
Case No.: UNDT/NBI/2009/071

Judgment No.: UNDT/2010/053

Date: 31 March 2010

Introduction

1. The Applicant, a former staff member of the United Nations Children's Fund

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UNICEF's Human Resources Policy and Procedure Manual

10. The relevant provisions in this manual are at Chapter 15, which provides details on UNICEF's disciplinary procedures.

Rules and Regulations Governing the UN Commissary

11. The UN Commissary, which is established at UNON, is operated for the benefit of the staff of the UN Organization and other eligible persons, with a view to facilitating the purchase of goods imported duty free.

Relevant factual findings

12. The Applicant is a Kenyan national. He started employment with UNICEF on 19 February 1990. His first appointment was as an Administrative and Finance Officer with the UNICEF regional office in Nairobi. His next appointment was as Human Resources Officer (HRO) in the Kenya UNICEF country office. In 2001, he was on mission assignment as an HRO with UNICEF Tanzania. In 2002, he was again on mission assignment to Afghanistan as an Operations Officer. In January 2003, he was assigned as an Operations Manager at UNICEF in Windhoek in Namibia, at the P-3 level, under the supervision of the Country Representative, until his contract was terminated on 1 September 2009 on the basis of alleged serious misconduct.

13. In September 2008, whilst the Applicant was serving in Namibia, he visited the UN complex in Nairobi. On producing his UNON ID card, he was stopped and questioned by a security guard who denied him access to the premises on the basis that the card was not valid. The Applicant asked to speak to a senior officer who explained that since his duty station was no longer Kenya, he could not use the UNON ID card to gain access to the premises. The ID card was confiscated and the

Applicant was issued with a temporary visitor's pass. The security officers clearly did not regard this as a serious matter since they did not report the incident.

14. Prior to September 2008, the Applicant and his wife made visits to the UN Commissary on 11 occasions. Their purchases over a period of approximately 5 years amounted to \$933.29¹. On no occasion during this period were they challenged either on gaining entry to the UN premises or the Commissary. After his card was confiscated, the Applicant heard nothing more until 6 April 2009 when he was called to Nairobi to discuss performance issues. It is not surprising that in these circumstances he concluded that the matter had been closed.

15. The Applicant had been summoned to the Kenya regional office of UNICEF to meet senior managers to discuss UNICEF's concerns about financial losses already incurred in the Windhoek office, and how such losses could be prevented in the future. There would appear to be nothing wrong in principle for senior managers to discuss such concerns with a staff member so long as the purpose of these discussions was intended to be constructive, supportive, developmental and with a view to putting in place appropriate procedures, including identifying and meeting training requirements, designed to avoid a recurrence of the problem. Three meetings took place on 6 April 2009.

16. The first two meetings conducted by the Deputy Regional Director and the Acting Regional Operations Officer concentrated on a peer-review and an audit report which highlighted the lack of proper financial controls and the Applicant's performance failures. Although the Tribunal was not given a great deal of information about these meetings it would appear that the managers concerned had given the Applicant a clear indication that there were serious concerns about his performance to such an extent that they were not optimistic about his capacity and

¹ This includes a sum of \$304.32 for purchases that the Applicant is disputing. Without this, the total is \$628.97.

against him as a charge of misconduct. The Applicant responded by stating that he had been given to understand that he could use the card and that upon its confiscation and having heard nothing since September 2008 he thought that the matter had ended. The meeting ended inconclusively with the Applicant stating that he would think about the options that were offered.

20. The Regional HRO admitted to having mentioned the incident with the Applicant's UNON ID card during the 6 April 2009 discussion. There was no conceivable reason for the Regional HRO to have mentioned the incident when, according to him, the purpose of the 6 April 2009 meeting was to discuss the Applicant's serious performance shortcomings in the Windhoek office and to offer him some options. Furthermore, he said that the possibility of disciplinary action was not in his mind at that time.

21. A month later, on 7 May 2009, the Senior Investigations Specialist (OIA Investigator) with UNICEF's Office of Internal Audit (OIA) contacted the Applicant to arrange an interview on 8 May 2009. This date, however, was not convenient and the interview took place on 12 May 2009.

22. On 24 June 2009, the Director of OIA sent his report to various senior officers in UNICEF. This report was produced to the Tribunal as part of the response to the claim. The report begins with a statement that "on 6 April 2009 the Regional Chief of Human Resources, ESARO, [...] contacted OIA saying that he had discovered that the Operations Officer in Namibia, [the Applicant] who left his position in Nairobi in 2003, had wrongfully retained his United Nations office at Nairobi (UNON) ID card and had been using it to purchase duty free goods from the UN Commissary ever since."

23. This statement is at odds with the Regional HRO's evidence that on 6 April 2009 he had no knowledge of the Applicant using his UNON ID card to purchase duty-free goods from the UN commissary. It was his evidence that the issue of the

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well advised to reconsider the terms of such charge letters so as to avoid the impression of a pre-judgment having been made, unless of course that that is precisely the meaning that is intended, which would be a matter of surprise.

Issue 3: Delay in bringing the disciplinary charge

41. One of the important issues for the Tribunal to resolve was the reason for the delay in bringing the charges from September 2008 to 14 July 2009 or alternatively the delay from September 2008 to 6 April 2009 when it was first mentioned to the Applicant and reported to OIA.

42. The Regional HRO informed the Tribunal that he had no knowledge of the Applicant's unauthorized use of his ID card prior to 6 April 2009 when, in a casual conversation with the UNICEF Kenya Country Office Representative, she informed him that the Applicant was rude to a security guard who challenged him about the unauthorized use of his UNON ID card. At that stage, the Regional HRO told the Tribunal that his principal concern was the allegation of rudeness. At that time the issue of any disciplinary action had not occurred to him. He agreed that he may well have mentioned the matter in the course of the meeting with the Applicant on 6 April. He also accepted that that was the date on which he informed OIA that there was an issue to investigate.

43. The UNICEF Kenya Country Office Representative corroborated the Regional HRO's evidence to the effect that she happened to be in the same building as the Regional HRO when she saw the Applicant. Seeing him jogged her memory about the conversation she had with the security officer who challenged the Applicant. She said that it was a casual conversation and her only concern following that conversation was to impress upon Human Resources that they should tighten up the procedures relating to check out and, in particular the return of ID cards. She thought no more about it until she saw the Applicant on 6 April. In mentioning the incident to the Regional HRO it seems that she was simply passing on some gossip

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as a result of an incomplete check out list, had forfeited 20% of his final clearance pay as indicated in the check out list.

47. Further, whilst the Applicant could not remember the name of the security officer who informed him that as a permanent staff member he could keep his UNON ID card it is surprising that during the investigation, the investigator did not ask him to describe the individual concerned. Furthermore, given that the period when he would have been required to complete the checkout procedure would have covered a matter of a day or two no enquiries were made to check the duty roster for those days in the expectation of identifying the individuals who were on duty at the time.

48. Whilst it is understandable that the Applicant may not be able to recall the identity of the individual given the lapse of six years it would have been valuable for the OIA Investigator to have explored these avenues to test the Applicant's credibility. This was particularly important given the possible serious consequences of an adverse finding against him. At all times the Applicant made it clear that he knew the rules and followed them and that he acted in good faith on what the security officer had told him when he had gone to surrender his ID card.

49. Paragraph 4.4 (c) of CF/AI/2009-004 allows UNICEF managers to conduct or assist in investigations if so requested by the Director of OIA or by authorized investigators and in paragraph 8.2 (e), the Director of OIA may task other staff to assist in particular aspects of an investigation under the guidance of an Officer of OIA. The OIA Investigator informed the Tribunal that since he was conducting the investigation remotely from New York, he relied on the Regional HRO, who had reported the incident to OIA, to obtain documents for him from the Commissary and the Kenya Country Office. The Regional HRO confirmed the OIA Investigator's testimony and also informed the Tribunal that, upon the directions of the OIA Investigator, he had also made inquiries about the number of times the Applicant had used his card in the Commissary.

50. Having taken careful note of paragraphs 4.4 (c) and 8.2 (e) of CF/AI/2009-004, the Tribunal considers that it is highly questionable and arguably not consistent with the highest standards of impartial investigations by the OIA to ask the very manager who referred the alleged disciplinary offence to them to assist in the conduct of that investigation. Without casting aspersions on the integrity of either individual it is my view that this is bad practice, particularly where it would have been possible to seek the information in question from individuals other than the referring officer. Not surprisingly this defect in the investigative procedure was seized upon by the Applicant's representative to cast serious doubt on the quality of the investigation and the Regional HRO's role in it.

Assessment

51. The charge relating to the unauthorized use of the UNON ID card to gain access to the UN premises in Nairobi was correctly brought. The more serious charge of abuse of privileges and immunities relating to duty and tax-free purchases in the UN Commissary is worthy of closer examination. Whilst it is correct that abusing the duty free privileges amounts to

53. The question that has to be addressed, where a disciplinary charge is brought against such a background, is the staff member's state of mind. Did he knowingly misuse the Commissary facilities? Did he have the intention to abuse the privileges and immunities of the Organization as alleged and charged? Did he genuinely believe, on reasonable grounds that he was entitled to have access to the Commissary?

54. The conduct in question in this case has nothing to do with efficiency and competence. Arguably it has something to do with integrity. The Respondents have relied on the Applicant's previous position in Human Resources and his current position as an operations officer in support of their contention that he was aware of the applicable rules and was in willful breach of them. The Respondents, however, did not provide the Tribunal with a specific Organizational rule or regulation governing the return of ID cards during the check out process. It appears therefore that this was a practice requirement. It was not an issue of dispute. Further, the Respondents would require cogent evidence to support their contention that the Applicant had the necessary knowledge or *mens rea* to commit the disciplinary offences in question.

55. There is no doubt that as a matter of fact he should not have retained his UNON ID card. Have the Respondents proved that he did so intentionally? Assuming in their favour that they were not required to prove beyond all reasonable doubt but only to satisfy the test of whether it was more probable than not that he had the requisite intention, it is necessary for the Tribunal to examine the evidence pointing to the existence of such an intention.

56. The Applicant accepted that he was fully aware of the checkout procedure and the need to return his UNON ID card. When he reported to the security desk to return the card he was told that he was a permanent member of staff continuing in employment with UNICEF and in the circumstances it was appropriate for him to

card. More damaging, however, is the implied suggestion that he might have had something to do with the absence of the checkout list in his OSF. Again in relation to this matter they could have pursued further enquiries but failed to do so.

60. It is clear from the evidence relating to the meetings that took place on 6 April 2009 that the Respondents had come to a considered view that it was in the interests of the Organization to part company with the Applicant. When they failed to secure his agreement to a consensual termination of the contract, pressure was applied to him to force a decision to accept severance terms. The Respondents knew that the alternative would have been to go down the performance assessment route, which would have taken a considerable length of time. Whilst it was suggested to him that as an alternative to an agreed voluntary severance package, he could resign it would have been clear to the managers concerned that no reasonable employee would voluntarily resign as an alternative to agreeing to a severance package.

61. Given the evidence suggesting on balance that the Applicant did not have the intention to defraud, I find that the Respondents did not have the necessary evidential basis to prove a charge of serious misconduct within the meaning of staff rule 110.1.

62. The disciplinary rules cater for a range of penalties in misconduct cases. Even if the Respondents believed that misconduct had occurred in this case, it did not constitute serious misconduct given the absence of intent.

63. In all the circumstances, the penalty of separation from service without notice is disproportionate to the offence.

Judgment

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