
United Nations Dispute Tribunal

Case No.: UNDT/NBI/2015/088

Judgment No.: UNDT/2019/045

Date: 25 March 2019

Original: English

INTRODUCTION

1. The Applicant, a former staff member of the United Nations Children’s Fund (UNICEF), is contesting the Administration’s decision to “coerce” him into submitting a resignation letter.

2. At the time of the Contested Decision, the Applicant was serving in Garowe, Puntland, Somalia, as a Local Security Assistant (LSA) at the GS-6 level.

b. In July 2009, the UNICEF Somalia office advertised several Local Security Assistant posts in Somalia, including one in Bossaso in the North-East Zone.² The Applicant applied for the post in Bossaso and after a written and oral assessment, was recommended for selection by UNICEF's Selection and Advisory Committee (SAC) on 16 September 2009.

c. The SAC minutes include a list and descriptions of the educational qualifications that the Applicant claimed in his curriculum vitae to have obtained which included: (i) a Bachelor's degree in behavioral science and a minor in counseling and group therapy; (ii) an advanced certificate in legal research; (iii) a diploma in legal research; (iv) a certificate in counseling and (v) training in peer education and counseling.

d. The Applicant's work experience was listed from the said curriculum vitae as including: (i) security guard with Wells Fargo in New York from 1989 -1991, (ii) legal clerk with a New York law firm from 1991-1997 and (iii)

m. In late 2014, Mr. Gibson, Mr. Lauwerier and Ms. Laila Pakkala who was UNICEF Regional Director, reported their concerns of possible misconduct by the Applicant to UNICEF's Office of Internal Audit and Investigation (OIAI).

n. Following a preliminary investigation in late 2014, OIAI informed Messrs. Lauwerier and Gibson and other senior managers that there were indications that the Applicant had a criminal record and had falsified his academic and professional credentials.

o. OIAI provided the senior managers with copies of the following documents: (i) an inmate information sheet for "Mohamed, Guled" from the website of the New York State Department of Corrections and Community Supervision; (ii) the Applicant's curriculum vitae; a signed UNICEF P.11 form for the Applicant with a 10 July 2014 date; (iii) a letter from New York City Commission on Human Rights stating that it had no employment record for the Applicant; (iv) an email from the State University of New York stating that it had no attendance record for the Applicant; a degree verification certificate from Mercy College confirming the Applicant's attendance; (v) and a photograph of na199.68 494.64 Tm0 0.0 0.0 rg 0.9998 0.0 03422m 5(0.0

process but the Applicant did not comply with this request because he claimed his documents had ended up in another location on the UN flight. The venue was subsequently changed from Nairobi to Mogadishu, Somalia.

r. The Applicant met with Mr. Gibson in Mogadishu on 16 January 2015. The routine background vetting turned out to be a 2-hour long interview about the Applicant's academic credentials, work experience and criminal record. The interview was recorded by Mr. Gibson without the Applicant's knowledge. Another UNICEF staff member, Giorgio Figus, was present initially, but asked by the Applicant to leave when questions arose about his incarceration.¹¹ According to Mr. Gibson, he had contemporaneously typed the transcript that was submitted by the Respondent as the Applicant answered his questions.¹²

s. Mr. Gibson confronted the Applicant with the discrepancies in his academic and professional credentials and the Applicant sought to provide explanations. The Applicant claimed that he had been wrongly convicted and imprisoned for a crime he did not commit.

t. At the conclusion of the interview, Mr. Gibson told the Applicant that he had two options which were that he could resign and that if he did

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signed another one in longhand that stated he had not been coerced into resigning.¹⁵

v. At 12:41 hours on 17 January 2015, the Applicant sent an email to Mr. Lauwerier informing him of his decision to resign for personal reasons and requesting approval to take 30 days' annual leave "before friendly departure".¹⁶ Mr. Lauwerier acknowledged receipt of the Applicant's email and accepted his resignation by email dated 18 January 2015.

