

Introduction

1. The Applicant filed two Applications. In Application 1, he challenged the imposition of the disciplinary measures of demotion and a reprimand. In Application 2, he challenged the Organization's decision to retain him on a P-4 level after he had been selected for a P-5 position in the Uganda office of the United Nations Children's Fund (UNICEF); his non-selection for a P-5 post in UNICEF Tanzania; the failure to issue him with a written notice of abolition of a post that he held in UNICEF Malawi; and the refusal by the UNICEF Malawi Country Representative to sign his Travel Authorization (TA).

Procedural History

2. When the two Applications were filed on 6 April 2012, the Respondent challenged the receivability of all of the Applicant's claims except that relating to the disciplinary measures (the demotion) on the grounds that they had been filed with the Tribunal out of time. He requested the Tribunal to consider the merits of the allegation regarding the disciplinary sanction after deciding the receivability issue.

3. In Judgment No. UNDT/2012/159 dated 31 October 2012, the Tribunal held that:

a. The Applicant filed a comprehensive request for management evaluation on 29 September 2011 with the Chief Policy and Administrative Law Section (PALS)/UNICEF. In light of that request and taking into account the Applicant's submissions, the Tribunal finds that the Applicant requested management evaluation of each of the issues and administrative decisions challenged by him.

b. On the basis of the documentary evidence submitted by the parties, the Tribunal finds that by 1 February 2012 the Respondent sought and the Applicant agreed to mediation of their dispute.

c. The documentary evidence shows that the Ombudsman's engagement was extended over a number of days. As evidenced by the Applicant's letter, by 16 February 2012 the mediation had broken down. Pursuant to Article 8 of the Statute, the 90 days for filing the Application in the Tribunal commenced on 17 February

- d. Were the facts on which the demotion was based established by clear and convincing evidence?
- e. Did the established facts amount to misconduct?
- f. Was the sanction proportionate to the offence?
- g. The Tanzanian Post
- h. Remedies

Background

12. The Applicant is a medical doctor. On 6 July 2008, he joined the Malawi Country Office as Chief of Health and Nutrition with UNICEF on a fixed-term contract at the P-4 level expiring on 31 December 2011. In addition to his role as Chief of Health and Nutrition he was also the Office Ombudsperson.

13. On 25 January 2010, the Applicant made a formal complaint to the Office of Internal Audit (OIA) that he was being sexually harassed by Ms. H, a UNICEF staff member who worked as Executive Assistant in Operations, a different section from the Applicant. He alleged that she made telephone calls and sent text messages to him about her work related stress, insomnia and a mental condition.

14. The Applicant told OIA that these text messages and telephone calls progressed from expressions of gratitude for counselling and advice, to polite compliments before changing into messages of a sexual nature. He said that Ms. H began spreading rumours within the office about the two of them having an affair and only discovered what she was saying when he was approached by a colleague and asked if it were true.

15. Ms. H was informed of these allegations and responded with a detailed account of events that she said she recorded in her diary, listing meetings between her and the Applicant between 25 August 2009 and 27 January 2010.

16. She alleged that as a result of her relationship with the Applicant, she became pregnant. When she informed the Applicant of that fact he allegedly told her to get an

abortion. Ms. H said that as a result of the Applicant threatening her career she had an abortion on 21 November 2009.

17. On 16 December 2010, OIA commenced an investigation into the actions of the Applicant. The OIA investigators put it to him that they believed he had been intimately involved with Ms. H. He agreed that he had and that it was a mutually agreed arrangement. He told OIA that she started to harass him with the emails and texts after he tried to end the affair.

18. In February 2010, Ms. H informed OIA that she was again pregnant and the Applicant was the father. The Applicant adamantly denied this. He said that the relationship had ended on 24 November 2009 and he had not had any sexual relations with Ms. H since then therefore proving that it would be biologically impossible.

19. As a result of the developing situation between the two staff members, OIA approached a UNICEF Staff Counsellor in New York to assist. She was asked to help the Applicant and Ms. H to move forward following the end of their relationship and to assist Ms. H deal with the situation she was in i.e. being married and expecting a child that she believed was the product of her extramarital affair with a colleague.

20. The Counsellor visited Malawi for a week at the end of March 2010. She met individually with the Applicant and Ms. H to try to find a solution to their issues which would be not only in the interests of each of the two staff members but also of the Organization. She separately suggested to them that if the Applic

c. Recommends that Department of Human Resource (DHR)/PALS consider the evidence and take whatever action that is deemed appropriate.

28. On 11 August 2011 the Applicant was offered the post of Chief of Child Survival and Development in Uganda at the P5 level. The offer letter attached an Acceptance of the Offer of Appointment Form and stated:

Congratulations once again on your appointment as Chief Child Survival and Development in Kampala, Uganda. I am writing to provide you with the administrative details on [the Applicant's] reassignment and promotion to the level P-5 Step 1...This appointment is for a period of 24 months on a fixed-term basis.

29. He accepted the offer on 16 August 2011 by signing and returning the acceptance form. The contract had an agreed starting date of 19 September 2011.

30. On 25 August 2011, having considered the OIA June 2011 investigation report into the allegation that he had sexually exploited another staff member, the Director of HR sent his decision to the Applicant in a letter.

31. The Director told him that it was decided that there was not enough evidence to establish that the complainant was in a position of vulnerability or that the Applicant abused his position as an international civil servant, therefore disciplinary proceedings would not be commenced against him. However because he had filed a complaint of sexual harassment against his former partner without disclosing their intimate relationship and because he had not taken the paternity test he had allegedly agreed to, his behaviour was not befitting the standards of an international civil servant.

We thus expect you to honour your commitment to Ms H and proceed with the test before you resume your new responsibilities in Uganda....Please consider this note as a reprimand [...]

32. Ms. H also received a reprimand in which she was asked her to facilitate the paternity test process by making her daughter available for testing. The Applicant and Ms. H received these letters on 30 August 2011. The Applicant did not know of Ms. H's reprimand at that time.

33. On 2 September 2011, having made an appointment for the paternity test Ms. H went to the Applicant's office. The Applicant says that he was working at his desk when Ms. H burst into his office with her hands raised above her head and slammed the door behind her. He repeatedly asked her to leave in forceful language and when she didn't he took hold of her clothing near her neck with one hand and tried to open the door with the other to remove her. He said she was fighting and resisting him. Another staff member, hearing the commotion, opened the door to see what was happening. Ms. H left the office. The Applicant said he felt under attack and acted in self-defence. He admitted calling her names in a voice loud enough to be heard by others in the office.

34. In preparation for leaving Malawi to take up his new post in Uganda the Applicant ended the rental on his house. He removed all his belongings and handed them over to a shipping company. On 15 September he and his family moved into a hotel pending his departure on 17 September 2011 to take up his new post on 19 September.

35. However, the Malawi Country Representative declined to approve his travel authorization after the Uganda Country representative expressed dismay that the Applicant's promotion had gone through without consideration of the reprimand and the on-going

This notwithstanding, no decision withdrawing the offer of appointment has been made at this time.

36. On 29 September 2011, the Applicant requested management evaluation of the conditions placed on his re-assignment; the issuance of a reprimand; the refusal by the UNICEF Country Representative to sign his travel authorization; keeping him on a P-4 contract after he had accepted a P-5 position; the failure to issue him with a notice of abolition of post and non-selection for the UNICEF Tanzania post.

37. On 6 October 2011, the Applicant was told that OIA UNICEF had opened investigations into his alleged assault of another UNICEF staff member. He was placed on three months administrative leave with pay pending the investigation as requested by the Country Office and was told it was neither desirable nor reasonable to reassign him nor redeploy him elsewhere.

38. On 25 October 2011, the Recruitment and Staff section of DHR informed the Applicant that “due to evolving changes in our programme interventions in the Tanzania Country Office in Dar-es-Salam, the recruitment process” for the position of Chief of Health in Tanzania, for which he had applied and been interviewed, had been cancelled.

39. In a decision dated 13 November 2011, the Deputy Executive Director (“DED”), who was delegated to undertake management evaluations for UNICEF, delivered a decision on the Applicant’s request for management evaluation.

