

Case No.:

Introduction

1. On 12 November 2007, the United Nations Administrative Tribunal received an appeal against the Secretary-General's decision to impose on the applicant the disciplinary measure of summary dismissal for serious misconduct. The applicant was at the time of the dismissal working in a UN Refugee Agency (UNHCR) country office. The Administrative Tribunal did not consider this appeal which was transferred to the Dispute Tribunal on 1 January 2010 in accordance with sec. IV, para. 45, of United Nations General Assembly Resolution 63/253 and sec. 4 of ST/SGB/2009/11 concerning the transitional measures related to the introduction of the new system of Administration of Justice.
2. The former Administrative Tribunal dealt with appeals against administrative decisions, and in this case the staff member

requirements which comply broadly with the principles of natural justice and internationally recognised standards for reviewing administrative actions in relation to disciplinary matters in an employment context. These requirements are wholly consistent with the principles enshrined in the UN Charter guaranteeing fundamental rights and recognizing duties and responsibilities of both staff members and managers. The

Relevant legal instruments

Misconduct

6. Article 101.3 of the United Nations Charter provides that in exercising responsibility for the appointment of staff the Secretary-General shall give paramount consideration to employing staff of “*the highest standards of efficiency, competence and integrity*” (emphasis added).

7. Staff regulation 1.2 (basic rights and obligations of staff) elaborates on the duties and obligations of staff members as international civil servants and includes the following:

...

(b) Staff members shall uphold the highest standards of ... 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;*

...

(e) ... Loyalty to the aims, principles and purposes of the United Nations, as set forth in its Charter, is a fundamental obligation of all staff members by virtue of their status as international civil servants;

(f) ... [Staff members] shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations.

(g) *Staff members shall not use their office or knowledge gained in their official functions ... for the private gain of any third party ...*

...

[emphasis added]

8. At the material time (3 December 2003), the power of the Secretary-General to dismiss a staff member for serious misconduct was provided for in former staff regulation 10.2, which stipulates that:

The Secretary-General may impose disciplinary measures on staff members whose conduct is unsatisfactory.

The Secretary-General may summarily dismiss a member of the staff for serious misconduct.

9. Former staff rule 101.2 (basic rights a

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(vi) Demotion;

(vii) Separation from service, with or without notice or compensation in lieu thereof, notwithstanding rule 109.3;

(viii) Summary dismissal.

...

[emphasis added]

Disciplinary proceedings

12. The rights of staff members to due process in the investigation of alleged disciplinary offences is provided for under former staff rule 110.4(a) concerning due process which states that:

(a) No disciplinary proceedings may be instituted against a staff member unless he or she has been notified of the allegations against him or her, as well as of the right to seek the assistance in his or her defence of another staff member or retired staff member, and has been given a reasonable opportunity to respond to those allegations.

(b) No staff member shall be subject to disciplinary measures until the matter has been referred to a Joint Disciplinary Committee for advice as to what measures, if any, are appropriate ...

...

(d) An appeal in respect of a disciplinary measure considered by a Joint Disciplinary Committee pursuant to either paragraph (b) or (c) may be submitted directly to the United Nations Administrative Tribunal.

13. Section II, paragraph 7, of ST/A1/371 provides:

The staff member should be given a specified time to answer the allegations and produce countervailing evidence, if any. The amount of time allowed shall take into account the seriousness and complexity of the matter. ...

Events leading to the disciplinary charges

14. After a series of previous short-term appointments, from August 1996, the applicant was employed on a fixed-term appointment. At the time of her dismissal, she was a senior protection assistant. The events in question took place in 1998 when, as part of her duties, the applicant conducted interviews and took basic information for the

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the resettlement consultant. Whilst a proper enquiry into the alleged misdeeds of others, in this case particularly those of the head of office, should not excuse liability for the commission of the actual offence by an individual, it will explain the circumstances in

lawyer, the applicant should have known the seriousness of altering a form and she ought to have stood up to the head of office. Whilst this is a statement of principle which is difficult to challenge, it nevertheless fails to take into account the practical realities of the workplace and how acts of bullying and harassment by those in power could have such a deleterious effect on junior members of staff that they would comply with unlawful instructions until such time as they are enabled to report them in circumstances of safety. In fact, the applicant made a full disclosure of all these matters after the head of office left the UNHCR duty station. The Tribunal takes judicial notice that such behaviour is consistent with the well recognised pattern of conduct in working establishments that are run by bullying and harassment which undermines the individuals' self-esteem and confidence. To expect a junior staff member to stand up to a bullying manager is, in the circumstances of this case, to expect too much and fails to recognize the phenomenon so well articulated in the UN's policy on bullying and harassment as expressed in former staff rule 101.2(d), as recited above, and the Information Circular, "Our core values prohibit discrimination and harassment" (ST/IC/2003/17), para. 3, which states that, "The Organization cannot tolerate discrimination and harassment in any form. Any infraction will be taken very seriously". Furthermore, the allegations against the head of office, if proven, would have contravened the principles of the Charter.

