



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

NOURAIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-Represented

Counsel for the Respondent:

Melissa Bullen, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is a former staff member of the African Union-United Nations Hybrid Operation in Darfur (“UNAMID”) in El Fasher, Sudan where she worked as a Language Assistant from 1 June 2008 until 30 May 2011 when she was dismissed from service for a misrepresentation on her Personal History Profile (PHP) form.

Facts

2. The Applicant joined UNAMID on 1 June 2008 as a Language Assistant on an Appointment of Limited Duration (ALD). She submitted a signed PHP dated 8 April 2008 in which in response to question 18 which asked; “Are any of your relatives employed by a Public International Organization?” the Applicant answered “No”. Also as part of her application documents to UNAMID, she submitted a birth certificate.

3. The General Assembly through Resolution 63/250¹ decided to discontinue the use of ALD contracts. Consequently, by Information Circular No: 2009/0017 of 24 March 2009² all UNAMID national staff were informed of the requirements for converting their ALD contracts to fixed-term contracts and among the required documents was an updated PHP form.

4. As per the requirements for the conversion of her contract, the Applicant submitted her updated PHP on 2 June 2009 and again in response to question 18, she answered “No”. As at this time, she had filled out two PHP forms which had been submitted to the organization.

5. In October 2009, UNAMID received complaints from both local authorities and staff members that a large number of related staff members were employed by the Mission. Following these complaints, inquiries were made by the Human

¹ A/RES/63/250 (Human Resources Management) Adopted on 10 February 2009.

² On the “Requirements for conversion of National Staff from 300 series Contract to New Fixed Term Contract Effective 1 July 2009”.

Resources Services Section (HRSS), which conducted an audit of PHP forms. This audit revealed that some national staff members had made misrepresentations and material omissions in their answers to question 18 of the PHP forms which they submitted to UNAMID during the recruitment process.

6. Personnel records of 34 suspected staff members were reviewed and 28 of them found to have made misrepresentations on either their PHP forms or other recruitment documentation. The Applicant and one other staff member (hereinafter referred to as “A.A.N.”) who was later identified to be the Applicant’s sister, were among them.

7. In a memorandum dated 8 November 2009 to the Applicant’s sister, A.A.N. the Chief National Staff Unit-Human Resources Section (“CSU/HRS”) pointed out the family relationship between her and the Applicant as sisters working within UNAMID. The CSU/HRS gave A.A.N. 14 days in which to decide with the Applicant and advise management as to which one of them would resign since they were in violation of former staff rule 4.7.³

8. Both A.A.N. and the Applicant did not respond to the said communication and consequently, on 26 November 2009, another memorandum was sent to A.A.N. instructing both of them to comply with the directive given in the first memorandum by 1 December 2009. The new memorandum also warned that a failure to respond as requested would result in the matter being referred to the Conduct and Discipline Unit (CDU) for investigation.

9. On 15 January 2010, the matter of the Applicant and A.A.N. was referred to the Special Investigations Unit of UNAMID (“SIU/UNAMID”) and on 16 January 2010 an investigator was appointed to look into it. The investigator visited UNAMID, Zam Zam police where the Applicant was stationed so as to interview her but found that she was on annual leave as from 15 November 2009 and had not returned to work since then. On 19 January 2010, however, A.A.N gave her statement to the

³ ST/SGB/2009/7 which was abolished and currently replaced by ST/SGB/2011/1.

investigators stating that the Applicant was her sister and that she was working with UNAMID at El-Fasher Zam Zam police post.

10. The matter of the Applicant and A.A.N. was referred to the Under-Secretary-General for Field Support on 7 March 2010 and accordingly the case referred to the Office for Human Resources Management (OHRM) on 18 May 2010. By this time, the investigators at SIU/UNAMID had been unsuccessful in obtaining a statement from the Applicant and reached the conclusion that she had refused to provide a statement to the investigators.