40. The decision concluded, *inter alia*, that as there was an absence of sufficient evidence

41. The DHR altered the reprimand letter in line with the MEU directive and reissued it on 22 November 2011. It removed the requirement for the Applicant to proceed with the test before assuming his new duties in Uganda.

42. The Applicant remained in Malawi at the P-4 level between September and December 2011. On 21 December 2011, he was re-issued with another P4 contract for his Malawi post from 1 January to 31 March 2012.

43. In the meantime, the investigation into the assault proceeded.

Investigation: Staff Conduct (Assault)

44. On 5 September 2011, the Applicant sent an incident report about the assault in the workplace that took place on 2 September 2011 to the Representative of the Malawi Country Office. In addition to alleging that Ms. H had assaulted him, he said that on 25 July 2011 Ms. H tried to run over his wife with her vehicle in the UNICEF parking lot. Ms. H reported that she had been physically abused by the Applicant.

45. On 6 September 2011, the Representative reported the allegations from both parties to the Regional Director, East and Southern Africa Regional Office. The same day, the Regional Office forwarded the matter to DHR and OIA.

46. On 14 September 2011, the Applicant and Ms. H were informed by OIA that they were the subjects of the investigation into the disturbance that had occurred on 2 September 2011. On 22 October 2011, Investigators from OIA travelled to Lilongwe, Malawi to carry out the investigation into the alleged assault and the alleged incident with the car.

47. OIA issued its investigation report on the Applicant's case in December 2011 and made the following findings and conclusions:

- a. On the morning of 2 September 2011, the Applicant and Ms. H were involved in an altercation of a kind that could only be described as an assault, which took place between the two of them. Ms. H's attempt to inform the Applicant of the appointment she had made for the paternity test and his violent reaction resulted in an incident, which caused a disturbance in the office.

reason was different from the one given to the Applicant on 25 October 2011 by the Recruitment and Staff section of the DHR.

51. On 9 March 2012, the Applicant was informed by the DED that as a result of the charges of misconduct against him, it had been decided that the interests of the Organization would be served through an informal resolution approach and that on 30 January his case was referred to the Office of the Ombudsman. He agreed to engage with the Ombudsman's office however no agreement was reached.

52. Following consideration of the facts, the DED further informed the Applicant that it was concluded that there was clear and convincing evidence that he had engaged in misconduct but having considered mitigating facts decided that he should be demoted one level with deferment, during two years, of eligibility for consideration of promotion. The mitigating facts were:

- a. Long standing conflict between the Applicant and Ms. H derived from the end of their intimate relationship, which included allegations of sexual harassment, sexual abuse, and death threats.
- b. The Applicant was not advised about the instruction given to Ms. H to facilitate the taking of the paternity test requested from him.
- c. There is evidence to substantiate that the Applicant's behaviour was an unexpected outburst from a normally respectful, well-mannered, soft-spoken staff member.

53. In the same letter, the Applicant was then directed to take up his re-assignment to Uganda remaining at the P4 level due to demotion. He did so from the beginning of April 2012.

Applicant's submissions

54. The Applicant provided lengthy submissions. The following is a summary of the relevant points made by him.

55. The reprimands were unlawfully and improperly issued because they followed an investigation that was tainted with substantive and procedural irregularities.

56. The Organization had no jurisdictional competence with regard to this private and legal matter. The Applicant was the victim of abuse of position and authority for retaliatory purposes for refusing to comply with an unlawful request from a Stress Counsellor, Chief

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to December 2011 and issuing an extended contract at the P4 level from January to March 2012 was a breach of contract in violation of the terms and conditions of his offer of employment.

63. The refusal to appoint him to the UNICEF post in Tanzania after having prevailed in a recruitment process was a violation of due process, United Nations employment rules and regulations and constitutes an unfair and improper denial of employment opportunity.

64. The competency-based interview was conducted against the requirements and competencies set out in the vacancy announcement but the decision was that the Applicant did not meet particular and newly introduced competencies about which they were not questioned at the interview.

