

UNITED

**Counsel for Applicant:**  
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## **Introduction**

1. The Applicant was employed as an Administrative Assistant on a fixed-term contract with the United Nations Human Settlements Programme (UN-HABITAT) and was also the President of the Nairobi Staff Union (NSU). She was dismissed for misconduct on 15 August 2011 by the Under-Secretary-General (USG) for Management following two investigations by the Office of Internal Oversight Services (OIOS). She has challenged her dismissal.

## **Procedural History**

2. The Applicant filed an Application with this Tribunal, dated 30 November 2011, but due to technical difficulties it was received on 6 December 2011.

3. The Respondent filed his Reply on 6 January 2012 submitting that the Application should be rejected on grounds of receivability as it was filed out of time.

4. By Order No. 121 (NBI/2012) dated 12 September 2012, the Tribunal found that the Application was receivable.

5. Three case management hearings were held. These resulted in the resolution of requests for further disclosure of documents; the finalisation of the issues for determination by the Tribunal; the filing of a joint statement of facts and an agreed bundle of documents for use at the hearing; witness lists for both parties with synopses of their evidence; and an agreed date of hearing.

6. By Order No. 061 (NBI/2013), issued on 15 March 2013, the Tribunal ordered Mr Suleiman Elmi, Chief of Human Resources Management Service (HRMS), United Nations Office at Nairobi (UNON) to appear at the hearing as a witness.

7. The hearing on the merits was held on 19, 20, 21 and 25 March 2013.

## **Issues**

8. The issues to be determined in this case are:

- a. Was due process accorded to the Applicant during the two investigations into her conduct?
- b. Were the findings of misconduct by the Applicant based on well-established facts?
- c. Whether the established facts legally amount to misconduct under the Regulations and Rules of the United Nations;
- d. Was the decision *ultra vires*?
- e. Was the dismissal a politically motivated act of victimisation against the Applicant?
- f. Was the disciplinary measure imposed on the Applicant proportionate to the misconduct?
- g. What, if any, remedies should be awarded to the Applicant.

### **The Facts**

9. The Applicant was employed by the United Nations for 18 years up to her dismissal first as a Secretary at the G-4 level and then as an Administrative Assistant at the G-5, Step 10 level. She served two 4-year terms as President of the NSU and held that position until she left.

10. Her dismissal occurred as a result of the two investigations into her conduct. The first was into her use of falsified payslips. The second concerned her behaviour in relation to a cheque. The findings of fact that follow are based on the evidence and documents presented to the Tribunal at the hearing of thisvi(ow)-6.1.6(tion .3(in6/TT-10.(u0 -2

10.

“Dear P...

As per our conversation see below:

Monies from Medical Insurance - 3,598 and advances - 20,000 plus Loan 58,385 = Total should be net. For three payslips, vary the net by about 500 or 400 so that it is not exactly the same.

Thank you. Call me when ready since I am giving them on Monday.”

12. It is alleged by the Respondent but denied by the Applicant that she then went to the UNON Payroll Office with three payslips for certification. The payroll assistants noted a discrepancy between the net income of approximately KES80,000 on the payslips she brought in and the Applicant’s zero net income as shown in the payroll records and did not certify them as requested. One of the payroll assistants reported the discrepancy to her supervisor. The allegations about the use of the payslips became the subject of the first investigation by the Office of Internal Oversight Services (OIOS) (the First Report).

### *The Cheque*

13. As one of her Presidential duties, the Applicant coordinated a fund raising campaign in early 2008 called Staff Assist Staff (SAS) to help people affected by the 2007 post-election conflict in Kenya. The NSU collected food stuffs which were given to the Kenyan Red Cross for distribution and funds which were deposited into an account with the United Nations Federal Credit Union (UNFCU) called UN Staff Joint Relief Initiative use13.1s( w)-67(Ir)-14(AGU)v)-5.3(i17.2ns)-4.5(Biea)852(r)-147(r)-673(i17.2tz, hs)-4.5(e13.1lds)-4.5(fCro)94 theUNu

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16. The Applicant wrote to the President of AIPU by letter dated 29 July 2008, with thanks “for the contribution [he] sent to [the NSU] of €140 in form of a cheque from [his] International Staff Association UNESCO.” She stated that the amount would “go a long way in assisting the Nairobi Staff Members who were affected during the post-election crisis”.

17. On 4 August 2008, the cheque was deposited into the NSU bank account with Kenya National Bank. At the bottom of the deposit slip was an annotation “Refund [K]”. On the same date the Applicant requested and received a cheque for USD216.30 from the NSU bank account. This was the equivalent of EUR140. These facts became the subject of an investigation by OIOS (the Second Report).

18. The letter of thanks from the Applicant was received and stamped by AIPU in Paris on 22 August 2008.

### **The Investigations and Disciplinary Process**

19. OIOS began its investigation into the Applicant’s use of the payslips in June 2009. The Applicant was interviewed by an OIOS investigator, Ms Izevbizua, first on 3 June 2009 in relation to the First Report and then on 7 May 2009, 21 January 2010 and 2 September 2010 in relation to the Second Report. In each case, OIOS prepared interview records for each person interviewed, including the Applicant. All the persons interviewed, including the Applicant, reviewed, amended where necessary, and signed all the interview records to certify their accuracy. The Applicant sent a preliminary response to the allegations to the investigators on 22 February 2010 (the First Report) and 2 December 2010 (the Second Report).

20. OIOS presented the First Report on the alleged forgery to Ms Anna Tibaijuka, the then Executive Director (ED) of UN-HABITAT, on 31 March 2010. The Report found that the Applicant’s conduct was inconsistent with the standards expected of an international civil servant. It recommended that UNON take appropriate action against the Applicant.

21. Ms Tibajuka gave evidence to the Tribunal. She said that she read the report and consulted her two legal advisors on it then wrote to the Under-

belief that there is a selective double standard of application of the rules especially

30. After an extension of time the Applicant responded to the charges on 20 April 2011. She made the following points:

- a. The statements of the witnesses about her payslips may not fully and accurately represent the state of affairs.
- b. The allegation that she had requested the Information Computer Systems Assistant to falsify payslips because she was looking into a matter about another staff member has no basis.
- c. She now recalled that in 2008 she expected to receive a refund from UNESCO funds for payment for accommodation for Mr Ali. After cashing the cheque she subsequently learned that the amount was a donation under the SAS initiative and so she purchased food for the equivalent amount and submitted it to the Kenya Red Cross.
- d. She noted the allegations had started immediately after the staff union opposition to a plot to remove Ms Tibaijuka. It appeared they were not motivated by a *bona fide* belief in them.
- e. The referral of the charges was in contravention of ST/AI/371 and the actions of Ms Tibaijuka.
- f. The allegations were vitiated by improper motives and she requested they be dismissed in their entirety.

31. On 15 August 2011 the Applicant was advised that:

After a thorough review of the entire dossier in your case, including your comments, in accordance with ST/AI/371/Amend.1 on revised disciplinary measures and procedures, the Under-Secretary-General for Management, on behalf of the Secretary-General, has concluded that there is sufficient evidence that you engaged in the misconduct alleged. The Under-Secretary-General for Management, on behalf of the Secretary-General, has decided, therefore to impose on you the disciplinary measure of dismissal from service, effective as at the date of your receipt of this letter.





38. OIOS ignored her request for representation/counsel and the investigation report came out skewed. Contrary to ST/AI/371, the Applicant had made a request for representation and to take notes, a request that was denied.

39. The Computer Systems Assistant was unable to falsify the pay slips on her behalf, that the same were never found on his computer, and that the PDF converter software was installed one month after the alleged incident. Thus the allegation by the investigators that the Computer Systems Assistant produced the falsified pay slip that she allegedly took to the payroll unit for certification is untrue.

40. She requests that the Tribunal find and rule that there is no clear and convincing evidence that she obtained falsified payslips and subsequently approached the Payroll Unit to certify them. The evidence by the Respondent's witnesses is inconsistent and thus incredible and is incapable of leading to the conclusion that misconduct has been proved.

41. The Applicant submits that on discovering the purpose of the cheque she immediately purchased foodstuff and other items for donation to the Kenya Red

offences had less grievous actions taken against them and lastly because there is no clear and conclusive evidence of the alleged misconduct.

44. Mitigating circumstances should have been taken into consideration in so far as the applicant did not proceed with the action of having her pay slips falsified and on discovery of the purpose of the EUR140 from UNESCO put the funds towards the intended purpose.

45. The Applicant seeks compensation for actual pecuniary or economic loss, non-pecuniary damage, procedural violation, stress and moral injury all of which have been faced and experienced by the Applicant.

#### **Respondent's submissions**

46. The Under-Secretary-General for Management took the decision to dismiss the Applicant on behalf of the Secretary-General. This was consistent with paragraph 9 of the ST/AI/371/Amend.1. The decision was not *ultra vires*.

47. The Applicant failed to point to any evidence supporting her allegations of discrimination and/or victimisation. The Applicant must, at a minimum, "bring in sufficient facts and reasons to convince the Tribunal why the decision should be set aside".

48. Both investigations pre-dated the NSU's protest. It is unclear how the investigation might have been orchestrated based on the NSePTD0.4(on )-he Trib ultra vires. ed purpernta

51. The Applicant's explanations to the investigator about both charges were not plausible.

52. Integrity failings (e.g. theft, forgery, fraud) typically attract the most serious disciplinary measures, because they breach the relationship of trust

**Standard of Proof**

57.

63. To determine this conflict of evidence the Tribunal looks to see if there is any other relevant and reliable evidence.

64. In this case, the only other evidence is contained in the OIOS records of interviews. Although the records are not *verbatim* the Tribunal finds that they are reliable. This is because the Applicant had the opportunity to read the typed version made from the investigator's handwritten notes after each interview, she

**Were the findings of misconduct by the Applicant established?**

*Charge 1. The Applicant was charged with haven taken steps in furtherance of her stated intention to submit falsified payslips to obtain a bank loan on the basis of falsely inflated income;*

Payslips

69. The allegation that the applicant had taken steps to use falsified payslips was first raised by OIOS with the Applicant in her interview with Ms Izevbizua on 7 June 2009. At first, she denied sending payslips online to anyone or requesting anyone to edit them. Only when she was shown the email in which she had requested the Computer Systems Assistant to alter some amounts on her payslips did she agree she had done so. She said that she “wanted [the Computer Systems Assistant] to add the above figures together to make [her] net income.

72. Copies of the interview statements of the payroll staff were supplied to the Applicant as she had requested on 22 February 2010 in her response to the draft investigation report. In her response to the charges on 20 April 2010 she commented that the statements of the payroll staff may not fully and accurately represent the state of affairs.

73. At the hearing the Applicant continued to deny that she had ever attempted to have the false payslips certified. She said she falsified the



respects, their accounts of these events to the Tribunal differed from their original 2008 accounts and were not completely consistent with each other.

77. Such discrepancies can be explained by the elapse of 5 years' time. In any event the discrepancies were matters of detail and did not undermine the overall credibility of Mr Matolo and Ms Njaramba. From the manner in which they gave their evidence it was quite clear to the Tribunal that they were describing a real event. As a result of their detailed evidence the Tribunal is satisfied of the following facts:

- a. Certification of staff member's payslips was required by lending institutions for proof of earnings and deductions.
- b. The Applicant was observed by the payroll staff to arrive at the Payroll Unit early on a Friday afternoon just before the office closed. She was accompanied by a person from Finance who was also the Vice

78. The evidence of Mr Matolo and Ms Njaramba is preferred to the

for “BK” a security officer at UNON. An NSU voucher for the cheque was raised in the name of Mr “K” on 4 August entitled “refund of accommodation for IAG for BK”. The Applicant requested and received a cheque for the amount in that voucher on 4 August 2008 in USD.

85. When BK was later asked to sign the voucher he told her the refund was actually for Aamir Ali.

86. When first interviewed on 7 May 2009 about this allegation the Applicant told OIOS that when she received the cheque for EUR140 in June 2008, she initially thought it was a refund for the money she had paid on behalf of a staff member Aamir Ali. She cashed the cheque but when she was later told by phone it was a contribution from UNESCO APIU for a fund for internally displaced persons she went to the supermarket and purchased foodstuffs to send to Red Cross and in that way refunded the money.

87. At the second interview on this subject dated 21 January 2010, the Applicant did not bring the documentation she said she would provide but answered detailed questions about the IAG games and the payment of accommodation costs by her. She further elaborated that she had cashed the cheque then bought the foodstuff as a refund.

88. In her final interview on 2 September 2010 she was asked about her letter of appreciation to AIPU dated 29 July. She told the investigator that:

In the Nairobi Staff Union office I have a letter format, which I normally use after editing the content as required, so I must have forgotten to change the date on the letter before sending it...it was sent through the registry or by post.

89. She also told the investigator that she did not follow the normal procedure of booking the letter on-line and having it certified by supervisors through the registry.

90. When she was formally charged with misappropriation, the charge letter referred to the responses she had given to the investigator noting

Applicant did not refer to the letter of appreciation nor attempt to substantiate her explanation that it contained the wrong date.

91. The Applicant repeated to the Tribunal that the date on the letter was incorrect as she had forgotten to change the date on her letter template. She added that she had sent the letter two weeks into August. She had not told the investigator this last point either at the interview or in her written responses.

92. The Applicant told the investigators that when the UNESCO cheque arrived she thought it had been sent as a refund of money she had paid on behalf of Aamir Ali during the 2008 IAG in France. When she deposited the cheque she gave the name of BK in mistake as it should have been for Mr Ali. The Administration formed the view that her recollection of events was inconsistent with information from other persons involved in the games including Mr Ali and BK.

93. The Applicant testified to the Tribunal that at the IAG Games in 2008 she was told that the UNON's men's volley ball team would not be able to play its game as there was a shortfall in the amount sent by UNON for the team's accommodation. The shortfall was caused by Mr Ali who had not paid as he was staying with his wife rather than in the official accommodation. She said that she paid the shortfall from her own money with an understanding that Mr Ali would repay her.

94. Three witnesses, Mr Denis Obiero, Mr Aamir Ali and Ms Bernadette Assisi-Ogolla, who had all been interviewed by the OIOS, were called to give evidence to the Tribunal about what happened at the games and whether the Applicant was entitled to any refund. There were considerable inconsistencies in this evidence in comparison with that given to the OIOS, especially from Mr Ali about when he was at the games, where he stayed and how he paid. However he maintained his denials given to OIOS that anyone had paid money on his behalf or that he owed money to the Applicant.

95. In the end it is the view of the Tribunal that this evidence only marginally assists the determination of the core issue which is whether the Administration





**Was the dismissal a politically motivated act of victimisation against the Applicant?**

107. The Tribunal has carefully analysed the Applicant's allegations that the charges laid against her were manipulated in retaliation for her support for Ms Tibaijuka.

108. The Tribunal finds that the Applicant was no ordinary staff member. She held the high office of President of the Nairobi Staff Union. In that role she obviously wielded considerable influence. Her public support for Ms Tibaijuka made her subject to more scrutiny from both staff members and the Administration than an ordinary staff member. The Tribunal has no reason to doubt Ms Tibaijuka's assertions that the Applicant was singled out for investigation, misconduct allegations and the ultimate penalty of dismissal for misconduct when the misconduct of others at UNON had been overlooked or minimized. That regrettable claim has been made in other cases involving the Administration of UNON.

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conduct in this case as established by the investigators and confirmed by the Tribunal legally justifies the findings of misconduct by the decision maker.

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

112. The jurisprudence on proportionality of disciplinary measures is well-settled. In *Meyo*<sup>4</sup> it was held that:

In considering the proportionality of a disciplinary measure the starting point is that the Secretary-General has a wide margin of discretion in imposing disciplinary measures against staff members



conduct which more than justified the decision to dismiss the Applicant. The sanction of dismissal was entirely proportionate to the behaviours which had been proven.

**Conclusion**

116. The Application is dismissed in its entirety.

*(Signed)*

Judge Coral Shaw

Dated this 19<sup>th</sup> day of April 2013

Entered in the Register on this 19<sup>th</sup> day of April 2013

*(Signed)*

Abena Kwakye-Berko, Officer-in-Charge, Nairobi Registry