Joseph was not an approving officer and did not have the authority to authorise a delay in the recovery of overpayments. There is no doubt that the Applicant ignored his own direct line of reporting, that is, Mr. Haque and Mr Wahab, and instead contacted the Chief of Payroll in Khartoum to seek a delay in recovery. The Applicant did not obtain proper authorisation to delay the recovery of his overpayments.

99. The Applicant admitted placing a "W" in the Payroll System Software to delay recovery, but only in April 2010. He testified that before this time, the overpayments he received were still in his 'Accounts Receivable' where they were not subject to automatic recovery.

100. The Respondent countered that the evidence bears out the likelihood that the Applicant entered a "W" into the Payroll System Software on more than one occasion.

101. Mr. Griffiths testified that in the normal course of business, once MPO reconciliation has been completed and an overpayment detected, this value would be entered into a staff members 'Accounts Receivable' by a Finance Assistant. A 'Journal Voucher' would then be generated in the Payroll System Software as part of the recovery process. Once the Journal Voucher had been approved, the outstanding overpayment would be moved to the staff members 'Accounts

Payable' where it could be automatically recovered by the Payroll System Software from the staff member's next payroll cycle.

102. The Applicant relied on 'Ageing Analyses of Accounts Payable' ("Ageing Analysis") in the course of his testimony. These documents show, for the entire mission, what sums are due for automatic recovery or repayment and how long these sums have remained due. The Applicant used these documents to show that a "W" entered into the Payroll Software System is not hidden from an audit and can still be picked up in a generated report.

103. The Ageing Analysis as of 30 September 2009 showed the USD1,000 overpayment received by the Applicant in August 2009 indicating the sum had been moved from his Accounts Receivable and was due for automatic recovery. The Ageing Analysis as of 31 October 2009 indicates that the Applicant had received a total overpayment of USD2,000; indicating both the overpayment he received in August 2009 as well as that received in October 2009 had been moved to his Accounts Payable and were both due for automatic recovery by the Organization.

104. The Ageing Analysis as of 31 February 2010 indicates that the Applicant had received a total overpayment of USD4,500 indicating all the overpayments he had received were in his Accounts Payable and available for automatic recovery by the Organization.

105. If all the overpayments had been moved to the Applicant's Accounts Receivable, how did they escape being automatically recovered until April 2010 when they were discovered?

106. In his third interview with SIU investigators on 7 April 2011, the Applicant was asked if it was normal for overpayments to remain unrecovered for such a long period he replied that it was not. When asked why they had remained unrecovered he answered that it was because he placed a "W" to withhold recovery by the system.

107. The evidence indicates that steps must have been taken to prevent their automatic recovery. These monies were not recovered because the Applicant had entered a “W” into the Payroll System Software to delay recovery not just in April 2010 but at least on two other separate occasions.

108. The Tribunal also considers the effect of the entry made by the Applicant in the MPO reconciliation statement referencing the overpayment of August 2009. The Applicant prepared the MPO reconciliation statement on 27 October 2009 and it was approved by Mr. Haque on 2 November 2009. The comments next to the Applicant’s name stated that the “difference in MPO already recovered from [the staff members] Sept’09 MPO-Local portion.”

109. This is a clear misrepresentation of the facts since the overpayment referenced in this MPO remained unpaid until April 2010 when it was discovered during the accounts review.

110. This Tribunal is not in any doubt that the Applicant sought to delay the recovery of the overpayment he received in August 2009 by leading his supervisor to believe this overpayment had been recovered. Similarly, on at least three separate occasions, the Applicant without approval from his supervisors, took illegal steps to delay the recovery of the overpayments he had received.

Was the disciplinary measure imposed on the Applicant proportional to the misconduct established taking into account any mitigating factors?

111. The Respondent submitted that the disciplinary measure of separation from service imposed on the Applicant was proportional taking into account three factors:

- a. that the Applicant failed to inform his supervisor or the Organization that he had received three overpayments over a period of eight months totalling USD4,500;
- b. that the Applicant was supervisor of the Payroll Unit and by preventing recovery of overpayments without authorisation from his superiors he abused his position; and

- c. that this delay gained him a financial advantage in the form of a *de facto* interest free loan.

112. The Tribunal found that one of these three factors on which the Respondent based the sanction did not exist because the Applicant was not supervisor of the Payroll Unit at the relevant time.

113. In disciplinary cases, the Appeals Tribunal has repeatedly stated that when a disciplinary sanction is imposed, the role of the Tribunal is to “examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offense.”¹

114. In considering whether the Applicant’s actions qualify as misconduct contrary to applicable staff rules and regulations, the Tribunal is mindful of the Basic Rights and Obligations of Staff (Core Values)²

- a. Staff Regulation 1.2 (b)- provides that:

Staff members shall uphold the highest standards of efficiency, competence and integrity.

