

Introduction

1. On 11 May 2017, the Applicant, a former staff member with the United Nations Development Programme (“UNDP”), filed the application in which he contests his summary dismissal. The case was registered with the Dispute Tribunal’s Registry in Nairobi under Case No. UNDT/NBI/2017/044 and assigned to Judge Agnieszka Klonowiecka-Milart.

2. On 15 June 2017, the Respondent filed his reply in which he submits that the decision to dismiss the Applicant was “a lawful exercise of administrative discretion” and that the application is therefore without merit.

3. On 19 October 2019, the case was reassigned to Judge Margaret Tibulya.

4. By Order No. 207 (NBI/2019) dated 5 December 2019, Judge Tibulya transferred the case to the New York Registry 2 re1feW*n1iW*7tMme5 Tm0 g01W*n1iW*7tMme5 Tm0 g

art. 16.2 of the Dispute Tribunal's Rules of Procedure, no hearing was necessary, because, among other things, the parties had explicitly stated that they do not want it (or a "trial"). As none of the parties had requested the production of any additional documentation, the Tribunal therefore found that the case appeared ready for adjudication and instructed the parties to file their written closing statements.

8. The parties duly filed their closing statements in the following sequence: the Applicant (24 January 2020), the Respondent (6 February 2020), and the Applicant (13 February 2020).

Facts

9. By judgment from a District Court in Belgium ("Tribunal de Premiere Instance Verviers") dated 7 December 2009, the Applicant got divorced from Ms. CR (name redacted). The Applicant was represented at the proceedings by an attorney recognized by the bar of Liege.

10. On 22 April 2011, the Applicant got married to Ms. KC (name redacted) (see the certified translation dated 23 May 2011 of the marriage certificate).

11. By email of 6 May 2011, the Applicant wrote a UNDP Human Resource Associate that, "I just wish to advi[s]e you that as of 16 of April 2011, I am divorced from [Ms. CR] ... Please kindly advi[s]e on actions expected from my end ... I think that her Van Breda Medical Insurance as my dependant must be canceled also?"

12. After an email exchange, on 9 May 2011, the Applicant emailed the Human Resource Associate that, "Here are the document that have been requested. However for the Official notification of Divorce I will have to wait it from Belgium".

13. In a UNDP form titled, "Questionnaire on dependency status" (presumably this is the so-called "P84" form to which reference is made in other documentation cited below) apparently dated the same date, namely 9 May 2011 (the handwriting is very illegible), the Applicant indicated that there had been "a change in [his] marital

Questionnaire form. Finally, on 22 July 2011, you provided a purported divorce judgement reflecting your divorce date as 16 April 2011”.

b. *“You failed to inform UNDP of your divorce and you claimed a later date of divorce to retain dependency benefits”* (bold omitted). Among various reasons was stated that “The evidence identified by OAI indicates that you sought and obtained a dependency benefit on behalf of [Ms. CR] between 7 December 2009 and 6 May 2011, a dependency benefit to which you knew you were not entitled as you were no longer married to her. As noted, the evidence indicates that you misrepresented the date of your divorce on communications and documents to do so”.

c. *“You forged documents in support of your misrepresentation regarding the date of your* (bold omitted). In this regard, the reasons included that “The ... facts show that on 22 July 2011, you submitted a forged version of the divorce judgment to UNDP which falsely reported your divorce date as 16 April 2011”.

23. On 18 August 2016, the Applicant provided his comments to UNDP’s 3 June 2016 letter in which he objected to all the allegations and concluded that he “did not engage in the alleged misconduct, and the allegations should be dropped and the case immediately closed for the reasons laid out herein”.

24. By letter dated 21 February 2017, the Associate Administrator of UNDP dismissed the Applicant in accordance with staff rule 10.2(aQq0.00000912 0 612 792 reW*n1 0 0aixET1

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that you didn't check the document such that you could determine that it was a

scanned forged document, and OAI failed to perform a forensic search of her computer or the Applicant's in order to produce same". Ms. DL gave "an incorrect date for the incident, which was off by a month". Mr. IR was "unable to corroborate the information provided by [Ms. DL]". Both Ms. DL and Mr. IR each claimed that the Applicant "asked them to scan the document, and could not remember who actually did it". Finally, it was "common knowledge that [Mr. WH] and the Applicant had a contentious relationship, and it was [Mr. WH] who brought the charge of forgery, not [Ms. DL or Mr. IR], who were actually involved in the incident". This gives "rise to questions about the motivations for making the allegations, which do not appear to have been explored at all by OAI. Especially in the aggregate, the facts do not result in a finding of guilt by clear and convincing evidence

Applicant's, [Ms. DL' and Mr. IR's] computers for evidence, and to "interview several witnesses proposed by the Applicant, who could have further corroborated his claims, or diminished their testimony about [Mr. WH's] antipathy toward the Applicant".

35. The Applicant contends that "OAI failed to follow its own procedures". The "UNDP Legal Framework for Addressing Non-Compliance with UN Standards of Conduct", Chapter III, section 1.4 states that the staff member should be either exonerated or charged within six months. In this case, the process "inexplicably took four years". The "undue delay was never addressed by UNDP" and "no reason was ever offered for such undue delay".

36. The Respondent, in essence, submits that the facts were properly established for the disciplinary measure of dismissal.

37. The Tribunal notes that the crux of the present case is whether the Applicant misrepresented the date of his divorce in various written communications to UNDP, leading him to unduly receiving a spouse dependency allowance with respect to his ex-wife (according to the OAI investigation report, he unlawfully received this allowance from 7 December 2009 until 16 April 2011 and thereby unjustifiably received approximately USD10,862.45).

38. From the written documentation on the case record, the Tribunal observes that it explicitly follows that the Applicant incorrectly indicated 16 April 2011 aq0.0 1 307.eu.q0.00000912 0 0

misrepresented the divorce date and was unduly enriched thereby, all the circumstances to which the Applicant refers are, in principle, not important for the present Judgment (see the Tribunal's additional findings below, in particular para. 56). The Tribunal, in any event, finds that the UNDP Associate Administrator's conclusion that the Applicant had also committed forgery and intentional unjust enrichment was appropriately based on the findings of the OAI investigation report and that it would appear that the OAI had appropriately established the facts for these offenses, although the parties disagree thereon. However, since the misrepresentations have already been properly established with clear and convincing evidence, in the interest of justice, expeditiousness and judicial economy, no further factfinding is necessary in this Judgment (see the Tribunal's conclusion below).

Did the established facts legally amount to misconduct and was the disciplinary measure proportionate to the offence?

43. The Applicant submits that he did not commit "misconduct". He was charged on "only one of the allegations—the other eleven allegations against him having been dismissed as unfounded, which itself serves as an indication that he was not likely to commit misconduct—and he had no other marks on his record". UNDP instead "meted out a severe penalty that arbitrarily held him up to a higher standard than other staff members" as it stated in the impugned dismissal letter that "as a profession-level staff member and one concerned with Security, you hold a position of heightened trust and authority". Nothing in the staff rules "permits the Organization to punish a staff member more harshly based on their position or level, yet UNDP appears to have done exactly that".

44. The Applicant contends that UNDP "did not consider the mitigating circumstances of this case", namely that (a) the Applicant worked "without incident before and after the alleged misconduct took place", (b) he "cooperated with the investigation", and (c) he "volunteered to repay the amounts in error in full on numerous occasions". Further, the Applicant did not pose an imminent threat to the

safety and security of the Organization or its staff, therefore the disciplinary sanction of summary dismissal was excessive and unnecessary. Finally, the Respondent did “not consider his years of flawless service all completed in hardship duty stations

46. The Respondent essentially submits that the Applicant committed misconduct and that the disciplinary sanction of dismissal was proportionated to his wrongdoings.

47. The Tribunal notes that the Applicant was dismissed pursuant to staff rule 10.2(a)(ix), which ranks dismissal as the severest disciplinary measure for misconduct. In this regard, staff rule 10.2(a) defines misconduct as follows:

... Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

48. As relevant to the present case, staff regulation 1.2 (concerning the basic rights and obligations of staff) highlights under “core values” that staff members “shall uphold the highest standards of ... integrity”, which “includes, but is not limited to ... honesty and truthfulness in all matters affecting their work and status”.

49. In implementing staff regulation 1.2, staff rule 1.2(d) underscores that “[d]isciplinary procedures set out in article X of the Staff Regulations and chapter X of the Staff Rules may be instituted against a staff member who fails to comply with his or her obligations and the standards of conduct”. Whether to institute such a disciplinary process and impose a disciplinary measure “shall be within the discretionary authority of the Secretary-General or officials with delegated authority” in accordance with staff rule 10.1(c).

50. Regarding the Administration’s discretionary authority in general, the Tribunal notes that the Appeals Tribunal has consistently held that its judicial review is limited as it is not to replace the decisionmaker’s sense of judgment but rather to assess how s/he reached her/his decision (see, for instance, *Sanwidi* 2010-UNAT-084, para. 40):

... When judging the validity of the Secretary-General’s exercise of discretion in administrative matters, the Dispute Tribunal

53. The Tribunal finds that, similar to *Bastet*, the Applicant could not “ignore” that the date of his divorce was 7 December 2009 and not 6 April 2011 when he informed UNDP about the divorce. Also, the Applicant clearly obtained “a monetary benefit” from his misrepresentation, namely the unwarranted spouse dependency allowances of approximately USD10,862.45.

54. In line herewith, the Appeals Tribunal found in another case concerning misrepresentation (although in a Personal History Profile) that “termination of [the applicant’s] employment was within the reasonable range of responses” even if the applicant “had more than 10 years’ service, a clean employment record and no evident harm was caused to the Organization by the misconduct” (see para. 49 of *Rajan* 2017-UNAT-781). The Appeals Tribunal further held that, “Although a graduated system of progressive discipline is normally to be preferred, a single incident of dishonesty or material non-disclosure at the time of recruitment is sufficient to justify termination.”

