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UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/005

Judgment No.: UNDT/2012/191

Date: 05 December 2012

Original: English

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Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

AINTE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS



5. On 13 May 2008, the Reference Check Unit (“RCU”) contacted the Somalia Ministry of Higher Education seeking confirmation of the authenticity of three of the Applicant’s academic qualifications obtained in Somalia.

6. On 22 May 2008, the Ministry of Education and Culture of the Transitional Federal Government of Somali (The Somalia Ministry of Education) informed the RCU that the Applicant’s qualifications were false. Two months later, on 22 July 2008, the Somalia Ministry of Education wrote to RCU apologizing for informing them that the Applicant’s degrees were false and stated that the Applicant had been mistaken for another individual. They confirmed that the Applicant indeed graduated from the three institutions in Somalia and earned the degrees and that therefore his documents were genuine.

7. Sometime in June 2008 the Applicant was contacted by a Human Resources Officer (“HRO”), Field Personnel Division (“FPD”) who sought to know whether the Applicant had completed the other two degrees indicated in his PHP purportedly obtained from Pakistan and the United Kingdom. In response, the Applicant informed her that he had not done the two courses she mentioned that though he had wanted to undertake the courses, he had been unable to do so due to work and time constraints.

8. He further informed the HRO/FPD that he had asked his assistant to complete his PHP for him because he was very busy at the time and that she made some errors which he had corrected on discovering them. He also explained that when updating his PHP, he had concentrated mostly on updating his employment history and other information which led to his overlooking the mistake reflected in the education part of his PHP.

9. On 14 July 2008 the Recruitment, Outreach and Career Development Section, wrote to the Conduct and Discipline Unit (“CDU”) referring the Applicant’s case for review and recommendation for further action in light of the finding that the Applicant did not possess the degrees cited in his PHP and that the Somalia Ministry of Education had informed them that the Applicant’s documents were false.

10. On 17 November 2008, the Under-Secretary General (“USG”), Department of Field Services (“DFS”) referred the Applicant’s case to the ASG/OHRM informing her of the Applicant’s allegations of misrepresentation of educational qualifications and recommending disciplinary action against the Applicant.

11. In a letter dated 12 December 2008 the ASG/OHRM informed the Applicant of the imposition of disciplinary measure termination with compensation in lieu of notice in accordance to the former staff rule 109.3 (c). The Applicant received the letter on 5 January 2009.

12. On 5 March 2009 the Applicant requested Administrative Review of the decision to terminate him from service. However on 25 March 2009, the decision was rescinded and he was reinstated in retrospect.

16. A hearing was held via teleconference from Nairobi on 4 and 5 October 2011 and counsel for the Applicant and Respondent closed submissions on 11 and 14 October 2011 respectively.

#### Applicant's Case

17. It is the Applicant's case that;
- a. The decision to separate him from service was marred with serious violations of due process rights;
  - b. The disciplinary process was flawed with various procedural irregularities;
  - c. There was lack of a proper investigation into the allegations against him;
  - d. The decision to separate him from service was marred by confused and contradictory assumptions of facts;
  - e. The errors on his PHP were made by his assistant in what was an honest and human mistake;
  - f. He had been subjected to double jeopardy by the Respondent and;
  - g. The penalty of separation was not proportional.

#### Respondent's Case

18. The Respondent on his part submitted that;
- a. The conduct of the Applicant relating to the misrepresentation was established and that it amounted to misconduct;
  - b. A fact finding into the Applicant's matter was conducted;

c. There were no procedural irregularities and the Applicant was accorded due process rights and;

d. The sanction imposed was proportionate to the established misconduct.

19. The Respondent therefore prayed the Tribunal to reject the Application in its entirety.

#### Issues

20. The issues in this case can be summarized in the following questions;

a. Were the provisions of ST/AI/371 (Rice Disciplinary measures and Procedures) observed by the Organization prior to imposing a disciplinary measure in this case?

b. Were the Applicant's due process rights breached by the Respondent?

c. Was the disciplinary measure imposed on the Applicant proportionate?

#### Consideration

Was there an investigation conducted as required by ST/AI/371?

21. Section 2 of ST/AI/371 provides:

*Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake a preliminary investigation. Misconduct is defined in staff rule 110.1 as "failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other administrative issuances to observe the standards of conduct expected of an international civil servant." (Emphasis added)*

22. In *Abboud* UNDT/2010/001, Adams J expounded on what amounts to ‘reason to believe’ in the application of ST/AI/371, thus:

The “reason to believe” must be more than mere speculation or suspicion: it must be reasonable based on facts sufficiently well founded – though of course not necessarily proved – to rationally incline the mind of an objective and reasonable decision-maker to the belief that the staff member has engaged in the relevant conduct. This is a question of fact and degree is a question of judgment, however, and not of discretion. Whether there is a “reason to believe” the relevant matter is an objective question of judgment and, if there is, the official has no residual discretion to refuse to conduct a preliminary investigation.

~~23. The procedural steps to be followed under ST/AI/371 (The procedure to be followed by the Panel) are set out in the Annex to the Panel's Report on the case of Mr. Abboud (UNDT/2010/001).~~

the Applicant's first degrees to be false? The memorandum further stated that '[I]n



July 2008 from the Chief Recruitment, Outreach and Career Development Section of the FPD together with supporting documents. Neither the contents of the said 14 July 2008 correspondence nor the facts relied upon were established in the course of an official investigation under ST/AI/371. The most that had been undertaken was an initial fact-finding exercise.