- b. Staff Regulation 1.2 (g)- provides that:

Staff members shall not use their office or knowledge gained from their official functions for private gain, financial or otherwise.

115. The Tribunal finds that the Applicant’s actions legally amount to misconduct contrary to sections 1.2 (b) and 1.2 (g) of the Staff Regulations of the United Nations.

116. In *Yisma* UNDT/2011/061 it was held that in assessing the proportionality of the sanction, both aggravating and mitigating factors should be considered.

¹ See *Mahdi* 2010-UNAT-018, *Abu Hamda* 2010-UNAT-022, *Haniya* 2010-UNAT-024, *Maslamani* 2010-UNAT-028, *Masri* 2010 UNAT-098.

² Staff Regulations of the United Nations, ST/SGB/2012/1.

117. The Respondent had submitted that in deciding the sanction to be imposed on the Applicant, mitigating circumstances such as the fact that the Applicant had reimbursed the Organization in full in April 2010, his conduct during the investigation, his sincere remorse and his previously unblemished service record were taken into consideration.

118. It is noteworthy that the Applicant's immediate supervisors put his actions down to a mistake of judgement on his part rather than gross or serious misconduct. Having spoken to the Applicant in regard to the overpayments, Mr. Wahab forwarded a memorandum to the Director of Mission Support. He noted that the Applicant's actions were a 'mistake' and recommended that his activities be closely supervised, the earlier recommendation for him to be delegated approving authority be revoked and a written reprimand be placed in his file.

119. The Applicant had continued to perform within the Finance Section in Juba for almost two years prior to his separation and during this period received positive performance reviews from both his First and Second Reporting officers.

120. In order to determine whether the disciplinary measure of separation from service is a proportionate sanction given all the mitigating factors in this case; it is instructive to examine the Appeals Tribunal's views on the issue of proportionality.

121. In *Sanwidi*, it was held that:

In the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive.³

122. The Respondent submitted that the Organization's jurisprudence supports the sanction of dismissal in cases where staff members have been found to have engaged in dishonest activity and cited *Yisma* where it was stated:

Separation from service or dismissal is often justified in the case of serious or gross misconduct of such gravity that it makes the

³ *Sanwidi* 2010-UNAT-084, para. 39.

continued employment relationship intolerable, especially where the relationship of trust has been breached. What is required is a conspectus of all the circumstances. This does not mean that there can be no sufficient mitigating factors in cases of dishonesty. However if dishonesty is of such a degree as to be considered serious or gross and such that it renders a continued relationship impossible, the cessation of the employment relationship becomes an appropriate and fair sanction.⁴

123. It is not in doubt that the Applicant had exhibited a measure of dishonesty in preventing the immediate recovery of overpayments mistakenly made to him. Although the overpayments were not his fault, he had in effect as submitted by the Respondent, succeeded in granting interest-free loans to himself. However, in light of the reasoning in *Yisma*, was his dishonesty of such a degree as to render a continued relationship with the Organization impossible?

124. As soon as the withheld overpayments had come to the attention of his supervisors in April 2010, the Applicant immediately paid it all back at the same time.

125. Evidence shows that for about two years following the discovery of his actions and the commencement of investigations against him, the Applicant had continued to work within the Finance Section and had diligently applied himself to his tasks as to have received positive performance appraisals. His supervisors had in fact judged his actions to be a mistake in judgment and recommended a written reprimand.

126. Termination of an employment contract is an extreme measure applicable only in the most severe of cases.

127. The Tribunal finds that, taking into account all the mitigating factors, the sanction of termination imposed by the Respondent was not proportionate to the misconduct proved against the Applicant.

⁴ *Yisma*, para. 40-41.

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128. The Applicant failed to discharge his duty to inform his supervisors of having received overpayments. He also abused his position by taking unauthorised steps to prevent the immediate recovery of the said overpayments.

129. The Tribunal is of the view that the Applicant's actions establish misconduct within the Organization's Staff Rules and Regulations.

130. The Respondent's imposition of the sanction of termination in this case is excessive and disproportionate having regard to all the mitigating factors present.

131. The Tribunal hereby strikes out the sanction of termination imposed on the Applicant and substitutes it with the sanction of demotion with deferment for a specific period of eligibility for consideration for promotion.

132. Should the Secretary-General decide not to perform the obligation to reinstate the Applicant with a demotion as ordered, he must in the alternative pay compensation to the Applicant in the sum of two years' net base salary at the rate of FS-4 salary in effect at the date of Judgment.

133. If the Secretary-General decides not to perform the obligation to reinstate the Applicant, the total sum of compensation is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Nkemdilim Izuako

Dated this 14th day of May 2014

Entered in the Register on this 14th day of May 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi