



**Before:** Judge Coral Shaw

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko, Officer-in-Charge

ATANA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Joan Arang'a, Maina & Maina Advocates

**Counsel for Respondent:**

Cristiano Papile, ALS/OHRM, UN Secretariat

Susan Maddox, ALS/OHRM, UN Secretariat

## **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 this matter.

#### *The Payslips*

11. On 29 August 2008, the Applicant sent a UN-HABITAT Information Computer Systems Assistant an email enclosing her August 2008 payslip which showed that after adjustments for recovery of salary advances, loans and other deductions her net payment was zero. She requested the Computer Systems Assistant to alter the payslip as follows:

“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. This account was closed in June 2009.

14. Also in her capacity as President, the Applicant attended the Inter Agency Games (IAG) in Biarritz, held from 29 May to 1 June 2008, as a team leader for the UNON sports teams.

15. Under cover of a letter from the President of the UNESCO International Staff Association (AIPU) dated 5 June 2008, the Applicant received a cheque for EUR140 dated 30 June 2008. The cheque did not name a payee but the letter said that it was a contribution to SAS.

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 Tibaijuka 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-Secretary-General for OIOS (USG/OIOS) on 18 June 2010. In that letter she said that the report failed to demonstrate that the allegations of misconduct against the Applicant were well founded, in particular because OIOS had not provided copies of any of the payslips she was alleged to have falsified; that it did not address the allegations about due process nor any other concerns raised by the Applicant in her preliminary response. She accordingly decided not to refer the matter to the Office of Human Resources Management (OHRM) for the institution of disciplinary proceedings.

22. The Officer-in-Charge (OIC) of the Investigations Division of OIOS (ID/OIOS) replied to her on 26 July 2010 stating that her refusal to refer the matter to OHRM risked an evidential error and could undermine accountability more generally. He also noted that since the subject staff member claimed to have mobilised staff to oppose decisions that negatively affected Ms Tibaijuka's interests there could be a conflict that could be avoided by an OHRM review.

23. Ms Tibaijuka protested this in a long letter of reply dated 30 August 2010 addressed to the Deputy Secretary-General and the Under-Secretary-General of the Department of Management. She expressed her concerns about the conduct of OIOS and her belief that the case against the Applicant was motivated not by legitimate evidence but by illicit *animus* of certain staff members for her having mobilised the Staff Union to push for governance reforms at UNON.

24. In her evidence to the Tribunal, Ms Tibaijuka elaborated on this. She stated that there had been pressure from Nairobi and maybe from Headquarters against the UNON reforms she had initiated to bring the transparency, dignity and respect that was lacking in the way things were done in UNON especially with regard to the selective treatment of staff, harassment and unfair treatment. As President of the Staff Union, the Applicant was equally pushing for the reforms. Ms Tibaijuka believed it was clear that the Applicant was being targeted and that the investigation against her was politically motivated. She referred to a pattern of harassment and unsubstantiated charges as "a shame on the UN system." It is her

belief that there is a selective double standard of application of the rules especially with regard to General Service staff members.

25. Ms Tibaijuka's term as Director General of UNON and Executive Director of UN-HABITAT ended in August 2010.

26. The Second Report on the alleged fraud by the Applicant was presented to the new Executive Director of the UN-HABITAT on 28 December 2010. It found that the conduct of the Applicant may be inconsistent with the standards expected of an international civil servant. It recommended that "appropriate action" should be taken against her. The covering letter drew the ED's attention to the fact that the First Report was pending a decision on the appropriate disciplinary action.

27. On 20 January 2011 the new ED sent both reports to the Assistant Secretary-General (ASG) of OHRM for consideration of disciplinary action.

28. On 14 March 2011, the ASG sent the reasons for the allegations of misconduct to the Applicant and specified the charges she faced under sect. 5 of ST/AI/371/Amend.1 (Revised Disciplinary Measures and Procedures), namely that she had:

- a. Taken steps in furtherance of her stated intention to submit falsified payslips to obtain a bank loan on the basis of falsely inflated income; and
- b. Misappropriated the proceeds of a EUR140 cheque that had been sent by UNESCO staff to the NSU in support of a NSU fundraising initiative.

29. The Applicant was invited to send her comments to these allegations and was specifically invited to provide copies of relevant personal banking statements or other documents that she believed would support her contention that she used the proceeds of the EUR140 cheque to purchase donations for the Kenya Red Cross. The Applicant was informed of her right to avail herself of the assistance of the Office of Staff Legal Assistance (OSLA), or of other counsel at her own expense.

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.

### **Disputed facts**

32. The facts disputed by the parties in this case include the sufficiency of the rights given to the Applicant during her interviews; whether or not the Applicant approached the Payroll Unit to request the certification of falsified payslips and the actions and motivations of the Applicant in dealing with the UNESCO cheque for EUR140.

33. These will be evaluated in the course of the considerations.

### **Applicant's Submissions**

34. The decision to terminate the Applicant's contract is reserved to the Secretary-General and was not delegated to the author of the decision, in contravention of ST/AI/234/Rev.1 ("Administration of the staff regulations and staff rules") and therefore *ultra vires*.

35. The investigations dated 31 March and 28 December 2010 were dismissed by the then Executive Director of UN-HABITAT as unfounded and not meeting the threshold required under ST/AI/371 but immediately upon the departure of that Executive Director, the investigation was reopened. The investigations and subsequent termination of contract were due to discrimination and/or victimisation by virtue of the Applicant's former position in her capacity as the then President of the UNON Staff Union where she opposed the plot to remove the former Director General of UNON.

36. The entire process was orchestrated on dubious and non-existent evidence, 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 the United Nations Office at Nairobi (UNON).

37. The investigators focused more on irrelevant matters and ignored the Applicant's side of the story. The Applicant was not provided with any evidence, of the alleged altered payslips.

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 Cross, which was handed over in a second handing over ceremony to the Kenya Red Cross. There is no evidence by the investigators that the Applicant used these monies for her own personal gain which formed the basis of the second investigation.

42. Without prejudice to the foregoing, even if the Applicant was found to have acted improperly, which is denied, dismissal from service as a disciplinary measure is excessive and is not proportionate to the alleged misconduct under any circumstances. The charges levelled against her were politically instigated to either silence her or remove her from office for daring to challenge the powers that be.

43. The action to dismiss her was not reasonable especially in light of the fact that other staff members who engaged in falsifying pay slips did not face the same disciplinary measure, that other staff members investigated for more serious

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 NSU's stand against the replacement of Ms Tibaijuka as Director General. The investigations were careful and meticulous.

49. There is no right to be assisted by counsel at the investigative stage of the disciplinary process and, in particular, during an investigative interview that precedes the formal issuance of allegations of misconduct.

50. The Respondent never had in its possession the allegedly altered payslips to supply to the Applicant. The evidence established that the falsified payslip was returned to the Applicant. There was sufficient evidence that it had existed.

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 between employee and employer. Both cases against the Applicant go to integrity. Either one, alone, would have led to dismissal.

53. There can be no compensation without proof of damages, even for any due process violations.

54. For all the foregoing reasons, the Respondent respectfully submits that the Applicant should be dismissed in its entirety.

### **Considerations**

#### **Role of the Tribunal**

55. The role of the Tribunal is to conduct a judicial review of how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. (*Sanwidi* 2010-UNAT-084).

56. In accordance with *Molari*<sup>1</sup>, in reviewing disciplinary cases, the Tribunal has to examine the following:

- a. Whether the facts on which the disciplinary measure was based have been established;
- b. Whether the established facts legally amount to misconduct under the Regulations and Rules of the United Nations;
- c. Whether the disciplinary measure applied is proportionate to the offence; and
- d. Whether there was a substantive or procedural irregularity.

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<sup>1</sup> 2011-UNAT-164. See also *Maslamani* 2010-UNAT-028.

## **Standard of Proof**

57. In *Molari*<sup>2</sup> the Appeals Tribunal also considered the issue of the standard of proof required in disciplinary cases. It 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.

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

58. The Applicant made two allegations of breach of due process.

59. The first allegation was that she was refused the opportunity to take notes at the investigation interviews. The second was that she asked for and was refused access to counsel at the interviews.

60. The Applicant told the Tribunal that she had been prevented by Ms Izevbizua from making notes during the interviews. She said she had asked but was refused permission. Ms Izevbizua, in testimony, denied preventing the Applicant from taking notes. She told the Tribunal that at one stage the Applicant took out a jotter and made notes of the witnesses she wanted OIOS to speak to.

61. The Applicant said she also asked for a lawyer to be present but this was refused. Ms Izevbizua denied that the Applicant asked for a lawyer but said that this would have been refused as OIOS procedure does not allow a lawyer to be present at the preliminary interview.

62. The interview process was well documented in this case. The Applicant was able to check the record of each interview before signing it. She did not register any protest to the conduct of any of the interviews in spite of the opportunity to do so.

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<sup>2</sup> *Molari* 2011-UNAT-164, para. 30

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 was invited to and did make any alterations she wished and then signed each as a true and accurate record of the interview. She also acknowledged in the record of interview that she had no objection as to how the interview was conducted. Having heard directly from the Applicant, the Tribunal finds that it is highly unlikely and does not accept that she only answered this last question because she was intimidated.

65. None of the written records of interview show that the Applicant asked to take notes or that she requested the assistance of counsel. The Tribunal finds that the Applicant was not wrongfully deprived of the opportunity to take notes and that she did not ask for her counsel to be present at any stage.

66. The Tribunal notes that it is UNAT jurisprudence that based on the staff rules there is no mandatory right to counsel for staff members who are undergoing interviews during the preliminary investigation of allegations for misconduct.

67. In this case there is no evidence that the Applicant requested counsel to be present at any of the four investigation interviews. In addition, she had the opportunity to take legal advice between the interviews and did so. There was no request by her or her lawyers to be present at any time.

68. The Tribunal finds that neither of the allegations of breach of due process can be sustained on the facts and concludes that there was no breach of the Applicant's due process rights.

**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. The total on the altered payslip should therefore [have been] KSH81,983.”

70. The Applicant then explained to Ms Izevbizua that she did that because she wanted to acquire some loans from a bank but later changed her mind about doing this so did not use the altered payslip. She denied collecting the altered payslip and said she did not know if it had been altered. She denied requesting anyone at the UNON Payroll Unit to certify the altered payslip.

71. Ms Izevbizua interviewed staff members from the Payroll Unit in September 2008. They told her that on a Friday afternoon two or three months earlier, the Applicant had come to the Payroll Unit in the company of a staff member from the Finance Section with three of the Applicant’s payslips for certification. When the standard computer check of the Applicant’s computerised payroll records was done, a discrepancy was noted between the net pay of approximately KES80,000 on the payslips which had been handed in and the Applicant’s correct net pay of zero. The payroll staff printed out the correct payslips and then signed and stamped them as certified. The certified payslips and the ones brought in by the Applicant were handed back to her and she left the office.

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 that the explanation she gave to Ms Izebizua of wanting to use the altered payslips to get a loan was not true. She told the Tribunal she had no need to apply for a loan. In spite of having zero net pay she was able to meet her financial obligations because her husband has a good job and she had other business interests.

74. She told the Tribunal that the reason for requesting the Computer Systems Assistant to alter her payslips was that the Staff Union is an independent office to whom staff members came with their grievances. In her capacity as President she had been conducting an investigation into whether it was possible to falsify payslips. She said she did so after Mr Suleiman Elmi had called her to speak about a staff member who was facing possible disciplinary action for the same thing. She explained to the Tribunal that she did not give this explanation to the Investigator when interviewed as she did not want to expose Mr Elmi who had allegedly requested her to refrain from mentioning their discussion.