w. By a memorandum dated 19 January 2015, the Head of Human Resources, UNICEF Somalia, provided the Applicant with detailed administrative procedures and information concerning his entitlements upon his separation from UNICEF on 17 February 2015.

x. By a memorandum dated 21 January 2015, Mr. Lauwerier acknowledged receipt of and accepted the Applicant's resignation, effective 17 February 2015.

y. The Applicant was separated from service on 17 February 2015.

z. Thereafter, on 18 March 2015, the Applicant filed a Management Evaluation Request (MER) of the decision by UNICEF to accept his resignation. He alleged in his MER that he had been coerced by Mr. Gibson to tender his resignation.

aa. In a management evaluation response dated 10 May 2015, Mr. Martin Mogwanja, Deputy Executive Director, UNICEF, affirmed the decision to accept the Applicant's resignation and informed him of the decision to pay him an amount equivalent to what he would have been pai

an action by a staff member and not a unilateral decision by the Administration.

c. The Applicant filed his application to the UNDT on 12 August 2015, which was outside the 90-day delay set out in art. 8.1(d) (i) (a) of the UNDT Statute. Additionally, the Applicant did not file 00 135.36 697(o)g95.

16. There is agreement between the parties that the meeting at which the Applicant alleges he was “coerced” by Mr. Gibson into drafting a resignation, who

incarceration and the falsification of several academic qualifications and previous jobs in his curriculum vitae.

25. When late into the interview, the Applicant finally admitted the facts of his previous conviction and incarceration and the falsification of his some of his qualifications and employment record and sought Mr. Gibson's cooperation to cover it up; Mr. Gibson told him that he would not be part of a cover-up and that he would recommend his dismissal. After further discussion the next day, he drafted a resignation letter for the Applicant. The Applicant tendered his resignation to the UNICEF Country Representative in a hand-written letter and by email on 17 January 2015.

26. After a review of the transcript of the meeting between Mr. Gibson and the Applicant on 16 January 2015 and the circumstances leading to the said meeting, the Tribunal is not in any doubt that when the Senior Security Advisor told the Applicant that he would recommend his dismissal, it was an invitation to take the soft landing of resignation. He was also indirectly conveying the yet unspoken **decision** of the senior UNICEF managers in Somalia that because of the false claims and undisclosed felonious conviction and incarceration regarding the Applicant, he could not be expected to continue in the services of UNICEF.

27. The crux of the Applicant's case is that he was badgered, threatened and harassed and then coerced into resigning his position by Mr. Gibson. In his sworn oral testimony, the Applicant told the Tribunal that after threatening him, Mr. Gibson gave him a hand-written draft resignation letter which he told him to copy in tendering his resignation. The transcript of the meeting between the Applicant and Mr. Gibson does not disclose any form of coercion. The Tribunal heard the Applicant's sworn testimony and finds that he was not coerced, threatened or harassed in any way into tendering his resignation to UNICEF. The Applicant clearly understood that a resignation would spare him an embarrassing need to respond to charges of misconduct and a likely dismissal from service.

28. As to whether the apparent resignation of the Applicant was instigated by the action of Mr. Gibson, this cannot be denied. As already stated, the Applicant understood that he would have an easier passage out of the Organization if he

tendered a resignation based on “personal reasons.” It does not serve any useful purpose to engage in an academic exercise to examine the meaning of “resignation” under the Staff Rules and whether it is a process “initiated by a staff member” in order to determine whether there is in fact an administrative decision which the Applicant is contesting in this case. To the extent that the resignation of the Applicant was instigated by the Respondent or his agents, it was in fact, an administrative decision capable of being challenged.

Was UNICEF aware of the misrepresentations in the Applicant’s personal history of age, educational background, employment background and criminal record on 16 September 2009 when he was recommended for recruitment and if

36. The Tribunal has examined the Applicant's CV. Regarding his education, he claimed to have attended four post-high school institutions in the United States and to have obtained a diploma and degrees from them. The CV states that between June 1990 and 1992, the Applicant studied at the Southern Institute of Florida and obtained a degree in Advanced Legal Research; in May 1992, he obtained a degree in Social Science from Ulster Community College, New York; in May 1994, he obtained a Legal Research Diploma from Albany Legal Research, New York and in May 1997, he then added a Bachelor's degree in Behavioral Science with a Minor in Psychology in Counseling and Group Therapy from Mercy College, New York, USA to his academic achievements.

37. A response by email to enquiries made by the OIAI to Ulster College, State University of New York (SUNY) on 14 November 2014 informed that the Applicant did not attend the college. In answer to a question in cross-examination, the Applicant suggested that Ulster Community College may have lost some of its records if it could not find his name and said he could send his original certificate from the College to the Tribunal. When Mr. Gibson asked the Applicant at their meeting on 16 January 2015 whether he had original his certificate from Ulster, he responded that he didn't and that the college would have it. The Applicant never sent his promised Ulster College certificate to the Tribunal.

38. When Mr. Gibson put it to the Applicant during their meeting that the Albany Legal Research and Southern Florida Institute which he claimed to have obtained certificates from were fictitious colleges and did not exist, the Applicant said he studied at those institutions by correspondence and that he had the certificates in his luggage. Under cross-examination, it was again put to him that the two institutions did not exist but the Applicant's answer was that at the time he studied in them, they existed. He never tendered the certificates.

39. It was however confirmed that the Applicant obtained the degree in Behavioral Science at Mercy College of SUNY in August 1997 while he was an inmate at Woodbourne Correctional Facility in New York State.

40. With regard to information concerning his employment background, the Applicant stated in his CV that from February 1989 to March 1991, he worked as a

security guard at Wells Fargo Security Service in New York; from April 1991 to March 1997, he was a legal clerk in Harry C. Batchelor Legal Firm in New York; and from January 1998 to February 2001, he worked as a Human Resources Officer at the

continued,

47. During cross-examination, the Respondent's counsel pointed out to the Applicant that

Did UNICEF follow proper procedure in mandating its Senior Security Advisor to question the Applicant on 15 January 2015 rather than initiate a disciplinary process under CF/EXD/2012-005 (Disciplinary process and measures) or termination under Staff Rule 9.6(c)(v)?

55. It was submitted on behalf of the Applicant that if the Respondent had clear and convincing evidence that the Applicant had withheld information related to his criminal background, he should have terminated him pursuant to the facts anterior clause of the Staff Rules.

(v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter of the United Nations, have precluded his or her appointment;

59. In other words, a staff member may be terminated when he/she fails to disclose relevant facts that existed prior to his/her appointment and which facts, if known, would have precluded that staff member's appointment.

59. Staff Regulation 9.3(c) provides for the payment of an indemnity and giving of notice in those instances where the Secretary-General terminates the appointment of a staff member.

60. CF/EXD/2012/005 is UNICEF's Executive Directive that provides for the Agency's disciplinary processes and measures.

61. Pursuant to section 3.1(a) of CF/EXD/2012/005, the onus is on UNICEF managers to undertake a timely preliminary review upon receipt of allegations of misconduct; section 3.2 explains that the purpose of the preliminary review is to establish basic facts of a matter and to preserve or safeguard basic evidence. It does not normally involve interviewing the subject(s) in the case. Section 3.3 obliges the manager to report his/her findings to OIAI if a preliminary review indicates that misconduct may have occurred. Under section 3.4, OIAI should undertake a preliminary assessment upon receipt of information about possible misconduct.

62. Section 6.4 of CF/EXD/2012/005 explains the authority and role of UNICEF managers in the handling of allegations of misconduct. Section 6.4(d) authorizes UNICEF managers to assist in investigations under the guidance of the Director/OIAI.

63. To what extent did UNICEF comply with its own Executive Directive here? There is evidence that after preliminary investigations in late 2014 into alleged misconduct by the Applicant and into the rumors that he had a criminal record, the OIAI uncovered that the Applicant had misrepresented his personal history, academic qualifications and employment background and had withheld information on a former criminal conviction whilst applying for employment with UNICEF. The Applicant had evidently been recommended and then appointed based on these

had failed to grant him his due process rights and had not acted fairly, justly and transparently.