29. This is a clear departure from the Secretary-General's usual practice of basing his disciplinary decisions on facts established in an official investigation.

30. There were no investigations, preliminary or full-blown conducted into the allegations against the Applicant. The decision to refer the Applicant's allegations of misconduct to ASG/OHRM for charges was based on a 'reason to believe'.

31. This Tribunal finds that 'reason to believe' that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, creates a requirement to investigate. The Appeals Tribunal in *Aboud* 2010-UNAT-100 held *inter alia* that ST/AI/371 creates the obligation to undertake an investigation into acts or behavior that would discredit the Organization. Conducting an official investigation in such a case is not optional or discretionary.

32. Further in *Messinger* 2011-UNAT-123, the Appeal's Tribunal had held that it is not the task of the Dispute Tribunal to conduct fresh investigations but rather to determine if there was a proper investigation into the allegations. In the instant case, there was no official investigation of any sort into the allegations.

a.

36. In her closing submissions, the Respondent's counsel submitted that:

In his testimony, Mr. Ainte also raised the issue that no investigation into his possible misconduct had taken place. To the contrary, the record demonstrates that a fact-finding took place.... The disciplinary case arose out of that initial fact-finding together with the additional information ...

37. This argument clearly did not deny that proper official investigation took place but rather sought to urge upon the Tribunal that a fact-finding under ST/AI/371 was sufficient for disciplinary action to be taken in this case. It is the legal position that no disciplinary action can survive or be upheld when it was imposed by circumventing the clear provisions set out by the Secretary-General himself in ST/AI/371 as to the prior steps to be taken.

38. Former staff rule 10.3 (a) dealing with due process in the disciplinary process reinforces the provisions of ST/AI/371 in providing as follows:

*The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. In such cases, no disciplinary measure or non-disciplinary measure, except as provided under staff rule 10.2 (b) (iii), may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the charges against him or her, and has been given the opportunity to respond to those charges. (Emphasis added)*

39. There is no gainsaying in the circumstances that only findings of misconduct based on proper official investigation can be used to initiate the disciplinary process against a staff member. What are the convictions of management as to a staff member's guilt, it is imperative that rules and regulations laid down by the Organization are adhered to.

Was the disciplinary measure imposed on the Applicant proportionate?

40. Having determined that a proper official investigation under ST/AI/371 was wrongly avoided when disciplinary action was imposed on the Applicant, the matter

of proportionality of the disciplinary measure imposed becomes irrelevant. A proper investigation and report would have provided the basis for determining this issue.

### Findings

41. A fact-finding is not an investigation and cannot be a basis for imposing a disciplinary measure or a sanction for that matter.

42. The Applicant was entitled to all due process rights under ST/AI/371 but these were denied him.

43. There was no proper official investigation into the allegations against the Applicant as is procedurally required for the disciplinary measure was imposed.

44. The charge of serious misconduct against the Applicant was consequently never established nor proven.

45. The Respondent breached ST/AI/371 to the detriment of the Applicant and thereby violated his due process rights.

46. The Respondent unfairly separated the Applicant from service.

### Remedy

47. In his Application, the Applicant prayed for the following remedies:

- a. Rescission of the decision to separate him from service;
- b. Reinstatement in service at the P-5 level with effect from 2008;
- c. Appropriate compensation for moral damages and emotional stress for violation of his due process rights;
- d. Compensation in excess of two years' net base pay for wrongful dismissal and;

e. That the officials who were responsible for wrongfully terminating his dedicated and highly praised career referred to the Secretary-General for accountability.

48. The charge of serious misconduct against the Applicant was never proven; there was lack of due process and the required official investigation into the allegations against the Applicant was not conducted. Accordingly, the Tribunal:

a. Pursuant to Article 10(5)(a) of the Statute, Orders rescission of the administrative decision and Orders Respondent to reinstate the Applicant and to make good all his lost earnings from the date of his separation from service i.e. 6 January 2011 to the date of reinstatement with interest at 5%;

b. Takes into account the exceptional circumstances surrounding this case and Orders that in the event reinstatement of the Applicant is not feasible, the Respondent shall pay Applicant as an alternative compensation in lieu of reinstatement the amount of two years' net base salary;

c. In view of the fact that the Applicant suffered serious due process violations, awards him compensation in the amount of one year net base salary;

d. Orders that all material relating to the Applicant's separation from service be removed from his official status file, with the exception of this judgment and any subsequent action taken by the Administration to implement it and;

e. Orders that all the compensatory awards made in this judgment shall be computed at the Applicant's category and level of employment at the time of the contested decision.

49. If payment of the compensation is not made within 60 days, an additional five per cent shall be added to the US Prime Rate ~~Rate~~ ~~to~~ ~~effect~~ from the ~~date~~ ~~of~~ ~~expiry~~ of the 60-day period to the date of payment.

#### Conclusion

50. The Tribunal did not consider ~~the~~ other issues of genuine mistake on the part of the Applicant, double jeopardy ~~in~~ withdrawing a sanction imposed on the Applicant only to impose it a second time on the basis of the same offence, as these issues were, like the question of ~~proportionality~~ ~~of~~ ~~the~~ ~~sanction~~ ~~meted~~, already overtaken by the illegality ~~of~~ acting outside the ~~mandate~~ ~~provisions~~ of ST/AI/371.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 5<sup>th</sup> day of December 2012

Entered in the Register on this 5<sup>th</sup> day of December 2012

*(Signed)*

Jean-Pelé Fomété, Registrar, Nairobi.