



Before: Judge Francis Belle
Registry: Nairobi
Registrar: Abena Kwakye-Berko

SIMIYU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON LIABILITY

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Jonathan Croft, AAS/ALD, OHR, UN Secretariat
Jacob van de Velden, AAS/ALD, OHR, UN Secretariat

Introduction

1. At the time of the impugned decision, the Applicant held a continuing appointment at the P-3 level and was serving at the United Nations Support Office for Somalia (“UNSOS”).

2. On 19 May 2020, the Applicant was separated from service of the Organization pursuant to staff rule 10.2(a)(viii) with compensation *in lieu* of notice and termination indemnity for serious misconduct in violation of staff regulation 1.2(b) and staff rule 1.5(a). The Applicant filed her application to challenge this decision on 20 May 2020.

3. The Respondent filed his reply on 19 June 2020. The Respondent takes the position that all relevant circumstances were considered in making the disciplinary decision, and that the Applicant’s rights to due process were respected throughout the disciplinary process.

4. On 21 May 2021, the Tribunal issued Order No. 106 (NBI/2021) setting this matter down for a case management discussion (“CMD”) with the parties. The discussion took place, as scheduled, on 28 May 2021.

5. On 2 June 2021, following the CMD, the Tribunal issued Order No. 110 (NBI/2021) stipulating timelines for the filing of further and final submissions.

6. In response, the Applicant informed the Registry that she had no further submissions to make.

Submissions

7. The thrust of the Applicant’s case is that the impugned decision is unfair. She has served the Organisation for 14 years, with consistently good performance appraisals and in difficult duty stations. The fact that the Respondent failed to properly verify her credentials before her initial recruitment, and subsequent recruitments is an administrative error on their part which must not be held against her. She is in the process of completing a postgraduate degree, and is the sole breadwinner for the care of her children and her elderly mother.

8. The Respondent takes the position that the Applicant's misrepresentations as to her qualifications are tantamount to serious misconduct. The Applicant violated staff regulation 1.2(b) and staff rule 1.5(a), which warranted the imposition of the disciplinary sanction of separation from service with compensation *in lieu* of notice and with termination indemnity under staff rule 10.2(a)(viii). All relevant circumstances were considered in making the disciplinary decision, and the Applicant's procedural fairness rights were respected.

Considerations

The Charge

9. The factual matrix in this application can be divided into two parts. The first part of the case against the Applicant relates to the job opening Number 16-LOG-UNAMID 37889 -F-E1 Fasher for Logistics Officer at the P-3 level in El Fasher with UNAMID. The educational requirements for that opening were "an advanced university degree (Master's degree or equivalent in business administration, engineering, law or other relevant field.) A first-level degree in combination with two additional years of qualifying experience which may be accepted *in lieu* of an advanced university degree."

10. In her Personal History Profile ("PHP"), as attached to the application, submitted in response to the job opening, the Applicant represented that she attended the University of Cambridge from 1 January 2008 until 18 December 2009, and that she had received a Bachelor's degree. She also represented that she had attended Morgan State University from 7 September 1988 until 4 September 1991 and that she had received a Bachelor's degree from there as well.

11. The second aspect of the charge relates to the application submitted by the Applicant dated 27 October 2017, for job opening 87477 where in her related PHP the Applicant indicated that she had attended the University of Cambridge from 9 January 2007 – until 30 November 2008 and that she had received a Bachelor's degree and also represented that she had attended the University of Cambridge from 31 December 2008 until 17 November 2009 and that she had received a Bachelor's

degree as a result of this attendance as well. In this PHP, she listed the location of the University of Cambridge as London, United Kingdom.

12. Cambridge International had informed the Mission's Human Resources Assistant ("HRA") that the Applicant had completed the following programmes: a. Leadership & Team Management, on 16 September 2009 with a grade of high pass; and b. Logistics, Supply Chain & Transport Management on 19 February 2009 with the grade of pass.

13. The HRA later informed the Applicant that her two diplomas were professional high quality diplomas, but were not equivalent to a Bachelor's degree and advised her to move the credentials to the training section of her PHP. The Applicant replied by email and stated that she had made the requested changes. Nevertheless, the Applicant persisted in the representation that she had a degree from the University of Cambridge

14. The Respondent contends that this is a breach of the Staff Rules and is confined to her misrepresentations during the recruitment process when she had submitted that she had received one or more undergraduate degrees from the University of Cambridge, despite the fact that she had not; she thus violated staff regulation 1.2(b) and staff rule 1.5(a) and engaged in serious misconduct which warranted the imposition of the disciplinary sanction of separation from service with compensation *in lieu* of notice and with termination indemnity under staff rule 10.2 (a) (viii).

15. The details set out in the Respondent's reply provide the complete case against the Applicant which must be acknowledged in order to grasp the full impact of the Applicant's misconduct. These detailed allegations have not been denied by the Applicant. Consequently, the Tribunal is obliged to conclude that the alleged misconduct is proved.

Defences

16. In her response to the investigators, and in her application, the Applicant argues that the Organization failed to conduct its due diligence in relation to her

qualifications. This assertion may be seen as an argument that the Organisation condoned her behaviour. However, the fact that the Applicant continued to refer to qualifications as degrees in a subsequent job application after having been told that they were not, and agreeing to move her credentials to the PHP training section, but failing to do so, demonstrates the Applicant's determination to benefit from the misrepresentations about her qualifications and the cloak of condonation would no longer be available to her.

17. The Applicant presented a number of other defences apart from submitting that the Respondent should have done proper due diligence and they would have discovered the error. Additionally, she argued that she was enrolled in a Master's degree program with her existing credentials, and therefore assumed that her qualification was the equivalent of a Bachelor's degree. Finally, she argued that she was pursuing the necessary education to bring her qualifications on par with the requirements of the post she holds.

Mitigating Circumstances

18. Courts and tribunals are often moved to consider mitigating circumstances when evaluating the acts which are deemed to constitute offences and infractions of rules and regulations.

19. By way of mitigation, there is no doubt that the Applicant served the Organization well. She has worked continuously for the past thirteen years, and during that time she has served in some of the most difficult duty stations including in Sudan, Darfur and Somalia.

20. The Applicant's case for recognition of this service was emphatically articulated in her written application, and most recently during the case management discussion. She also described her personal circumstances and the challenges she faces for having lost her job and the particular difficulties that she will face because of the sudden loss of health insurance.

Evaluating the Evidence

21. The Administration has to prove their allegation of breaches of the Staff Regulations and Staff Rules. The Tribunal is of the view that the case of misrepresentations being made by the Applicant has been proved by clear and convincing evidence. While the Applicant has made several submissions in mitigation, she has not introduced any facts that constitute a denial of the breaches alleged.

22. The Respondent has also shown that the Applicant benefited from due process and accepted fair procedures during the investigation of the charges against her. The Tribunal has concluded that the process was fair.

Personal Circumstances

23. The Applicant's work, her personal health status and family commitments would arouse anyone's human compassion. However, the Organization must maintain standards and be fair to all concerned. Consequently, if others were/are rejected for employment during the recruitment process because they were/are not qualified, then this should be the position across the board including for the Applicant.

Conclusion

24. The Tribunal is satisfied that the Applicant has received a fair separation package from the Organization in the circumstances.

25. The application to rescind the Respondent's decision to separate her from service is therefore denied.

Case No. UNDT/NBI/2020/036

Judgment No. UNDT/2021/075

(Signed)
Judge Francis Belle

Dated this 29th day of June 2021

Entered in the Register on this 29th day of June 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi