

Case No.: UNDT/GVA/2017/022
Judgment No.: UNDT/2019/074
Date: 3 May 2019

(a) Without authorization, accepting receipt of a gift, in the form of a free or subsidized

12. In particular, the DED/M found that:

- a. From June to October 2013, the Applicant had failed

- e. That an alleged transcript of a conversation between the Applicant and

- a. Consequence(s), if any, of the loss of potential evidence, namely the Applicant's professional emails relevant to the period

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21. On 17 October 2016, the Applicant wrote to UNICEF requesting access to

26. By email of 8 February 2018, the Applicant requested UNICEF “access to [her] official emails record from 2012 onwards to support [her] case before UNDT[.] [I] believe that some important emails are missing (sic) which needs to be attached with my case document.”

27. By email of 9 February 2018, UNICEF Postmaster provided the Applicant with a link to “download a copy of [the Applicant’s] emails available in UNICEF system” also indicating that “the link would expire by the end of 16th February 2018 (EST) without further notice.”

28. The Applicant encountered a number of technical issues to download such copy, which do not appear to have been resolved by 19 February 2018 when she sent an email to UNICEF Postmaster that read: “kindly make sure that I need all my email data including sent items and inbox items and archive folders (sic) from 2012 till the last day/date I was in the office[.] [R]equest of date extension has already been sent to the management considering the issues am facing with the downloading etc.”

29. By email of 27 February 2018, UNICEF informed the Applicant *inter alia* that “the UNICEF Quetta [O]ffice, Pakistan, [had] made the data available and [she could] pick it up at the Quetta [O]ffice.”

30. By email of 1 March 2018, the Applicant responded in the following terms:

I would like to extend my gratitude for the help you have provided, though the issue is still unresolved, Mr [M.] very kindly copied the file in a USB and instructed me to install Microsoft office from Market to open the required files, furthermore i (sic) checked the data and found it useless because in my all emails it is clearly mentioned that i (sic) need my emails data (inbox, outbox, archives and sent items) from 2012 till the last day i (sic) was in the office, data is required to support my case before UNDT , attached screen shots shows that all the emails are of 2016 and 2017

former UNICEF Rules, Regulations, Policies, Guidelines and Manuals on data retention especially regarding storage, closure and archiving of staff members' emails.

32. In response to the Tribunal's Order No. 57 (GVA/2018) of 13 March 2018, the Respondent *inter alia* provided it with a screen shot headed "PAK - UserDeProvision for Asma Asghar (AASGHAR)" showing the approval, on 20 February 2015, of a de-provisioning request that the above-mentioned IT Officer created on 19 February 2015. The document also shows that the "approver" commented as follows: "[a]pproving this request on behalf of the office as per the established/agreed process with DFAM Comptroller's Office."

33. The Respondent also submitted UNICEF's "Procedure for Granting, Modifying and Revoking User Access to ICT Resources" (CF/ITSS/PROCEDURE/2012-001). This document records that it applies to all UNICEF staff, consultants and all subsidiaries. In essence, it provides for access to ICT resources as is directed by managers or other designated officers.

34. A further document on record is entitled "Access for UNICEF's Information Assets" (CF/ITSS/POLICY/2011-003). This, in part provides, in para 4.1.7, for de-provisioning access, which will occur immediately after an individual is no longer under contract with UNICEF.

Obligations of the investigator in respect of locating and protecting evidence

35. The Tribunal has heard evidence from the investigator that she did not request that the email account of the Applicant be deactivated, only "de-provisioned", that is, to prevent the Applicant from accessing it. Attempts have also been made to trace any request in respect of the deactivation of the email account. No requests have been located. The IT Officer concerned no longer works for the Organization and has been uncontactable.

36. Furthermore, no correspondence from the investigator concerning the missing emails was provided to the Tribunal insofar as it related to the conduct of her investigation.

42. The role of investigators in the Organization is rather more closely aligned with the civil law investigative model where they search for the truth of a matter looking for both inculpatory and exculpatory evidence, which is then fully disclosed to any suspected person and any decision-maker. A suspected staff member has very limited rights in an investigation. ~~Decision (am) 10~~

45. The Respondent has asserted that these rights have been extended in full and that the investigation was undertaken without reference to the emails of the Applicant. The Tribunal is disturbed by this assertion, as it is indicative of the investigator's failure to search for, or even possibly consider, potential exculpatory evidence.

46. The actions of the UNICEF investigator are guided by not only the United Nations Staff Rules, but also the OIAI Investigations Manual ("Investigations Manual") which, whilst at the lower level of administrative instruments, is the primary guide for investigators and expresses the rights, and obligations of the investigators, as well as also recognizing the rights of a rights

18. All staff members have an obligation to cooperate with an investigation immediately and unreservedly when requested to do so by an investigator by providing all documents and/or testimony requested.

...

20. The subject of an investigation by OIAI has a right to:

- A presumption of innocence during the conduct of the investigation;
- A professional, impartial, thorough and timely investigation; and
- *Due care in the handling and sharing of confidential information during the conduct of the investigation.*

21. In order to ensure an effective internal justice process, the subject of an investigation by OIAI can expect the following:

...

- Investigators accessing official records and facilities according to established procedures that ensure appropriate collection of facts where justified.

...

- *A reasonable opportunity to respond to the allegations.*
- *A reasonable opportunity to present countervailing facts.*

49. Concerning an investigation's "stage 2", i.e., "Assessment", section 8.35 of the Investigations Manual provides that (*emphasis* has been added to certain key phrases and words):

In investigative terms, evidence is any information that may be pertinent to the investigation and the underlying allegation(s). (More detailed guidance in relation to evidence is provided in section 9.5 below.) During the course of assessing an allegation, *the investigator(s) will collect and secure basic evidence*; identify any inconsistencies or outstanding questions concerning the allegation; and analyse the evidence collected to determine whether an investigation into the allegation of misconduct is justified. OIAI may request other UNICEF staff to assist in the assessment.

50. With respect to an investigation’s “stage 3”, i.e., “Investigation”, section 9 of the Investigations Manual relevantly provides that (**bold** emphasis in the original; *emphasis* has been added to certain key phrases and words):

9.1. Work-plan

40. The work-plan will cover the following issues:

...

- Evidence to be gathered - *the plan shall identify the elements which are necessary to establish that the alleged event or transaction occurred and whether the subject committed the alleged misconduct, including the likely sources of the evidence* (documents, e-mails, telephone records, hard drives and other electronic storage devices etc.). More detailed guidance in relation to evidence is provided in **section 9.5** of the [Investigations] Manual.

...

9.5. Evidence

50. Investigations are fact-finding administrative processes that primarily serve *to collect and preserve evidence in a manner such that it can be communicated to appropriate decision-makers.*

51. Evidence is anything that may be pertinent to the investigation. It includes, but is not limited to, documents and records (including any written material and all forms of electronic or digitally recorded information such as computer and phone disks, devices or any other digital recording medium); verbal statements (testimonial evidence); and tangible items (physical evidence), or the physical conditions of those items (forensic evidence).

Relevance of Evidence

52. Evidence should be pertinent to the investigation. The evidence should make the existence of any statement

or ~~10000763217691002400170819597002 (It is not) (e-368904510 (E~~

Electronic Evidence

approach, which does not meet the balanced requirements for the United Nations. There needs to be a demonstration of fairness and that exculpatory evidence has been searched for, and if found, taken into account.

52. The Respondent has urged upon the Tribunal that it should apply the case of *Arizona v. Youngblood* (1988) 488 U.S. 51, 58, which was said to stand for the proposition that in the absence of a showing that the custodian of evidence acted in bad faith in not preserving evidence that was potentially useful to a party, there is no denial of due process.

53. The Respondent further asserts that other cases from the United States of America stand for the further principal that a defendant who is asserting that a due process right has been violated by not preserving the evidence must show “the exculpatory value of the evidence at issue was apparent before it was destroyed, and the defendant could not obtain comparable evidence by other means”, referring to *People v. Cooper* (1991) 53 Cal. 3d 771, 810-811, and *People v. Johnson* (1989) 47 Cal.3d 1194.

54. The Applicant has submitted that “[t]here is no denial of the fact that the custodian of the evidence has willfully (sic) destroyed the evidence supporting the case of the applicant just to save the skins of the real culprits in the situation.” In connection with the consequence of the destruction of the evidence, the Applicant argued that “[i]f there is no precedent case as that of the applicant let’s have one for the benefit of any person who is being denied justice through willful (sic) destruction of the evidence”.

55. Finally, the applicant, argued that she “cannot plead her case with the available evidence which is not enough”.

56. The Tribunal firstly notes that it does not find that the email evidence was destroyed wilfully. Rather, it was destroyed as a consequence of the negligence of a number of people.

61. It is asserted that the case of *Arizona v. Youngblood* established the law of lost evidence for the United States of America such that, where there is no bad faith, no due process violation occurs when the police lose potentially exculpatory evidence. This is so even though the evidence may be critical to the defense. Interestingly, *Arizona v. Youngblood* resulted in the conviction of a man who

investigator was compelled to use emails obtained from recipients of the emails or in respect of which the Applicant had been copied in and this was apparent from the heading

d. The investigator failed to ensure she collected and secured basic evidence, including emails and telephone records. The fact that she asked for the de-provisioning of the Applicant's emails disclosed she had identified them as important;

e. There was a failure to maintain a chain of custody and instructions in respect of evidence, as a result of which the evidence was lost;

70. 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 conversation between the Applicant and another staff member

71. The Tribunal has 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.

72. The Tribunal is satisfied that the recording of a conversation between the Applicant and a colleague of his in January 2015 is 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".

73. The Tribunal finds that the contents of the conversation were such that only the Applicant could have known about the matters attributed to her in the transcript in respect of the Children's Children's 18527 00 T69.Sown

hand, she asserts that the conversation was a fabrication, whilst on the other hand she refers to it as being

Conclusion

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