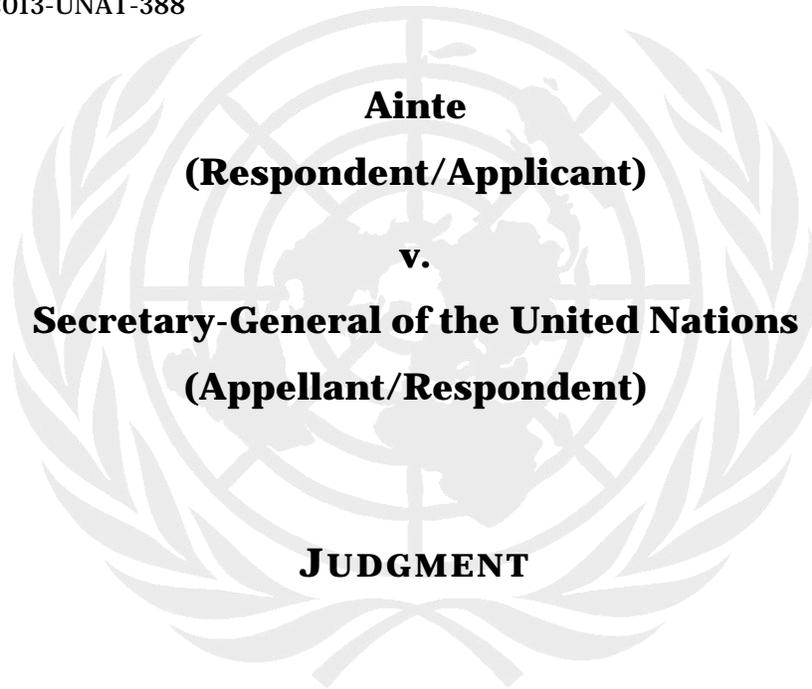




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-388



**Ainte
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Richard Lussick, Presiding
Judge Sophia Adinyira
Judge Rosalyn Chapman

Case No.: 2013-442

Date: 17 October 2013

Registrar: Weicheng Lin

Counsel for Mr. Ainte: Robbie Leighton

Counsel for Secretary-General: Simon Thomas

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2012/191, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 5 December 2012 in the case of *Ainte v. Secretary-General of the United Nations*. The Secretary-General appealed on 1 February 2013 and Mr. Ahmed Ainte answered on 8 April 2013.

Facts and Procedure

2. The facts established by the Dispute Tribunal in this case, which are not contested, read as follows:¹

... [Mr. Ainte] had worked for the United Nations in different agencies in various capacities from 1986 till 2011 when he was separated from service.

... In August 2007, [he] applied for the [P-5 level] post of Senior Administrative Officer in [the African Union/United Nations Hybrid Operation in Darfur (UNAMID)] and as part of his application, he submitted a copy of his Personal History Profile (“PHP”). The PHP indicated that he had two Masters degrees and three Bachelor’s degrees: Master in Business Administration and Management from the Somali Institute of Development and Management; Master of Science in International Relations from Birkbeck College-London, United Kingdom; Bachelor of Science in Management from Islamabad University, Islamabad-Pakistan; Bachelor of Arts in Business and Administration from the Institute of Development and Management, Mogadishu-Somalia and Bachelor of Sciences in Biology and Chemistry from Somali National University.

... In May 2008[, Mr. Ainte] was selected for the position ...

... On 13 May 2008, the Reference Checking Unit (“RCU”) contacted the Somalia Ministry of Higher Education seeking confirmation of the authenticity of three of [Mr. Ainte’s] academic qualifications obtained in Somalia.

... 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 [Mr. Ainte’s] qualifications were false. Two months later, on 22 July 2008, the Somalia Ministry of Education wrote to RCU apologizing for informing them that [Mr. Ainte’s] degrees were false and stated that he had been mistaken for another individual. They confirmed that [Mr. Ainte] indeed graduated from the three institutions in Somalia and earned the degrees and that therefore his documents were genuine.