11. On 25 June 2010, the Applicant was charged with making a material omission in her PHP forms dated 8 April 2008 and 2 June 2009 by failing to disclose that she had a sister working with UNAMID. She was also charged with failing to respond to requests for information from SIU/UNAMID investigators as she had declined to provide them with a statement.

12. On 27 April 2011, the Applicant and A.A.N. were informed of the decision by the Under-Secretary-General, Department of Management to separate them from service. Since A.A.N. was the first to join the service of the Organization and because of her acknowledgement of responsibility, she got the lesser sanction of separation from service with compensation in lieu of notice but without termination indemnity. The Applicant on the other hand was dismissed from service without compensation.

13. Following her dismissal, on 12 June 2011 the Applicant submitted to the Assistant Secretary-General/OHRM a request for review of the administrative decision. On 14 June 2011, the Chief of the Human Resources Policy Service replied to the Applicant's request for review informing her that her dismissal from service was effective 30 May 2011. In the letter she was advised to seek the services of the Office of Staff Legal Assistance (OSLA) with respect to the matters that she had raised in her request for review of the decision.

14. On 10 July 2011, A.A.N. also wrote to OHRM making a similar request for administrative review. On 14 July, the Officer-in-Charge of OHRM wrote back

informing her that her separation from service was effective 2 June 2011 when she received the letter informing her of her separation. She was similarly advised to contact OSLA.

15. On 30 June 2011, the Applicant sought the assistance of OSLA in representing her before the Tribunal as she challenged the decision to dismiss her from employment but OSLA was not disposed to represent her.

UNDT Proceedings

16. On 15 September 2011 the Applicant filed her Application with the Tribunal. The Respondent filed his Reply on 20 October 2011. On 14 May 2012 the Tribunal held a hearing on the merits of the case.

Applicant's case

17. It is the Applicants case that:

- a. The alleged misrepresentation in her PHP and the consequent decision to separate her from service were baseless since A.A.N. is not her biological sister;
- b. She was never granted an assurance of confidentiality on the "sensitive" information she was being required to provide to the SIU investigators and hence did not really have the opportunity to defend her rights; and
- c. Since her recruitment she was never informed about United Nations Rules and Regulations and was therefore unaware of staff rule 4.7 regarding family relationships until 2009.

Respondent's case

18. The Respondent case is that:

- a. The Applicant's explanation that A.A.N. is not her biological sister is irrelevant;
- b. The Applicant was availed adequate opportunity to be heard but she did not cooperate with the investigation process;
- c. The Applicant ought to have known the rules after having worked for over a year with the Organization; and
- d. By providing false information in response to Question 18 of the PHP, the Applicant demonstrated lack of integrity which is contrary to United Nations' values and the standard of conduct expected of staff members.

Issues

19. The legal issues arising for consideration in this case are:

- a. Whether the Applicant deliberately made a material misrepresentation when she filled out her PHP forms;
- b. Whether the Applicant's due process rights were breached during the investigation process; and
- c. What the exact meaning of "Public International Organization" as used in question 18 of the PHP is.

Considerations

Did the Applicant deliberately make a misrepresentation while filling out her PHP forms?

20. At the time the Applicant joined UNAMID on 1 June 2008, A.A.N. had already been working for UNAMID for five months beginning 1 January 2008. As at June 2008, therefore, when the Applicant filled out her PHP forms she ought to have disclosed the fact that her sister was working with UNAMID. Even after she had worked with UNAMID for one year, the Applicant submitted a second PHP in which she still failed to disclose the fact that she had a sister working within UNAMID.

21. During the two occasions; 2008 and 2009 when the Applicant filled out her PHP forms for the Organization, she knew and believed that A.A.N. was her sister. Therefore, she deliberately misrepresented this fact in her PHP. Simply put, her claim that in 2009 after the investigations into their family relationship had commenced she found out that A.A.N. was not her biological sister is irrelevant.

22. Question 18 of the PHP which the Applicant was charged with giving a false answer to is as follows, “are any of your relatives employed by a Public International Organization?” Additionally, staff rule 4.7⁴, lists “father, mother, son, daughter, brother or sister” of a staff member as persons sharing a family relationship.