75. The Tribunal called Mr Elmi to explain what, if anything, he had to do with this issue. He confirmed that he had asked the Applicant to speak to a staff member who was accused of falsifying a payslip to see if he would resign rather than face disciplinary proceedings. He did not ask her to undertake an investigation. The Tribunal is satisfied that Mr Elmi said and did nothing that would have required him to be protected from OIOS by the Applicant or that would have encouraged the Applicant to falsify her payslips. The Applicant's use of Mr Elmi as an excuse for lying to the investigator is shameful.

76. Because the Applicant completely denied taking the false payslips to the Payroll Unit for certification, the Respondent called two of the payroll staff, Peter Matolo and Lucy Njaramba, to give evidence to the Tribunal about this. In some

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 President of the NSU.
- c. The Applicant had an A4 envelope in her hand. She took out at least one paper from the envelope and gave it to her companion who took it to a payroll administrative assistant for signature.
- d. The administrative assistant checked the Applicant's payroll records and generated a payslip which showed that her net pay was zero compared against the one provided by the Applicant which showed a net pay of approximately KES80,000.
- e. The administrative assistant discussed it with her colleagues and only the new payslip was signed and then stamped by Lucy Njaramba who is the custodian of the stamp.
- f. The original and the new payslip were put back into the envelope and given back to the Applicant who left the office. The matter was reported the next Monday to a supervisor who had not been present on the Friday.

78. The evidence of Mr Matolo and Ms Njaramba is preferred to the Applicant's denial that she visited the payroll office with the false payslip.

79. The Tribunal finds that the Applicant's first explanation given to Ms Izevbizua that she wanted to use the false payslip to obtain a bank loan was correct. The second explanation which was given after she had time to reflect, namely that she was undertaking an investigation, was highly improbable and unsupported by any other evidence.

80. The Tribunal finds that on the basis of the evidence it had after the interviews, OIOS had sufficient evidence to conclude that the Applicant had requested the false payslips with the intention of using them to get a bank loan and that she had attempted to have them certified by payroll for this purpose.

81. This evidence was sufficient to establish to a clear and convincing standard that the Applicant had taken steps to have a false payslip certified with the intention of using that payslip to obtain a bank loan.

*Charge 2. The Applicant was charged with misappropriating the proceeds of a EUR140 cheque that had been sent by UNESCO staff to the NSU in support of a NSU fundraising initiative.*

#### Misappropriation of Money

82. The facts that the OIOS presented to the Administration before it made its decision to charge and then dismiss the Applicant for misappropriating money were as follows:

83. The Applicant sent details of her fundraising campaign for SAS to APIU on 28 April 2008. The IAG games were held in France, Biarritz on 29 May 2008 until 1 June 2008. On 5 June 2008, AIPU sent the Applicant a cheque for EUR140 dated 30 June 2008. The Applicant sent a letter of appreciation to AIPU dated 29 July 2008.

84. The Applicant deposited the APIU cheque for EUR140 into the NSU account on 4 August 2008 noting it was a reimbursement for IAG accommodation

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 that her explanation was internally inconsistent. In her response to this, on 20 April, the

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

had sufficient evidence before it to show that the Applicant deliberately misappropriated the EUR140 sent to NSU by AIPU.

96. The Tribunal does not accept the Applicant's explanation for the date on her letter of appreciation to APIU and finds that on the basis of the evidence and explanations given to the OIOS investigator the Administration was justified in concluding that it was highly probable that the letter of appreciation was sent a few days before the cheque was deposited. The Applicant said nothing during the hearing to displace this conclusion.

97. It is highly probably that she deposited the cheque into the NSU bank account only a few days after the date on the letter. If, as she suggests, she sent the appreciation letter at a later date then why did she not simply tell the donor that by then she had already purchased foodstuffs with it?

98. The Applicant accepted that she initially took the money as her own in the belief that she was entitled to it as a refund. That belief is not corroborated by any independent facts. The person who she said owed her the refund denied this. The amount she says she paid in accommodation costs was different from the amount she says she paid for accommodation - some Euros 300.