24. It is, nevertheless, important to emphasise that none of this excuses the act of tampering with a refugee-seekers's original registration form to conceal vital data. However, it seems plain that neither the majority members of the JDC panel, nor those advising the Secretary-General, gave sufficient credence to what appears to be legitimate complaints and concerns of bullying and harassment in the workplace by way of mitigating the failure on the part of the applicant to refuse to carry out an instruction of the head of office or to speak up at the meeting of the refugee research resettlement selection committee. It is clear that had she done so, it would have constituted persuasive mitigation in relation to her earlier act of altering the form.

25. The applicant makes much of the point that she did not alter the form for personal gain or to harm UNHCR, and it is accepted by the respondent that the applicant did not

alter the form as a result of attempting to gain personally. Whilst a benign motive may, in appropriate circumstances, constitute mitigation in relation to penalty, it does not affect the fact that the act in question had been done and that it was in breach of the terms of her appointment and the duty to carry out her day to day tasks with integrity. The same point applies to her assertions that her past good service record was not taken into account. A good service record is not an irrelevant consideration as mitigation of the severity of an offence. However, each case has to be looked at on its own merits. In this case there are two issues to be considered. In the first place, the need to safeguard the integrity of the UN's systems and procedures in relation to the resettlement of refugees has to be given significant weight. UNHCR has carefully devised protocols with various member states in relation to their receipt of refugees for resettlement. As an organization, UNHCR

issue of individual misconduct has taken place within a structure of systemic abuse and mismanagement undermining the very ethos and principles found in art. 101.3 of the UN Charter and staff regulation 1.2?

27. The appropriateness of the sanction is a matter for the discretion of the Secretary-General. However, the exercise of the discretionary power vested in the Secretary-General to determine the appropriate level of the sanction for serious misconduct is also subject to the overriding requirements to do justice and to have as its guiding principle the principles and values enshrined in the Charter of the United Nations. All the facts and circumstances have to be considered, including mitigating factors. In this case, sufficient weight should be given to both the majority and the minority views of the JDC Panel members. The unanimous recommendation, at para. 45 of the JDC report (recited above in para. 15), that a full enquiry should be conducted into the serious allegations of misconduct made by the applicant has not been acted upon. Those advising the Secretary-General had a duty to draw attention to this recommendation as well as to the comments of the dissenting panel member on the issue of disparity of disciplinary sanctions imposed by UNHCR for proven cases of serious misconduct. This member referred to a case involving thirty-two staff members who had submitted fraudulent claims. Ten of them were summarily dismissed and twenty-two remained in service because they had submitted fewer fraudulent claims.

28. By Order No. 230 (NY/2010), the respondent was asked to state what steps, if any, they took to investigate the applicant's allegations that the head of office instructed her to remove from the refugee-seeker's form information indicating that she was related to the protection clerk and what steps did they take to give effect to para. 45 of the JDC's report recommending that an investigation be undertaken by a neutral body.

29. In answer to this question, the respondent stated that enquiry made with the Inspector General's office of UNHCR indicated that none of the senior staff of the Inspector General's office at the time that the JDC issued its report are currently in the office, in particular, the Inspector General and Head of Investigations Service. Therefore,

an intensive search was made of the investigation service database and case files with the result that no follow-up action in the form of an investigation in relation to the head of office or in relation to the JDC recommendation could be found. Former staff in the Inspector General's office were also contacted, but could not recall any follow-up action.

30. From this it may be inferred that notwithstanding the very serious allegations that emerged in the course of the JDC panel's investigation and the detailed information provided by the applicant supported by the independent resettlement consultant, no disciplinary enquiry was instituted into the various shortcomings in the way in which the refugee resettlement programme was being conducted at the time at the UNHCR duty station. It is no surprise that the applicant should express the view that malpractices on the part of more senior personnel were being overlooked. In justifying the disciplinary sanction against the applicant, the respondent relies on the fact that altering the form of a refugee-seeker struck at the very core of UNHCR's functions. What then of fraud perpetrated on UNHCR? Is this a less serious offense? Furthermore, do the serious allegations made by the independent resettlement consultant, the unanimous recommendation of the JDC and the applicant's allegations not strike similarly at the very integrity of UNHCR as a humanitarian agency reliant on public funds?

31. The applicant has admitted altering the form of the refugee-seeker in order to delete references to her relationship with the staff member. This admission was made in the course of the investigations into allegations of misconduct on the part of the protection clerk. The respondent accepts that the evidence provided by the applicant was a key factor in the decision regarding the staff member who was subsequently dismissed for a breach of staff regulation 1.2.

Conclusion

32. The respondent had sufficient grounds to believe that the applicant had, by altering the form, breached a fundamental requirement safeguarding the integrity of the

3. Alternatively, if the parties consider that, in the circumstances of this particular case, they should discuss and agree the remedy they are at liberty to do so and inform the