23. In view of staff rule 4.7, it is clear that by giving a negative response to question 18 of the PHP form, the Applicant failed to disclose that her sister was employed by the United Nations. In so doing, she failed to disclose a material fact.⁵

24. The Applicant certified that the statements she made in answering the questions asked in her PHP were “true, complete and correct to the best of her knowledge and belief.” Furthermore the PHP form itself did specify that any material

⁴ *Supra* note 3.

⁵ Section 2(c) of ST/AI/371, “Revised Disciplinary Measures and Procedures” defines misrepresentation as failure to disclose a fact material to any United Nations claim or benefit.

omission would render a staff member liable to termination or dismissal. It is clear therefore that the Applicant, contrary to her undertaking, made statements in her PHP that were neither true nor correct to the best of her knowledge and belief and in doing so, she knew what the consequences would be.

25. The law regarding the expected conduct of international civil servants in so far as integrity is concerned when submitting documents and filling out PHPs is well settled.

26. In *Coulibaly* UNDT/2009/091, the UNDT, while upholding the summary dismissal of an Applicant for having submitted false documents about his educational qualifications, held that making false statements is a violation of the provisions of the Charter of the United Nations and the Staff Regulations. The court emphasized that staff members must uphold the highest standards of integrity which is a core value of the United Nations.

27. Similarly, the Administrative Tribunal of the International Labour Organization (“ILOAT”) in Judgment No. 2351 (2004), a case which also involved summary dismissal for falsification of documents, the court upheld the summary dismissal of the Applicant stating that at the time of recruitment, the Applicant did not act with the integrity and the sincerity expected of an international civil servant. The same Tribunal in Judgment No. 2602 (2007), in determining a case in which the Applicant had made false representations in his PHP stated that “misrepresentation and falsification of documents are serious matters that do not reflect the standard of integrity that is expected of staff members of international organizations.” The Tribunal further held that common decency, good faith and honest dealing lie at the heart of relations between employer and employee and whoever ventures to ignore that does so at his own peril.⁶

28. This is not a new position of law but rather one that has been upheld for decades. As far back as 1983, the former UN Administrative Tribunal in Judgment

⁶ ILOAT Judgment No 1764. (1998)

No. 306, *Gakuu* (1983), found in favour of the Respondent in a matter in which the Applicant had falsified statements in his PHP. In answering a question as to whether he had ever been arrested or convicted for breach of any law, the Applicant replied in the negative despite the fact that he had been dismissed by his former employer following a criminal conviction.

29. In conclusion, in this case, the Applicant deliberately made a false representation while filling out her PHP forms.

Familial Relationships between staff members

30. The Tribunal is of the view that it is vital to clarify the legal position on family relationships for staff members working within the Organization. The former⁷ and current staff rules⁸ do not exclusively prohibit relatives from working together within the United Nations except that certain stringent conditions must be satisfied. As a matter of law, staff rule 4.7 on family relationships provides thus:

- a. An appointment shall not be granted to a person who is the father, mother, son, daughter, brother or sister of a staff member.
- b. The spouse of a staff member may be appointed provided that he or she is fully qualified for the post for which he or she is being considered and that the spouse is not given any preference by virtue of the relationship to the staff member.

Clause (c) goes further to provide two conditions on which the above mentioned relatives may work together.

- c. A staff member who bears to another staff member any of the relationships specified in paragraphs (a) and (b) above:
 - i. Shall not be assigned to serve in a post which is superior or subordinate in the line of authority to the staff member to whom he or she is related;

⁷ *Supra* note 3.

⁸ ST/SGB/2011/1.

ii. Shall not participate in the process of reaching or reviewing an administrative decision affecting the status or entitlements of the staff member to whom he or she is related.

31. As it is therefore, provided that the above two conditions are met, staff members who bear family relations can lawfully work together in the Organization. In the case of the Applicant, the Tribunal finds it necessary to clarify that her transgression was not that she had a sister working for the United Nations but rather, the lack of disclosure of this material fact. Disclosure is crucial for the organization to ensure that the conditions stipulated by the law are adhered to. Failure to disclose demonstrates lack of integrity and points towards dishonesty.

Is the exact definition of “Public International Organization” as used in question 18 clear enough for the Applicant to have understood what was expected of her?

32. In this case it is imperative to determine whether the Applicant knew or ought to have known, at the time of filling out her PHP, that reference to “Public International Organization” in question 18 included the United Nations as an Inter-Governmental Organization and more specifically UNAMID as a mission of the United Nations.

33. During the hearing, Counsel for the Respondent was required to address the Tribunal on the meaning of the phrase “Public International Organization” as used in PHP forms. To this, the Respondent submitted that, the term Public International Organization is intended to mean the United Nations Common System. This includes the United Nations and the specialized agencies that have entered into a relationship with it.⁹ The Respondent further argued that the United Nations is an example “*par excellence*” of a “Public International Organization” and that it “self-evidently” falls within the meaning of the term.

34. If the term is intended to mean the United Nations Common system, it is not clear why for the purposes of specificity and clarity the Organization would not use

⁹ A conclusive list of all organizations considered to form part of the UN Common System is available at www.unsystem.org.

this term directly; perhaps with a reference to the website specifying all the relevant organizations as opposed to an ambiguous and more complex term; “Public International Organization”. For comparison purposes, an examination of the PHP of the World Bank Group, reveals that where the question on family relationships is asked, it is done in a more direct and unambiguous manner as follows:

Do you have relatives (by blood or marriage) who are or have been employed in any capacity including consulting, by the World Bank Group? (For the World Bank Group purposes, the term ‘relatives’ includes: grandparents, parents, siblings, grandchildren, aunts, uncles, cousins, nieces, nephews, and all step, half and in-law relationships.)

35. The term “Public International Organization” is not as self-evident as the Respondent submits that it is. Although this point was not raised or argued by the Applicant in this case, the Tribunal is of the view that it is necessary to frame the question in a clearer manner.

Were the Applicant’s due process rights breached during the investigation?

36. Part of the Applicant’s case is that her due process rights were breached during the investigation process. Evidence available to the Tribunal shows that the Applicant was availed adequate opportunity to be heard but she did not cooperate with the investigation process. Not only was she notified of the investigation into her case, she refused to meet with the investigator. On another occasion when she met with the investigator she failed to respond fully to requests for information.

37. Evidence clearly shows that the investigators made numerous attempts to reach the Applicant in order for her to give her explanation and to record a statement. Her claim that she could not give a statement because she felt shy or due to the “sensitive” nature of the information at her disposal is untenable. She did not inform the investigator that she could not cooperate because the information she had was sensitive. She did not even ask for confidentiality.

38. Furthermore, the cultural difficulties that the latter claimed to be facing upon discovery of the fact that A.A.N. was not her biological sister were never made

known to the investigators. Familial relationships under the law are not necessarily or exclusively about blood ties. Adoptive families have the same rights and responsibilities to the adopted person as a biological family would have.

39. It is on record that the Applicant openly told an investigator that she would not provide a statement but did not give any reasons as to why. It is also on record that she told an investigator that he had no right to collect a statement from her. At other times when the investigators tried to reach her she was conveniently away from work without authorization.

40. The Tribunal finds in the circumstances that the claim of a breach of the Applicants due process rights must fail.

Conclusion

41. By failing to disclose that A.A.N. was her sister, the Applicant breached a core value expected of all United Nations staff members.

42. The Tribunal finds and holds that the sanction of summary dismissal imposed upon the Applicant is proportionate.

43. The Application is rejected in its entirety.

(Signed)

Judge Nkemdilim Izuako

Dated this 26th day of September 2012

Entered in the Register on this 26th day of September 2012

(Signed)

Legal Officer for:
Jean-Pelé Fomété, Registrar, Nairobi