¹ The following facts are taken from Judgment No. UNDT/2012/191, paragraphs 2–14.

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

... 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.

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

... On 17 November 2008, the Under-Secretary-General (“USG”), Department of Field Services (“DFS”) referred [Mr. Ainte’s] case to the [Assistant Secretary-General, Office of Human Resources Management, (ASG/OHRM)] informing her of the ... allegations of misrepresentation of educational qualifications and recommending disciplinary action against [Mr. Ainte].

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

... On 5 March 2009 [Mr. Ainte] requested Administrative Review of the decision to terminate him from service. However on 25 March 2009, the decision [of 12 December 2008] was rescinded[, DFS having provided OHRM with the corrected information from the Somalia Ministry of Education,] and he was reinstated in retrospect as from 6 January 2009. In a letter dated 2 April 2009, the Administrative Law Unit of OHRM informed [him] that his request for administrative review was moot since he had been reinstated.

... On 7 January 2010, [Mr. Ainte] received a memorandum dated 12 February 2009 charging him with misconduct for making material misrepresentation in his educational qualifications in his PHP forms, to which he responded on 11 February 2010.

... In a letter dated 4 January 2011, the ASG/OHRM wrote to [Mr. Ainte], informing him of the imposition of a disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity. [He] received the decision on 6 January 2011 [and was separated that day].

3. Mr. Ainte appealed this decision to the UNDT on 1 February 2011. In its Judgment, the Dispute Tribunal held that Mr. Ainte was charged on the basis of information which was not established in an investigation, as required by ST/AI/371, “Revised disciplinary procedures”:

... The 4 January 2011 memorandum ... informed him that the referral of his case to the ASG/OHRM by the USG/DFS was based on correspondence dated 14 July 2008 from the Chief Recruitment, Outreach and Career Development Section of the FPD together with supporting documentation. Neither the contents of the said 14 July 2008 correspondence nor the facts relied on 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.

Relying on *Abboud v. Secretary-General of the United Nations*,² the UNDT recalled 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.”

4. As such, the Dispute Tribunal found that the misconduct charge was neither “established nor proven” against Mr. Ainte and that, moreover, his due process rights under ST/AI/371 were denied. The Dispute Tribunal ordered, *inter alia*, rescission of the decision to separate him from service and retroactive reinstatement, with interest on his lost earnings, or, in the alternative, compensation in the amount of two years’ net base salary. In addition, the UNDT ordered compensation in the amount of one year’s net base salary for the “serious due process violations” Mr. Ainte suffered.

5. In view of its findings, the UNDT considered moot the arguments raised in respect of “genuine mistake” on the part of Mr. Ainte, double jeopardy, and proportionality of the sanction imposed.

² Judgment No. 2010-UNAT-100.

Submissions

The Secretary-General's Appeal

6. The Secretary-General submits that any shortcomings in respect of the 2009 termination decision were rectified when that decision was withdrawn and Mr. Ainte was retroactively reinstated.

7. With respect to the 2011 termination decision, he contends that the UNDT erred in finding that the correct investigative procedure was not followed prior to disciplinary sanctions being imposed on Mr. Ainte. Where the initial fact-finding exercise so permits, the Secretary-General maintains that the ASG/OHRM may institute disciplinary proceedings without further or "formal" investigation.

8. The Secretary-General submits that the UNDT also erred with respect to Mr. Ainte's rights of due process. In the circumstances of this case, where he admitted wrongdoing, no further investigation was required; Mr. Ainte's due process rights with respect to the sanction imposed upon him in 2011 were afforded to him; he was informed of the charges against him, and had the opportunity to – and did – respond.

9. Notwithstanding the foregoing, the Secretary-General argues that even if the Dispute Tribunal was correct in its findings, the level of compensation it awarded in lieu of reinstatement was disproportionate. Mr. Ainte had no expectation of renewal of his fixed-term contract and any such renewal would probably not have exceeded one year. Moreover, the compensation in lieu of notice and termination indemnity granted to Mr. Ainte at the time of his separation ought properly to have been subtracted from this award.

