

UNDT/2019/074, Ashgar

UNAT Held or UNDT Pronouncements

Preliminary matters Loss of Applicant's professional emails (potential evidence): One of the Applicant's main arguments was that allegedly exculpatory evidence in her case (emails from and to the Applicant) had been lost which affected her due process rights, thus rendering the investigation unfair and improper. The Tribunal found that the alleged email evidence was not destroyed wilfully. Rather, it was destroyed as a consequence of the negligence of a number of people. The Tribunal noted that the investigators have a very high duty to locate and preserve evidence. The investigators are also taken to know the processes of UNICEF ICT, as they are part of the regulatory regime of UNICEF. They are presumed to understand that emails can be deleted, or be deactivated in the event of an account not being used for a period of time. The Tribunal emphasized that the very fact that the investigator, in this case, requested the de-provisioning of the Applicant's email account is clear evidence that she regarded the emails of the Applicant to contain pertinent evidence, which may be either inculpatory or exculpatory and that the emails needed to be preserved. The Tribunal found generally that the investigator did not take full and appropriate steps to ensure the preservation of evidence, in ensuring that the emails of the Applicant were safely separated and kept safe. The Tribunal noted that there had been a complete lack of candour by the investigator in respect of the loss of the emails. This is a matter which should have been fully disclosed to both the Applicant and, importantly, the decision-maker. The investigator admitted in evidence that she did not disclose the loss of the emails in the report, notwithstanding her knowledge of such. The approach adopted is entirely misleading, totally unacceptable, and unfair. Such unfairness taints and negates the findings in respect of those charges where such emails may have provided exculpatory evidence. The Tribunal further noted, with respect to the investigator, her failure to comply with requirements set out in the Manual of Investigation and that as a result of these failures, the Applicant was not given a reasonable or proper opportunity to: a) Identify information relevant to the investigation b) Respond to the allegations c) Present countervailing facts and d) Present her case properly

before the Tribunal in respect of most matters. Recording/transcript of a conversation between the Applicant and another staff member: The Tribunal had before it a transcript of a conversation between a colleague of the Applicant and the Applicant in which she makes statements that cause significant concern in respect of the specific charges that she colluded with others to defraud UNICEF, independent of any other possible evidence. The Tribunal was satisfied that the recording of a conversation between the Applicant and a colleague of his in January 2015 was genuine, notwithstanding that the Applicant asserted in her response to the Charge Letter that the reference therein, at para. 105, to a recorded conversation, was “fabricated”. The Tribunal noted that there was no direct illegality in respect of the recording of a conversation. The Tribunal found that even if it were relevant to consider the admissibility or otherwise, balancing the fairness of the proceedings and the need to admit relevant evidence, the probative value outweighs the prejudice caused to the Applicant. The Tribunal considered that even if the evidence were obtained illegally, the Tribunal would, in any event, admit the transcript into evidence. The Tribunal further noted that this evidence was properly before the decision-maker. Have the facts upon which the decision is founded otherwise been properly established? Due to the shortcomings in which the investigator proceeded, the charge about failing to declare a conflict of interest in respect of a close relationship with a director and receiving financial assistance in respect of a number of trips arranged by the said director cannot be fairly sustained, as the facts have not been properly established according to law. The Tribunal found that the Applicant was not provided with a reasonable opportunity to present exculpatory evidence and the investigator did not demonstrate that she properly searched for such evidence. The proper procedures were not followed to ensure that the Applicant was considered fairly and properly in respect of the charges where the email evidence may have provided exculpatory evidence. The rights of the Applicant were defeated by the conduct of the investigator and the negligence of others involved in the processes involved in the investigation. Do the established facts qualify as the misconduct complained of at the appropriate level of proof? The Tribunal found, given the plain meaning of the contents of the conversation recorded between a colleague of the Applicant and the Applicant, that it is genuine. It also noted conflicts in the assertions of the Applicant. The Tribunal found that the conversation took place and that it represents clear and convincing evidence that the Applicant engaged in arranging and assisting in submission and fulfillment of false claims from UNICEF resources for her personal benefit and causing financial and reputational loss to UNICEF, as recorded in the Charge Letter. The facts

disclosed by the transcript of the recorded conversation are breaches of 1.2(b), (g) and (m) of the Staff Rules and Para 2.1 of the Policy Prohibiting Fraud and Corruption at the appropriate level of proof. The Tribunal further found that the conclusion reached by the decision-maker in this regard at paragraphs 32 and 33 of the contested decision is correct and unassailable in respect of the allegation of fraud and collusion in respect of the International Child Day conference on 12 June 2014. Is the sanction proportionate to the alleged misconduct? The Tribunal considered that making fraudulent claims, and colluding in respect of such, against the funds of any part of the Organization are very serious matters. It is basal corruption and fraud in respect of which the Applicant was shown to be involved. There can be no level of tolerance in respect of fraud, particularly, as disclosed by the evidence, when it was a calculated activity. The Tribunal, therefore, found that the sanction of dismissal was proportionate.

Decision Contested or Judgment/Order Appealed

The Applicant, a former staff member of the United Nations Children's Fund ("UNICEF") in Quetta, Pakistan, challenged her dismissal on disciplinary grounds.

Legal Principle(s)

The investigators have a duty to work within the scope of the defined investigation when writing the investigative report. They must set out all relevant matters touching upon the issues investigated, whether inculpatory or exculpatory, so as to produce a report providing a full, fair and clear picture of all the facts involving the alleged misconduct, within their context, noting that it is the Secretary-General who has the burden of proof in any disciplinary matter. Due process in the disciplinary process The Secretary-General may initiate a disciplinary process where the findings of an investigation indicate that misconduct may have occurred. No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and has been given the opportunity to respond to those formal allegations. The opportunity to respond must be meaningful and on a basis where the staff member has access to the material which may provide explanation and exculpatory evidence. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defense through the Office of

Staff Legal Assistance, or from outside counsel at his or her own expense.

Outcome

Dismissed on merits

Outcome Extra Text

Judgment vacated by the Appeals Tribunal (Asghar 2020-UNAT-982). Case remanded to the UNDT.

Full judgment

[Full judgment](#)

Applicants/Appellants

Ashgar

Entity

UNICEF

Case Number(s)

UNDT/GVA/2017/022

Tribunal

UNDT

Registry

Geneva

Date of Judgement

3 May 2019

Duty Judge

Judge Downing

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Due process

Investigation

Applicable Law

Other UN issuances (guidelines, policies etc.)

- OIOS Investigations Manual

Related Judgments and Orders

UNDT/2019/015

UNDT/2019/033

UNDT/2011/218