Respondent's submissions

65. UNICEF staff are governed by the UNICEF Executive Directive CF/EXD/2008-004 (Prohibition of harassment, sexual harassment and abuse of authority). Issues of sexual exploitation and abuse (SEA) are governed by ST/SGB/2003/13 (Special Measures for Protection from Sexual Exploitation and Sexual Abuse).

66. The allegations made against the Applicant, although also referred to sexual harassment, were of SEA. There is no right in UNICEF disciplinary proceedings to seek counsel during the investigation stage of an investigation into SEA.

67. Reprimand letters issued after a disciplinary investigation is concluded, are governed by specific provisions contained in CF/AI/2009-004 (Disciplinary Process and Measures).

68. There is no basis to legitimately aver that the Applicant was not afforded the opportunity to be heard before the reprimand was issued. Once the Applicant received the amended reprimand, he again had the opportunity to request, within 60 calendar days, a management evaluation of such letter. The Applicant did not file any such request.

69.

Ms. H to facilitate the taking of the paternity test; and, c) his behaviour was considered an “unexpected outburst of a normally respectful, well mannered, soft spoken staff member”

70. The Applicant was verbally informed in May 2011 that the post he encumbered was slated for abolition on 31 December 2011, coinciding with the end of his fixed-term contract. The Applicant accepted the offer for the Kampala post four months before the abolition of the post he encumbered would be effective.

Tanzania Post submissions (to be dealt with on the papers)

71. The Applicant’s case in relation to the non-selection for the Tanzanian post is moot due to the fact that the Applicant accepted the post in Uganda before (August 2011) he was informed that he had not been selected for the post in Tanzania.

72. On 15 February 2012 he asked to be given the “comparative analysis of the candidates who were interviewed for this position along with [him]”. The next day his query was responded to by DHR, explaining that “the interview process [he] participated in did not yield a successful candidate for the position.” The Applicant was provided an explanation and informed that “as a result, we cancelled the vacancy and proceeded with a direct placement of a candidate from the Talent Group versus re-advertising the role.”

73. In his application, the Applicant presents as facts what are, at best, baseless conjectures. The Applicant applied for the Tanzania post on 18 April 2011, he was short-listed by DHR on 24 May 2011, and interviewed on 29 June 2011.

74. The Applicant has made baseless submissions against the UNICEF Representative in Tanzania of discrimination and prejudice against candidates from donor countries. The facts are that the candidate selected for the post in Tanzania is from Nepal, which is not a donor country.

75. The recruiting office – acting in accordance with section 6.20 of UNICEF Executive Directive CF/EXD/2009-008 (Staff Selection Policy) found that none of the applicants interviewed for the Chief Health and Nutrition Post in Tanzania, including the Applicant, was suitable for the post and, therefore, requested the vacancy to be re-advertised.

Considerations

(i) Was the failure to give the Applicant written notice of abolition of post unlawful?

76. The requirement to give written notice of the abolition of a post is found in section 9 of CF/AI/2010-001 (Separation from service) which deals with termination of appointment for reasons of abolition of post. Section 9 states as follows:

9.4 Notice of termination periods (see section 14) will be served in writing to staff occupying posts identified for abolition. This includes staff who encumber or maintain a return right to a specific post which is being abolished, and who are on any form of authorized leave, or on secondment or inter-agency loan.

9.5 During the period of notice, a staff member is expected to apply for all available posts for which he or she believes he or she has the required competencies. HR managers will assist staff in identifying and applying for available and potentially suitable posts (see paragraphs 9.7 and 9.8). They will include the name of such a staff member on lists of applicants and/or shortlists, even if the staff member did not submit an application. Every effort will be made to keep the staff member informed of the posts for which he or she is being reviewed.

77. This provision requires that a staff member occupying a post identified for abolition is to be given written notice of the termination period. Based on the wording of section 9 the purpose of the written notice is to advise the staff members of the time periods available within which he or she can apply for available posts.

78.

actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury.⁵

80. The types of damages that may be compensated are “actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury”.⁶

81. The Applicant told the Tribunal that because he did not have notice of abolition of post he was unable to refer to this in his applications for posts and that this would have prejudiced his chances of selection.