10. He argues that the UNDT further erred in law as, having rescinded the impugned decision on the basis of lack of due process, it should not have awarded separate compensation for such violations in the absence of any finding of moral or material damage.

11. The Secretary-General asks the Appeals Tribunal to vacate the Dispute Tribunal Judgment.

Mr. Ainte's Answer

12. Mr. Ainte contends that the Dispute Tribunal properly found that the enquiry in his case did not satisfy the requirement for an investigation under, *inter alia*, ST/AI/371: no investigation was conducted by the CDU or the Office of Internal Oversight Services, nor was he interviewed or advised that he could face disciplinary proceedings; on the contrary, he was given the impression that he need only correct his PHP.

13. In the alternative, Mr. Ainte submits that, even if the UNDT erred in its general interpretation of ST/AI/371, defects in the investigation of his case justify the Dispute Tribunal's ultimate finding that his separation from service was unlawful as the underlying allegations of misconduct were never properly investigated. Moreover, he argues that the Organization did not prove *mens rea* and that his misrepresentation of his qualifications was unintentional as well as, ultimately, irrelevant as he had the necessary qualifications for the position in question.

14. Mr. Ainte avers that the UNDT correctly found his rights of due process had been violated, and argues that the Secretary-General's appeal focuses on respect for his rights in the *post-charge* period, whereas the violations –which the UNDT recognized –occurred in the *pre-charge* period.

15. Mr. Ainte contends that the Dispute Tribunal did not err with respect to compensation, given the exceptional circumstances of his case, and that the UNDT Judge is best placed to determine the appropriate level of compensation due. Similarly, he argues that he was properly awarded compensation for the violations of his rights of due process, as a result of which he and his family had suffered.

16. In the event the UNDT Judgment is vacated, Mr. Ainte asks the Appeals Tribunal to remand his case to the Dispute Tribunal for consideration of his arguments on double jeopardy and proportionality of sanction.

17. He requests the Appeals Tribunal to dismiss the appeal in its entirety.

Considerations

18. Mr. Ainte was informed of his termination with compensation in lieu of notice, for falsely claiming to have Somali qualifications on his PHP, in a letter dated 12 December 2008. However, the Organization had been notified several months earlier - on 22 July 2008 - that the Somali Ministry of Education had initially erred in stating his degrees were false and that, in fact, Mr. Ainte held the Somali qualifications he claimed. The Organization had also been aware from June 2008 that Mr. Ainte confessed he did not have the U.K. and Pakistani degrees he had claimed. It demonstrates a quite astonishing lack of internal communication that, in 2008, Mr. Ainte was wrongly disciplined on the basis of a misrepresentation of the Somali degrees when he could have rightfully been disciplined on the basis of the U.K. and Pakistani degrees. Be that as it may, Mr. Ainte was reinstated for his wrongful 2008 termination as from 6 January 2009.

19. With respect to his 2011 termination, Mr. Ainte argues that his rights of due process were violated, as there was no specific investigation of the charges pertaining to his U.K. and Pakistani degrees, and that his termination was disproportionate and amounted to double jeopardy.

20. The Dispute Tribunal, finding that Mr. Ainte's misconduct was not established and that his rights of due process were violated, rescinded the decision to terminate him and did not proceed to a consideration of "the other issues of genuine mistake on [his] part, double jeopardy in withdrawing a sanction imposed on [him] 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 mandatory provisions of ST/AI/371".

21. In arriving at this decision, the UNDT found that "no proper official investigation took place ... circumventing the clear provisions set out by the Secretary-General himself in ST/AI/371" and that "only findings of misconduct based on proper official investigation can be used to initiate the disciplinary process against a staff member".

22. Section 2 of ST/AI/371 provides that:

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, or to observe the standards of conduct expected of an international civil servant.” ...

Former Staff Rule 10.3 (a) provided:

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.

