



**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

AINTE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON LIABILITY AND  
RELIEF**

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**Counsel for the Applicant:**

George Irving

**Counsel for the Respondent:**

Susan Maddox, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant is a former staff member of the African Union/ United Nations Hybrid Operation in Darfur (“UNAMID”). He is contesting the decision by the Assistant Secretary-General (“ASG”), Office of Human Resources Management (“OHRM”) dated 4 January 2011, to impose on him a disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity.<sup>1</sup>

## **Facts**

2. The Applicant had worked for the United Nations in different agencies in various capacities from 1986 till 2011 when he was separated from service.

3. In August 2007 the Applicant applied for the post of Senior Administrative Officer in UNAMID and as part of his application, the Applicant 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.

4. In May 2008 the Applicant was selected for the position of Senior Administrative Officer for the UNAMID in El- Fasher, Sudan at the P-5 level.

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<sup>1</sup> The indemnity was due to the delay between the date of issue and the receipt of the charges by the Applicant which was almost 11 months.

5. On 13 May 2008, the Reference Checking 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 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.

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 indicated 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 of 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 as from 6 January 2009. In a letter dated 2 April 2009, the Administrative Law Unit of OHRM informed the Applicant that his request for administrative review was moot since he had been reinstated.

13. On 7 January 2010, the Applicant received a memorandum dated 12 February 2009 containing the charge of misconduct; making material misrepresentation in his educational qualifications in his PHP forms to which he responded on 11 February 2010.

14. In a letter dated 4 January 2011, the ASG/OHRM wrote to the Applicant informing him of the imposition of a disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity. The Applicant received the decision on 6 January 2011.

### **UNDT Proceedings**

15. On 1 February 2011, the Applicant filed his Application with the Dispute Tribunal which was served on the Respondent on 2 February 2011 and a Reply received on 4 March 2011.

16. A hearing was held *via* teleconference from Nairobi on 4 and 5 October 2011 and counsel for the Applicant and Respondent filed closing 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 (Revised Disciplinary measures and Procedures) observed by the Organization prior to imposing a disciplinary measure 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, or 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 and 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. It is a question of judgment, however, and not of discretion. Whether there is “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 were elucidated by Kaman J. in *Cabrera* UNDT/2011/081 in which she stated that the distinct procedural steps for disciplinary matters are:

- a. An initial “reason to believe” that a staff member has engaged in unsatisfactory misconduct (sec. 2);
- b. A preliminary investigation to determine whether the belief of unsatisfactory conduct is “well founded” and whether the matter “should be pursued” further through formal investigation following due process rights (sec. 3 and 4);
- c. An evaluation by the relevant responsible official recommending whether to pursue the matter further (sec. 4);
- d. A decision by the ASG/OHRM, whether the matter should be pursued with written allegations of misconduct (sec. 5);
- e. The initiation of a formal investigation with the filing of formal charges against the staff member (sec. 6);
- f. The implementation of due process rights for the staff member and right of the reply for the staff member (sec. 6); and
- g. The review by the relevant official of the entire dossier on whether the matter should proceed further (sec. 9a)...

24. It is in evidence that on 14 July 2008, the FPD/DFS, wrote a memorandum to the CDU seeking verification of the Applicant’s educational details. In that memorandum, it mentioned that the Somalia Ministry of Education had verified that

the Applicant's first degrees to be false.<sup>2</sup> The memorandum further stated that '[I]n this connection, you may wish to approach the staff member and seek a clarification on this discrepancy.'

25. There is no evidence of any investigation into the matter either by the CDU or anyone else. On 22 July 2008, the Somalia authorities wrote to correct their earlier verification of the Applicant's Bachelors' degrees. It appears that no regard was given to this correction. What followed was the 17 November 2008 memorandum from the USG/DFS to ASG/OHRM referring the Applicant's case of allegation of misrepresentation of educational qualifications and recommending disciplinary action against the Applicant. Consequently on 12 December 2008, the ASG/OHRM imposed a disciplinary measure of termination with immediate effect.

26. The decision of 12 December 2008 was made with utter disregard to and contempt for the Applicant's due process rights and in absolute violation of ST/AI/371. The Applicant was not even given an opportunity to respond to the allegations levied against him, he was never formally charged and no official investigation into the allegations of falsification of educational qualifications was ever conducted.

27. The 12 December 2008 decision was reversed on 25 March 2009. The reason for the said reversal was contained in a memorandum nearly two years later dated 4 January 2011 from the ASG/OHRM communicating the second disciplinary measure of separation from service of the Applicant which is the subject matter of this Application. It was therein stated that the 12 December 2008 decision, was reversed because it was wrongly based on the Applicant's entry educational qualifications into the United Nations employment.

28. The 4 January 2011 memorandum also informed him that the referral of his case to the ASG/OHRM by the USG/DFS was based on correspondence dated 14

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<sup>2</sup> The Tribunal notes that the referral to CDU by the FPD/DFS for verification of the Applicant's educational details obtained in Somalia was made a few days before the Somalia Ministry of Education authenticated the Applicant's educational credentials thereby revoking its earlier letter of 22 May 2008.

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.

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 *Abboud* 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 against the Applicant.

### **Fact-Finding versus Investigation**

33. Fact-finding under ST/AI/371 is a prerequisite for an investigation to be conducted. The core of the fact-finding process is the collection and analysis of information to determine the veracity of an allegation against a staff member. As such the characteristics of a fact-finding process include but are not limited to the following:

a. A scope of the fact-finding should be established from the beginning and should be restricted to the unsatisfactory conduct the staff member is suspected to have engaged in;

b. This is a task to be borne by the head of office or responsible officer whose aim is to ascertain whether there is ‘reason to believe’ the allegations that a staff member has engaged in unsatisfactory conduct;

c. This task is mainly informal but consistent with principles of fundamental fairness. The strict and formal rules of evidence and investigations may not necessarily apply at this stage;

d. The outcome of the initial fact-finding would dispose a reasonable decision-maker to believe or not to believe that the staff member has engaged in the unsatisfactory conduct alleged and would lead to an investigation being conducted or the matter being closed.

34. An investigation on the other hand, is a legally based and analytical process designed to gather information in order to determine whether wrongdoing occurred and, if so, the persons or entities responsible.<sup>3</sup> During an investigation all the applicable principles of fair hearing and natural justice are to be observed. An evaluation is made of the evidence gathered and in appropriate cases the ASG/OHRM may take further action, which can lead to the charging of the staff member, receiving and reviewing of his comments and possibly the imposition of a disciplinary measure.

35. Fact-finding cannot replace or be confused with an investigation. Section 2 of ST/AI/371 clearly states that the Head of Office shall undertake a preliminary investigation. If anything, the presence of a ‘reason to believe’ that a staff member has engaged in unsatisfactory conduct is buttressed by a fact-finding, which then paves the way for an official investigation to be conducted.

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<sup>3</sup> Office of Internal Oversight Services, Investigations Divisions, Investigations Manual (March 2009)  
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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 no 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. Whatever the convictions of managers 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 any 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 before 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 year's net base pay for wrongful dismissal and;

e. That the officials who were responsible for wrongfully terminating his dedicated and highly praised career be 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 its Statute, Orders rescission of the administrative decision and Orders the 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 his reinstatement with interest at 5%;

b. Takes into account the exceptional circumstances surrounding this case and Orders that in the event that reinstatement of the Applicant is not feasible, the Respondent shall pay the 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 in 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 mandatory 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.