68. The Tribunal does not accept this claim and finds that UNICEF did not breach its Executive Directive. OIAI duly investigated the Applicant with regard to the false claims in his P-11 of July 2014 and the CV he submitted to UNICEF when he applied for his job and followed it up with the interview in which it was assisted by Mr. Gibson.

69. In choosing the option to avoid a disciplinary process, the Applicant resigned and his resignation was accepted by the Country Director. The said resignation was to take effect thirty days after it was received which was enough time for the Applicant to withdraw it if he felt that his rights had been breached in any way. He was later separated with full entitlements. No duty existed on the part of UNICEF in the face of the Applicant's resignation to continue to the issuing of charges after the resignation was tendered.

70. In the case of *D'Hooge*, the applicant had entered on duty at the P-4 level as Chief of the Protection Coordination Unit (PCU) in the Department of Security and Safety (DSS) in January 2007. Following an anonymous allegation that he was unsuitable for the post due to unprofessional behavior in a previous employment and that he had overstated his academic qualifications, he was placed on special leave with pay during the pendency of an investigation into the allegations.

71. His appointment was later terminated and the reasons given were that he listed his "Police Diploma" as a university degree in his PHP and did not disclose that he was reprimanded when he worked as an investigator at the International Criminal Tribunal for the former Yugoslavia (ICTY). The applicant requested an administrative review of the termination decision on 14 May 2008. He was not given a copy of the investigation report or the material upon which it was based and his suggestions for certain enquiries to be made to vindicate his conduct and character were ignored. The investigation report was later provided him on 6 August 2008 without attachments after his repeated request for the report in June.

72. One of the submissions of the applicant in that case was that his rights were violated because he was not informed of the allegations against him during the investigations and that his due process rights were violated because he was never provided the documents that formed the basis for his termination. The respondent submitted that the applicant was terminated based on non-disclosure of facts anterior such as his previous employment with ICTY, his reprimand there and misrepresentation of his academic qualifications.

73. The Tribunal held that good faith and fair dealing required that the applicant be given an opportunity to respond to any adverse findings of fact and any adverse recommendations before the decision to terminate was made. The Tribunal held further that if decision-making is to be legitimate, it must be rational and that in that instance, it was irrational of the decision-maker not to provide the investigation report or any meaningful particulars to the applicant.

74. The case of *D'Hooge*

institutions he claimed to have attended and did not obtain any degrees from them. The investigators also obtained documentary evidence showing that the Applicant was never employed in some offices and firms as stated on his CV. It was also shown that some of the academic institutions stated on the Applicant's CV as schools he attended did not exist. When Mr. Gibson confronted him with the false claims on his CV and P-11, the Applicant admitted them.

77. In other words, the adverse findings against this Applicant were not capable of dispute. The Applicant did not dispute them even during his oral testimony before the Tribunal. The Tribunal's decision in *D'Hooge* cannot avail the Applicant.

Should the Applicant be granted the remedies he seeks?

78. The Applicant asks for rescission of the decision to accept his resignation. In the alternative, he asks for a compensatory award of twelve months' net-based salary and moral damages for the failure of the Administration to fulfil its obligations towards him.

79. The Respondent urges that the Applicant has received the benefit of both a resignation and a facts anterior termination and is not entitled to further compensation.

80. Upon separation, the Applicant was paid: (i) his salary and allowances for a period of 30 calendar days in lieu of notice; and (ii) three months' gross salary as a termination indemnity.

81. The Tribunal agrees with the Respondent that the Applicant has been overly compensated. He is not entitled to any compensation.

JUDGMENT

82. This Application fails.

(Signed)

Judge Nkemdilim Izuako

Dated this 25th day of 00 00 00 00 at 331.0 1.0 2.0 0.0