23. While ST/AI/371 provides for a preliminary investigation to be undertaken, it does not require a separate “official” investigation to be made. In Mr. Ainte’s case, a preliminary investigation had resulted in indisputable information that he acted improperly. He confessed that his PHP contained false qualifications, and has never retracted his confession or otherwise proven that he does, actually, hold the degrees in question. The Appeals Tribunal recognizes that there are cases in which allegations of misconduct would require further investigations. However, in the present case, where the material facts were not in dispute, no additional investigation was required to establish the misconduct.³

24. Consequently, we find that the UNDT erred in law in finding that the investigative and disciplinary process had not been properly conducted and that Mr. Ainte’s due process rights had been violated by the absence of an “official investigation”. Mr. Ainte has not demonstrated that the Secretary-General has failed in any other way to observe his due process rights as afforded by ST/AI/371. We further find that the Secretary-General was correct in deciding that the established facts amounted to misconduct.

25. Mr. Ainte requests that, in the event the Appeals Tribunal finds in favour of the Secretary-General, it remands his case to the Dispute Tribunal for consideration of the issues of double jeopardy and proportionality, which were not addressed in the UNDT Judgment. We consider that it is not necessary to remand the case since the facts are not disputed and these are legal issues which can be appropriately dealt with by this Tribunal.

³ See, generally, *Nasrallah v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-310.

26. Mr. Ainte argues that he was unaware of the consequences of his confession regarding his PHP and that, in any event, the inaccurate information therein was the result of an assistant misunderstanding his educational history. Neither argument is sustainable.

27. The HRO/FPD was not under an obligation to inform Mr. Ainte that errors, deliberate or otherwise, on his PHP could result in disciplinary proceedings because not only should that be self evident, in particular to a senior official, but in certifying his PHP, Mr. Ainte took responsibility for the veracity of its content and certified that it was true and correct, and that he was aware any misrepresentation or material omission could result in disciplinary action. As such, he cannot now argue that he was unaware of the gravity with which the United Nations treats false applications.

28. With respect to the content of the form, Mr. Ainte could – and, indeed, should – have completed the form himself or, at the very least, checked it carefully. It was his responsibility to ensure that his candidacy was premised upon accurate qualifications and experience. The Organization is under no obligation to prove *mens rea*, as he alleges, and his submissions concerning the misunderstanding between himself and his assistant regarding the British and Pakistani degree courses, either never completed or even commenced, stretches the credulity of the Appeals Tribunal. It is difficult to believe that details of non-existent degrees, together with the names of the universities concerned and the attendance dates, could have been entered into his PHP by mistake. Or that his assistant would have filled out his PHP without informing him and that he would blindly have accepted what had been done without checking. Or that although he had on occasion updated his employment history on the PHP, he had never at the same time thought to check the accuracy of his educational qualifications.

29. Accordingly, we reject Mr. Ainte's claim that his termination was disproportionate. The Secretary-General has the discretion to determine the appropriate level of sanction to be imposed and we do not find termination of a senior official for the very serious misconduct of submitting a false document to be absurd, unlawful or otherwise disproportionate.⁴ As such, we will not interfere with the legal exercise of that discretion.

⁴ *Aqel v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-040, para. 35.

30. Mr. Ainte raises claims of double jeopardy, in view of the fact that he was twice terminated for essentially the same misconduct of falsifying information on his PHP. Double jeopardy is a principle of criminal law which is not applicable to this case, since disciplinary cases are not criminal. Moreover, even were double jeopardy a permissible claim, it could not be construed in the circumstances of this case because the factual bases of the misconduct leading to Mr. Ainte's terminations differed.

31. For these reasons, the decision of the Dispute Tribunal cannot be allowed to stand.

Judgment

32. The appeal is allowed and the Judgment of the Dispute Tribunal is vacated.

Original and Authoritative Version: English

Dated this 17th day of October 2013 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Chapman

Entered in the Register on this 19th day of December 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar