



Case No.: UNDT/GVA/2010/030
(UNAT 1627)

Judgment No.: UNDT/2010/128

Date: 22 July 2010

Introduction

1. The applicant was employed as a G-2 level Security Officer by the Security and Safety Section (SSS) of the United Nations Office at Geneva (UNOG) on a number of short-term contracts from February 2003 until his separation in February 2006. While still employed, he applied for two advertised vacancies, was interviewed, but not selected for either. Based on information gathered at the selection process, it was decided that he did not have the necessary integrity to hold the position of a security guard and the decision was made to separate him.

2. After an unsuccessful request for administrative review, the applicant appealed to the Geneva Joint Appeals Board (JAB). The JAB panel recommended the payment of one week of salary in lieu of notice and one month's salary for moral damage suffered by the applicant. The Secretary-General accepted this recommendation.

3. The applicant appealed to the former United Nations Administrative Tribunal (UNAT) and the case was transferred to the United Nations Dispute Tribunal (UNDT) as of 1 January 2010.

4. The applicant contests the decision to separate him from service with the United Nations from 10 February 2006.

The issues

5. The nature of the case and the issues to be decided shifted from those originally pleaded in the appeal to the former UNAT. In the course of directions hearings, both parties made appropriate concessions which resulted in the issues being refined and reduced.

6. At the hearing, counsel for the respondent advised the Tribunal that as the respondent was not in a position to prove otherwise, it conceded that the applicant's short-term contract had been terminated as a result of the selection

of UN Security Staff. Witnesses spoke of perceived unfairness in selection of security officers for promotion and training, which in their opinion affected the applicant's chances of professional development and advancement. There was a need to professionalise the service and to regularise the contractual status of the employees.

12. To meet this need, a new Department of Safety and Security was

applicant's claim in his PHP that he had been an officer in the Nigerian army and the duties he told the interview panel he had performed as a corporal. The Specialist could not accept that a person of the applicant's rank could describe himself as an officer or would have been involved in court martial investigations. He also doubted that the applicant would have been the Officer-in-Charge of a section or that he could have been in charge of computer training as he alleged. The Specialist felt that the applicant's answers were not clear, flowing or straightforward.

18. Although he was convinced that the applicant had not been truthful about

- The applicant's integrity, core value, did not meet the United Nations standard;
- Contrary to what was on his PHP, he was not an officer in the military but a soldier;
- He could not have conducted military internal investigations;
- He could not have prepared military charges for court martial offences;
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that his employment with the Security and Safety Section would not continue beyond 10 February 2006.

30. Although the applicant appeared to the Assistant Chief, SSS, to be calm and collected at this interview, his body language showed surprise and the Assistant Chief stayed with him after the interview until he gained his composure.

31. The Assistant Chef, SSS, who is no longer employed by the UN, gave evidence at the hearing. He had had personal experience of the applicant while he was employed as a security guard. He was surprised at the conclusions of the interview panel. He said the applicant's performance had always been well above satisfactory and had never had negative reports about him. In fact, he has since employed the applicant as a security guard outside the UN and found that he worked well. He also confirmed that a remnant of the old system existed at UNOG to this day and there are still people employed on short-term contracts.

32. The applicant, who had never been told that the continuation of his services in UNOG depended on his selection as a security officer, was not only disappointed that he had not been successful in the positions he had applied for but was shocked to learn that his contract was being permanently terminated.

33. On 9 February 2006, two Personnel Actions (PAs) were issued for the applicant. The first was entitled "[e]xtend [a]ppointment" and covered the period from 1 January 2006 to 10 February 2006. The second PA was entitled "[s]eparation" effective on 10 February 2006. On 10 February 2006, the applicant was separated from the Organization.

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Discussion of the issues

Issue No. 1: Did the applicant have a legitimate expectation that he would

per Article 5.03-- ?41 5 5 . 0 3x?] T J i 2 5 5 . 7 3 F 6 5 4 1 1 -Nru?1 . 8 9 9 6 2 -m?1 . 8 2 . 2 7 tatx

Originally, the 300 series of the Staff Rules covered only short-term staff appointed for a period not exceeding six months. Short-term staff are recruited and administered at offices away from Headquarters without reference to the Office of the Human Resources Management.

39. The other document submitted by the respondent was a memorandum dated 28 April 2005 from the Department of Safety and Security, Division of Headquarters Security and Safety Services, New York, to all Chiefs of Security at Offices away from Headquarters, which states inter alia:

Please review your present recruitment procedures in view of the practice in New York and expedite discussions with the Human Resources divisions at your duty stations in order to explore whether a similar policy could be adopted.

40. The selection process for posts in the General Service category in Geneva is detailed in information circular No. 17 (IC/Gene

48. The specific rules for termination of 300-series appointments were found in the 300 series of the Staff Rules. These were to be read in conjunction with the Staff Regulations. Termination of 300-series appointments could be by an administrative decision under former staff rule 309.2 or a disciplinary measure under former staff rule 310.1 (set out below). Each of these rules referred to the Secretary-General as the decision maker. The administration of the Staff Regulations and Staff Rules is set out in ST/AI/234/Rev.1. This does not expressly refer to the delegation of authority for 300 series. It provides that termination under staff regulation 9.1 is a matter reserved to the Secretary-General, with exceptions. The authority to terminate as a result of disciplinary measures is not an exception and has not been delegated by ST/AI/234/Rev.1. That power is reserved to the Secretary-General.

49. The selection process in the present case was conducted on the basis of a policy adopted and administered by UNOG. The termination resulted from the application of that policy and was carried out without reference to the Secretary-General. If the termination of the applicant were of the type specified in

should have been given notice of these allegations and the procedure for termination invoked, including referral to the Joint Disciplinary Committee.

52. It was further submitted for the applicant that there were deficiencies in the findings of the panel because of the manner in which it was conducted. These deficiencies included making no enquiries outside of the interview to establish the correctness of what the applicant had told the panel, failing to tell the applicant of the serious concerns they had about his integrity, deciding he was liar without substantiating the facts and acting on assumptions about his military career rather than on evidence. This amounted to a breach of the applicant's right to a full and fair consideration.

53. The respondent submitted that this was a competency-based interview, that integrity is a core competency and if the panel had serious doubts about a candidate, it had the right to express those doubts when deciding to select for a position. It was noted that the panel also had doubts about the applicant's client orientation and technical knowledge.

54. The respondent further submitted that the finding of lack of integrity was not sufficient to justify disciplinary proceedings.

Consideration

55. The nature of the action taken against the applicant dictates what procedure should have been followed. If it was a disciplinary measure, then the Staff Rules dictate the procedure.

56.

57. Terminations under staff rule 309.2 were for the same purposes as those in Article IX and Chapter IX, i.e., where the requirements of the UN system mean that there is no longer a position available for the employee. There is no pejorative aspect in such a termination; it is an organisational decision or, as stated in staff regulation 9.3, because of the “necessity of the service”. This is consistent with the lack of any due process protections for employees in Chapter IX or staff rule 309.2. The procedure does not require adverse findings against an employee before he or she can be terminated under this article.

58. On the other hand, separation as a disciplinary measure was governed by former staff rule 310.1. The relevant parts of that rule are:

(a) 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 relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to unsatisfactory conduct within the meaning of staff regulation 10.1, leading to the institution of disciplinary proceedings and the imposition of disciplinary measures for misconduct...

(c) In any case involving possible disciplinary action, the Secretary-General may refer the matter to a standing Joint Disciplinary Committee or may establish, on an ad hoc basis, machinery to advise him before any decision is taken.

(d) No disciplinary proceedings may be instituted against a staff member unless he or she has been notified, in writing, of the allegations against him or her and of the right to seek the assistance of counsel in his or her defence at his or her own expense, and has been given a reasonable opportunity to respond to those allegations.

(e) Disciplinary measures under these Rules may take one or more of the following forms:

- (i) Written censure;
- (ii) Suspension without pay;
- (iii) Fine;

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of his separation, the applicant was employed on a contract which was understood by him to be a short-term contract. It was not, however, in writing and was therefore of indeterminate length. The applicant had not been given a written contract to sign and no end date for the contract had been mutually agreed with him before or after he began work following the expiry of his last contract on 17 November 2005. He was therefore not separated because of the expiry of his short-term contract. The notice required for termination of a short-term contract was not given. To this extent, his separation was not an administrative termination of his short-term contract under former staff rule 309.2.

60. I find that the termination of the applicant had the form and substance of a disciplinary measure. First, the applicant was given no notice such as he would have been entitled to if it were a termination under former staff rule 309.2 termination. Second, the main reason given for the applicant's permanent separation from service was that he lacked competence and the core value of integrity required of a UN staff member. This was an adverse and prejudicial finding against the applicant. The person who made this decision believed that the applicant had lied about at least on two matters in his interview for the G-3 position. It is clear from the evidence that as a result of the selection process, it had been decided that he did not meet the standards of an international civil servant.

61. I do not accept the respondent's submission that the finding of lack of integrity was not sufficient to justify disciplinary proceedings. The interview panel recommended that he should not be further employed by the UN because of lack of integrity, which is a fundamental requirement of an international civil servant.

62. I conclude that whatever action the administration intended to take against the applicant, the termination was in effect a disciplinary measure which resulted in either separation from service without notice or compensation (former staff rule 310.1 (e) (iv)) or a summary dismissal (former staff rule 310.1 (e) (v)). He was alleged to have failed to comply with his obligations as a UN staff member and did not observe the required standards of conduct. These are serious and

damaging allegations which were acted on to the detriment of the applicant. It led to the loss of his UN career, albeit one performed on short-term contracts.

63. While the Administration has a broad discretion to determine what action is to be taken against a staff member in a specific

66. Because the applicant had no notice that his contin

71. The respondent's argument is that the actions taken against the applicant, including both non appointment and separation, were based on valid reasons which were justified on the basis of the applicant's performance at interview and in the psychological tests. It is also submitted that the applicant had no expectancy of advancement in his career while working under a short-term contract and is therefore not entitled to any more compensation than that already awarded by the Secretary-General.

Considerations

72. Compensation may be awarded under the two heads in article 10, paragraph 5, of the UNDT statute.

73. First, under article 10 (5) (a) as the applicant does not seek rescission of the administrative decision or specific performance, he is entitled to compensation for the notice that he was denied. Although he was summarily dismissed, this was unlawful.

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75. However, none of these provisions apply in this case. The applicant's contract did not have a specified expiration date and there was no letter of appointment. In the absence of any end point for the short-term contract, the period of notice to which the applicant was entitled can only be calculated in terms of what would in all the circumstances of the case be considered reasonable. I conclude that a reasonable period of notice to the applicant that his employment would end was six weeks, that is from the date he was told of the termination to the end of March 2006.

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