



Before: Judge Francis Belle
Registry: Nairobi
Registrar: René M. Vargas M., Officer-in-Charge

KIBE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Donald W. Kaniaru

Counsel for the Respondent:

Nicola Caon, DAS/ALD/OHR, UN Secretariat
Jacob van de Velden, DAS/ALD/OHR, UN Secretariat

Introduction

1. By an application filed on 16 December 2022, the Applicant is contesting the disciplinary measure imposed on her of separation from service with compensation in lieu of notice and with termination indemnity, in accordance with staff rule 10.2(a)(viii) (“the contested decision”).
2. The Respondent filed a reply on 20 January 2023 urging the Tribunal to reject the Applicant’s arguments and dismiss the application in its entirety.
3. On 16 June 2023, the Tribunal held a case management discussion (“CMD”). At the CMD, the parties agreed that an oral hearing was not necessary for a fair and expeditious disposal of this case. The Tribunal will therefore determine the application based on the case record.
4. The Applicant and Respondent filed closing submissions on 12 and 13 July 2023 respectively.

Facts

5. On 1 November 2006, the Applicant joined the Organization. She was granted a “when-actually-employed” contract governed by the former 300-Series Staff Rules.
6. On 29 October 2008, the Applicant obtained a fixed-term appointment as a Program Assistant with the United Nations Environment Programme (“UNEP”).
7. In December 2016, the United Nations Office in Nairobi/Human Resources Management Services (“UNON/HRMS”) was notified, in relation to another investigation being conducted by the Office of Internal Oversight Services (“OIOS”), that the Applicant had a sister who was also working with UNEP. Specifically, the complaint alleged that the Applicant failed to disclose that she had a sister occupying the position of Documents Management Assistant, Ozone Action Branch, Law Division at the Paris Office of UNEP.

8. On 14 December 2017, UNON/HRMS referred the complaint to UNEP Management.

9. On 3 March 2021, a fact-finding panel was appointed by the Executive Director/UNEP pursuant to section 6 of ST/AI/2017/1 (Unsatisfactory conduct, investigation and the disciplinary process) to investigate the allegation of possible unsatisfactory conduct implicating the Applicant.

10. On 30 June 2021, the fact-finding panel transmitted its investigation report and findings to the Executive Director/UNEP.

11. On 4 August 2021, the Executive Director/UNEP referred the Applicant's case to the Office of Human Resources ("OHR").

12. After reviewing the investigation report, supporting documentation and additional information obtained, by memorandum dated 14 March 2022, OHR issued formal allegations of misconduct against the Applicant. It was alleged that the Applicant had: a) on one or more occasions between 2008 and 2015, submitted false information in her job applications for posts with the Organization, namely that she did not have a relative working for a public international organization; and b) certified to the truthfulness of the statements.

13. On 6 April 2022, the Applicant submitted comments on the allegations against her, including supporting documentation.

14. By letter dated 16 September 2022, the Applicant was informed of the contested decision.

Parties' submissions

15. The Applicant's principal contentions are:

- a. She is and has been estranged from her family for a very long time and had no way of knowing that her sister was also employed by the United Nations. They are in different continents and not in the same line of duty. She was not therefore in a position to account for the whereabouts of her sister;

- b. During the period she is said to have known and not disclosed the information, she was in and out of hospital and her health was then her priority. Having just heard the matter mentioned, she had no ability to confirm the details as her health was taking a toll on her;
 - c. She corrected the position in her Personal History Profiles (“PHPs”) after it was confirmed in 2016 that her sister worked for the Organization;
 - d. In 2018 and despite this issue, her contract was duly renewed for continued service up to the year 2028;
 - e. This was a first violation that was “duly purged upon confirmation”;
 - f. The decision to separate her was categorical that no harm was done by her conduct and there was no conflict of interest occasioned by her employment and continued engagement;
 - g. The decision to separate her was so severe given the above grounds and given that she had even been awarded a continuing contract of service while the matter pended; and
 - h. Chapter X, rule 10.2 of the United Nations Staff Regulations and Rules provides more lenient disciplinary measures, not effected in this matter. In assessing the proportionality of a sanction, the length of service, disciplinary record of the employee, the attitude and their past conduct, the context of violation and employer consistency are to be taken into account. This did not happen in her case.
16. The Applicant requests the Tribunal to grant her the following reliefs:
- a. Compensation for the remainder of the six years of her contract of service;
 - b. Full benefits that would have accrued had she completed her contract;
 - c. Severance pay; and

d. Legal costs.

17. The Respondent's principal contentions are:

a. It is established by clear and convincing evidence that the Applicant failed to disclose in her 2008, 2010 and 2015 PHPs that her sister was employed by the Organization;

b. When submitting the PHPs, the Applicant certified as to the completeness and accuracy of the information contained in the PHPs and acknowledged that false or inaccurate information or material omissions could lead to the termination of her appointment;

c. Consequently, the information provided by the Applicant in her PHPs was objectively inaccurate and her certifications were incorrect;

d. The Organization is under no obligation to establish the intent of a candidate when she/he provides incorrect information, and a false answer in a PHP is *prima facie* proof of dishonesty, shifting the evidentiary burden to an applicant to adduce sufficient evidence of innocence;

e. The Applicant's state of mind was properly recognised and taken into account when determining the proportionality of the disciplinary measure;

f. The Applicant's statement that she was not aware of the requirement to disclose relatives employed by the Organization is not sufficient. Staff members are expected and assumed to be aware of the Staff Regulations and Rules. The fact that the Applicant left blank the relevant question in her 2015 PHP, while in her earlier PHPs she had answered "No", raises doubt as to her claim not to have been aware of her sister's employment and the requirement to disclose it;

g. The Applicant has not adduced any evidence of any steps she took to verify whether her family members were employed by an international organization. The Under-Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”) considered that the Applicant’s absence of contact with her relatives did not necessarily prevent her from making enquiries to ensure that none were employed by an international organization;

h. The USG/DMSPC properly assessed the Applicant’s comments regarding her health complications in 2015 to 2017. However, the USG/DMSPC considered that two years had elapsed from the time the Applicant was alerted to her sister’s employment and when UNON/HRMS raised the matter with her in 2016. The USG/DMSPC did not accept that the Applicant’s health issues prevented her from raising the issue with UNON/HRMS or disclosing it in her 2015 PHP;

i. In the circumstances, the USG/DMSPC’s determination that the Applicant engaged in serious misconduct by providing false information and/or failing to disclose material information to the Organization, was reasonable. The Applicant’s conduct amounted to serious misconduct in violation of staff regulation 1.2(b). She failed to uphold the highest standards of efficiency, competence and integrity, including probity, honesty and truthfulness, and to ensure that the information she provided to the Organization was accurate;

j. The disciplinary measure imposed was consistent with the Organization’s past practice in cases of false or inaccurate information provided in PHPs and false certification. Disciplinary measures in such cases tend towards the severe end of the spectrum and have ranged from demotion, with deferment for eligibility for consideration for promotion, to dismissal;

k. The USG/DMSPC considered, *inter alia*, that the employment of the Applicant and her sister did not cause a conflict of interest and that, while the Applicant's conduct damaged the integrity of the Organization's recruitment practices and the employment relationship, it had not caused other tangible harm. However, the USG/DMSPC also considered that the Applicant's misconduct was substantive and that she had not acknowledged or accepted responsibility for her actions;

l. In the circumstances, considering the Applicant's conduct, its effect on the Organization's recruitment practices, and the lack of remorse by the Applicant, the disciplinary measure of separation from service, with compensation in lieu of notice and with termination indemnity, was appropriate. It was not the most severe of the disciplinary measures available and was reasonable and proportionate;

m. The Applicant's due process rights were respected during the investigation and the disciplinary process; and

n. The contested decision was lawful. There is no basis for the Applicant's request for relief and the issue of compensation does not arise.

Consideration

18. The uncontroverted evidence shows that the Applicant's sister, Ms. Mugure Kibe, who is an Administrative Assistant with the Ozone Action Branch, Law Division, UNEP, based in Paris, began her service with Organization as a Document Management Assistant with UNEP on 5 June 1996, which is some time before the Applicant first was appointed to work with the United Nations.

19. The Applicant joined the United Nations in 2008 and at that time she was required to submit a PHP. That PHP was submitted in September 2008. At that time Ms. Mugure Kibe had been working at UNEP for 12 years.

20. There is further evidence that on a date in 2014, at a work-related event in Paris, Ms. Betty Kamanga, Senior Administrative Assistant, UNEP, informed Ms. Mugure Kibe that she resembled a colleague of Ms. Kamanga's in Nairobi named Kibe. She was referring to the Applicant. Ms. Mugure Kibe responded that she had a sister by that name.

21. In or about 2014, at a year-end party in Nairobi, Ms. Kamanga informed the Applicant that she had met a woman by the name of Lucy Ursulet (Ms. Mugure Kibe's married name) who resembled the Applicant and who had stated that she was her sister. This evidence leads to the conclusion that from at least December 2014 the Applicant was on notice that her sister, Ms. Mugure Kibe, was employed by the Organization.

The History

22. On 23 November 2010, the Applicant submitted a PHP as part of her application for a position with the Organization. In response to the question "Are any of your relatives employed by a public international organization, the Applicant responded "No". At the time, staff rule 4.7(a) prohibited appointments to a person who was the father, mother, son, daughter, brother or sister of a staff member.

23. The Respondent has argued that from at least December 2014, the Applicant was on notice that her sister was employed by the Organization. The details that prove this are outlined above.

24. The Applicant claims that there was a period of estrangement from her family but this does not explain why even after being told in 2014 by a colleague who had visited Paris that she had met somebody working for UNEP in Paris who looked like her and said that she had a sister by the Applicant's name, she continued to submit a PHP that failed to declare that she had a relative who worked with the Organization.

25. About two years later, another colleague told the Applicant that she met someone working for UNEP who looked like her and she provided the name. On hearing the name, the Applicant said that the person who this colleague met was her sister. This was in 2015. But that same year, the Applicant applied for a job in an international organization and when she was asked to respond to the question whether she had a relative who worked for an international organization, she left blank the section requiring a response to this question.

26. In December 2016, Ms. Anouk Paauwe, Chief Talent Development Unit, HRMS/UNON, contacted the Applicant and asked her about her family relations. During an in-person conversation between Ms. Paauwe and the Applicant, also in December 2016, the Applicant stated that she had found out about her sister's employment in UNEP after a colleague (Ms. Kamanga) had returned from mission in Paris and informed the Applicant. When Ms. Paauwe asked why the Applicant had not disclosed the matter to UNON/HRMS when it came to her attention, the Applicant said she did not know it was a requirement and so had not thought about it further.

27. On 26 September 2018, the Applicant was granted a continuing appointment with UNEP and made no effort to inform the relevant officer that she had a relative working for an international organization.

28. The Applicant was later informed that she was being investigated for not disclosing that she had a relative in the employment of an international organization.

The Allegation

29. The allegation against the Applicant was that she had provided false information to the Organization in her 18 September 2008, 23 November 2010 and 3 September 2015 PHPs. In the 2008 and 2010 PHPs the Applicant incorrectly stated that she did not have any relatives employed by an international organization. In her 2015 PHP, after being informed in late 2014 of her sister's employment with the Organization, the Applicant failed to disclose her sister's employment with the Organization.

30. On the commencement of the investigation of the case against her, the Applicant was informed that, if established, her conduct would constitute a violation of staff regulation 1.2(b) that requires staff to uphold the highest standards of integrity including honesty and truthfulness.

31. The details of the false declarations on her PHPs were that on 18 September 2008, the Applicant submitted a PHP as part of her application for a position with the Organization. In response to the question “Are any of your relatives employed with a public international organization?” the Applicant responded “No.” Then staff rule 104.10(a) provided the following:

Except where another person equally well qualified cannot be recruited, appointment shall not be granted to a person who bears any of the following relationships to a staff member: father, mother, son, daughter, brother or sister.

32. At the end of the investigation for breach of the relevant staff rules, the Applicant was separated from service and contested that decision before this Tribunal.

33. The issues that are to be resolved considering the application are:

- a. Is the Applicant’s separation from service lawful?
- b. Were all the relevant circumstances taken into consideration?
- c. Were the relevant facts established to the required standard?
- d. Were the relevant Staff Regulations properly applied?
- e. Was the Applicant afforded all her due process rights?

34. The position of the Respondent is that the breach of staff regulation 1.2(b) is a case of serious misconduct. Having established that the breach of staff regulation 1.2(b) is serious misconduct, the question that arises is whether the disciplinary measure imposed was proportionate. Could it be argued that separation from service in the circumstances was blatantly illegal or arbitrary?

35. Even if the disciplinary measure taken was legal, the question remained whether it was executed with procedural fairness and the Applicant's rights respected. This is so because illegality can occur both at the substantive level and the procedural level.

36. The Tribunal believes that to establish that the disciplinary measure taken against the Applicant was lawful, it is necessary to examine the Applicant's submissions and arguments carefully.

37. The Applicant argues that she was estranged from her family including her sister for some time and was not aware that she was working for the Organization. The Respondent rebutted this argument effectively by arguing that the Applicant was informed that someone looking like her and who said she had a sister by the name Kibe was working for another international organization. Thereafter, the Applicant did not respond by disclosing to the relevant authorities that she had a sister working in an international organization.

38. The evidence adduced also shows that the Applicant failed to disclose that she had a sister in another international organization when she had the opportunity to do so having applied for a position in the Organization, and being required to disclose during that process whether she had a relative in an international organization. When given that opportunity, rather than admitting that she did have a relative working in the Organization, she left the relevant section blank. Thereafter, she never tried to disclose to any relevant authority that she had a sister working in the organization. There is therefore no doubt about the Applicant's alleged misconduct.

39. The Applicant also stated that she had been ill for some part of the time of the investigation against her. Nevertheless, the Applicant cannot deny that she was given an opportunity to respond to the allegation against her, and even though she may have been ill for some part of the relevant time of the investigation, she had ample time to disclose and provide any information to refute the allegation made or clarify any information that may have made an impact on the outcome. But she did not do so.

40. Consequently, the Tribunal can find no procedural flaws in the procedure adopted to investigate and impose the disciplinary action taken.

41. It is also important to discuss whether the decision to separate the Applicant was proportionate to the misconduct alleged. In response to this, the Respondent has explained that the breach of staff regulation 1.2(b) has attracted different forms of disciplinary measures including demotion, suspension, and separation from service.

42. However, the Administration has explained that the varied disciplinary measures are responses to different circumstances. By way of example, Counsel for the Respondent states that in some cases the alleged misconduct complained of was mitigated by an admission and explanation of the circumstances during the investigation or sometime before a disciplinary measure was imposed. In this case, the Applicant refused to provide the information required when expected to do so and, even when confronted, she refused to admit that she had a relative of the relevant degree of connection in the Organization.

43. In the circumstances, there was no basis for a more lenient disciplinary measure. The imposition of separation from service is applied because the misconduct is considered serious. The seriousness of the misconduct is related to the fact that the Organization expects employees to be of high integrity, and dishonesty is inconsistent with high integrity. The Organization also has to be cognizant of the fact that the representation of different nations in the Organization has to be proportionate and therefore employing persons from the same family would appear to be particularly contrary to that rule.

44. In the circumstances, the Tribunal finds the application should be denied since the misconduct committed by the Applicant was very serious, and there were no mitigating factors. The Applicant refused to supply the relevant information even though she knew that it was known that she had a sister working in the Organization. The disciplinary measure imposed was therefore proportionate and fairly imposed, with full opportunity to respond to questions asked and clarify answers, if necessary.

Conclusion

45. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(Signed)

Judge Francis Belle

Dated this 27th day of February 2024

Entered in the Register on this 27th day of February 2024

(Signed)

René M. Vargas M., Officer-in-Charge, Nairobi