99. However, even on the best possible interpretation for the Applicant, if she did genuinely have that misunderstanding, once she knew that the money came from APIU she did not refund it to the NSU bank account or otherwise correctly account for the use of the money.

100. The purchase of foodstuffs with the money she withdrew from the NSU account cannot be regarded as a legitimate refund of the money. She was unable to tell the investigators or the Tribunal how much she had spent or provide any receipts for the purchase of the foodstuffs nor did she make any official record of what she had done with the donated money. There is no record of the foodstuffs being handed over to the Kenya Red Cross at or near the time of the alleged purchase.

101. The Tribunal finds that the Administration had before it clear and certain evidence upon which to reach the conclusion that money which had been donated to the NSU to be used for charitable purposes had been misappropriated by the Applicant. The Administration had good reason to treat the Applicant's explanations as improbable.

***Was the decision ultra vires?***

102. The Applicant submits that the decision to terminate her contract is reserved to the Secretary-General and has never been delegated to the author of the decision, in contravention of ST/AI/234/Rev.1.

103. ST/AI/371/Amend.1 (Revised disciplinary measures and procedure) states in section 9(b) that “[d]ecisions on recommendations for the imposition of disciplinary measures shall be taken by the Under-Secretary-General for Management on behalf of the Secretary-General.”

104. In *D’Hooge*<sup>3</sup> the UNDT held that “if the decision is made pursuant to a delegation, the decision-maker must state that it is so made and identify the person who gave the delegation... The notification was signed by the OIC/OHRM and did not mention the ASG...It is conceded that the decision was not made by the Secretary-General”.

105. The decision in *D’Hooge* is fact specific and can be distinguished from the present case.

106. The author of the decision in this case was not the person who signed the 15 August 2011 dismissal letter but, as referred to in the letter, was the Under-Secretary-General for Management who took the decision on behalf of the Secretary-General. Pursuant to ST/AI 371/Amend.1, the decision-maker had the proper authority to do so and the decision was not *ultra vires*.

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<sup>3</sup> UNDT/2010/044 para 61-61.

**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.

109. However, persons in positions of influence must expect scrutiny and therefore must maintain high standards of moral and ethical probity. In this case, by her behaviour, the Applicant left herself open to the charges that were made and proven. While the allegations may have come to light for that reason the Tribunal is satisfied that the Administration acted appropriately in investigating and reaching the decisions it did.

**Whether the established facts legally amount to misconduct under the Regulations and Rules of the United Nations**

110. Staff regulation 1.2 (b) states that "[s]taff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status."

111. Attempted fraud and misappropriation are at the serious end of misconduct. Each of the offences breaches staff regulation 1.2(b). The Applicant's

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 who have committed misconduct provided those actions follow the law and lawful procedure and that the outcome is proportionate to the degree of misconduct.<sup>5</sup>

113. The principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The Tribunal will give due deference to the Secretary-General unless the decision is manifestly unreasonable, unnecessarily harsh, obviously absurd or flagrantly arbitrary.<sup>6</sup> Additionally, in *Sanwidi*<sup>7</sup> UNAT held that it is not the role of the Tribunal to consider the correctness of the choice made by the Secretary-General nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

114. Finally, there may be instances where a comparison may be made between the disciplinary measure imposed on the staff member and other similar circumstances with alleged different disciplinary measures. It has been noted that in these instances, although it may assist in the assessment in the proportionality of the measure imposed, generally, the circumstances of each case differ so greatly that comparisons may be difficult to make.<sup>8</sup>

115. The allegations of falsifying pay slips and misappropriation of money are both serious in their own right. Taken together they reveal a pattern of unlawful

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<sup>4</sup> UNDT/2012/138 at para 30

<sup>5</sup> See *Applicant* UNDT/2010/171

<sup>6</sup> *Perelli* UNDT/2012/034 at para 110.

<sup>7</sup> *Sanwidi* 2010-UNAT-084.

<sup>8</sup> *Koutang* UNDT/2012/158 at para 78.

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