

UNDT/2010/044, D'Hooge

UNAT Held or UNDT Pronouncements

The facts alleged as justifying termination could not make the contract void but only voidable. The Administration is barred from arguing that there was no contract because it affirmed the contract when it was in full possession of the relevant facts by proceedings under staff regulation 9.1. Cancellation and effect of staff regulation 9.1: Under the general law the parties are bound by any condition in the contract relating to cancellation, rescission or repudiation. The only mode by which separation can be effected is pursuant to regulation 9.1 or pursuant to disciplinary procedures. These are part of the instrumental conditions of the contract. Every misrepresentation capable of justifying cancellation or rescission of the contract under the general law would necessarily fall within the grounds for termination specified in regulation 9.1. The notification to the applicant categorically stated that this was the decision of the Secretary-General. This was untrue. It is unacceptable that communications to staff refer to decisions as made by the Secretary-General which were not made by him. The untruthful attribution to the Secretary-General (or any other official) of decisions they did not make is unjustifiable. A decision under a delegation should always be so identified and the actual decision-maker nominated. A staff member has a legal right to this information. Misconduct proceedings and termination: There is a substantial degree of overlap between conduct justifying dismissal on the one hand and that justifying termination on the other. Misconduct cannot be relied on to terminate under regulation 9.1. Wrongful conduct that occurred at a time prior to employment with the Organization cannot be the subject of proceedings under chapter X and thus, in principle, could justify termination as a relevant anterior fact under regulation 9.1. Dismissal as a disciplinary measure could only be justified in cases involving substantial moral turpitude, whether by act or omission. Decision to proceed with misconduct: The ASG/OHRM implicitly made a decision that the matter should not be pursued under secs 6 and 9 of ST/AI/371. The requirements of good faith and fair dealing required the ASG to inform the staff member of this decision. The matter must then be regarded as closed and the disciplinary process completed. Due process in preliminary investigation: Although

ST/AI/371 does not prescribe any of the requirements of due process at the preliminary investigation stage, the requirements of good faith and fair dealing nevertheless apply. Any resulting decision on allegation of misconduct must be based upon an adequate inquiry. This necessarily involves seeking information from the staff member both as to the charges and, ultimately, the findings or recommendations affecting him or her. Proper procedures prior to termination: The contractual obligations of good faith and fair dealing apply to a decision to terminate employment. Good faith and fair dealing in this case required the applicant to be given an opportunity to respond to any adverse findings of fact and any adverse recommendations. This could not sensibly be done without giving him the report itself or a redacted copy, if necessary or at least detailed particulars of the matters relied on. A staff member must be given an opportunity to respond before the decision to terminate was made. Special leave with full pay: Assistant Secretary-General for OHRM does not have authority to place a staff member on special leave pending the outcome of a preliminary investigation. Outcome: The respondent failed to comply with the requirements of staff regulation 9.1 when terminating the applicant's appointment which was accordingly unlawful and in breach of his contract of employment. The placement of the applicant on special leave was also unlawful and in breach of his contract of employment. The parties are to file submissions on compensation.

Decision Contested or Judgment/Order Appealed

The applicant contests the decision (which was not made by the Secretary-General) to terminate his contract with the United Nations under staff regulation 9.1 following an investigation of an anonymous complaint alleging that he had made misrepresentations when applying for a position in the Department of Security and Safety. Test for termination, integrity: No one can meet the "highest standards of integrity" or the "highest standards of efficiency", let alone both. There can be no absolute standard and not every failure to meet the highest standards could justify termination. The failure must be a substantial one that significantly affects the staff member's effectiveness as an employee. A mere failure to comply with the highest standards of efficiency could not justify disciplinary measures. Authority to terminate: Authority to terminate the applicant's contract resided solely in the Secretary-General and no other official.

Legal Principle(s)

N/AAdministrative review: Administrative review should involve independent analysis of the relevant facts, including the matters raised by the staff member. A review must apply the relevant facts to the legal requirements for validity of the impugned decision.Misrepresentation and cancellation of contracts: Although contract law envisages that contracts may be voidable for misrepresentation, giving right to rescind or cancel, this is not so in respect of every misrepresentation.

Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

D'Hooge

Entity

UN Secretariat

Case Number(s)

UNDT/NY/2009/077/JAB/2009/035

Tribunal

UNDT

Registry

New York

Date of Judgement

19 Mar 2010

Duty Judge

Judge Adams

Language of Judgment

English

French

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Separation from service

Termination (of appointment)

Applicable Law

Administrative Instructions

- ST/AI/292
- ST/AI/371

Former Staff Rules

- Chapter X
- Rule 105.2
- Rule 109.1

Staff Regulations

- Regulation 9.1

Related Judgments and Orders

UNDT/2009/018