



UNITED NATIONS DISPUTE TRIBUNAL

Case No.:

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.

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

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.

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 did cont e7v.5 TD

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

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 Secretar

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-

(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 st[(shall 9147i)-2715 TD0 Tc0 Tw372.

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.

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.