82. However, as a matter of fact, after he was informed about the abolition of his post the Applicant promptly applied for and was selected for the Uganda post within the notice period. Apart from the events which intervened, he suffered no break in service and therefore no monetary loss arising from the failure to give written notice.

83. The Tribunal concludes that the Applicant has not demonstrated any actual harm caused by this breach. The claim is dismissed.

(ii) Was the first reprimand dated 25 August 2011 and the refusal to sign the Applicant’s TA for the Uganda post lawful?

84. Section 4 of CF/AI/2009-004 states that the Executive Director has the authority to impose disciplinary measures regarding UNICEF staff members in accordance with Chapter X of the Staff Rules. The Executive Director has delegated this authority to the Deputy

A reprimand is an administrative measure not a disciplinary measure within the meaning of Staff Rule 10.2. In *Akyeampong*⁷, a reprimand is “recorded in the staff member’s file to serve as a reminder, should the staff member misconduct [him or] herself again”.

87. Under sec. 2 of ST/AI/292 (Filing of Adverse Material in Personnel Records), adverse material is defined as any “correspondence, memorandum, report, note or other paper that *reflects adversely on the character, reputation, conduct or performance* of a staff member.” (Emphasis added). It requires that adverse material, as a matter of principle, may not be included in the personnel file unless it was previously shown to the staff member who was accorded an opportunity to make comments.

88. It was held in *Johnson* UNDT/2011/124 that:

While a reprimand is not considered a disciplinary measure...and therefore does not carry the same procedural safeguards that apply to disciplinary procedures under ST/AI/371 and ST/AI/371. Amend.1...certain protections nevertheless apply under ST/AI/292.⁸

89.

alleged harassment started. It was not until the investigators raised it with him following Ms. H's allegations that he admitted to the relationship.

93. This omission was untruthful and misleading to

took action expressly on the basis of the facts relied on in the first letter of reprimand including the disputed agreement that the Applicant would take the paternity test. On 21 September, the Administration acknowledged that UNICEF could not compel him to take the test but nevertheless sought to enforce the requirement for him to take it. It was clear from the letter that if he took the test, arrangements would be made for him to travel. Otherwise UNICEF would not authorize and pay for his departure. This was an overt form of compulsion.

100. There was another thinly veiled attempt at coercion in the letter. Although the Applicant had already received formal confirmation of his promotion on 11 August 2011, the letter said that “the decision to appoint [him] to Uganda and to allow for [his] possible promotion at the P5 level was made without knowledge of the reprimand issued on 25 August 2011.” It said that the appointment was under review although no decision was made about withdrawing it at this stage. There is a strong inference to be drawn that if the Applicant did not take the test the promotion would be at risk.

101. Although the second letter of reprimand removed the reference to the paternity test by then the Applicant’s travel to Uganda and his promotion had been delayed. The damage had been done and the second letter did not repair that damage.

102. The agreement entered into by the Applicant and UNICEF on 16 August 2011 for the employment of the Applicant in Uganda was unconditional and binding.⁹ The Applicant was entitled to and should have taken up his appointment in Uganda at the P5 level on 19 September 2011. This was prevented by the imposition of the unlawful conditions placed on his travel in the reprimand and the letter of 21 September. The refusal to issue a TA for the Applicant to take up his duties was unlawful.

103. In reaching this decision the Tribunal is mindful that the physical altercation between the Applicant and Ms. H took place on 2 September and an investigation was underway by 14 September. Although that obviously had a bearing on the decision not to approve his travel to Uganda, this does not detract from the fact that the first reprimand which attempted to place restrictions on his travel by reason of the paternity test occurred before that date and should have been treated as a separate and discrete issue.

⁹ See *Gabaldon* UNDT/2011/132.

104. In reaching these conclusions the Tribunal is in no doubt that the Administration tried to do what it thought was the right thing by the Applicant, Ms. H and the child in what were extremely challenging circumstances. It was very mindful of the responsibilities and obligations on UNICEF and its staff to uphold the principles of child protection. Unfortunately the actions it took were in breach of UNICEF's other important obligations to act in accordance with the staff rules and its contractual arrangements with the Applicant.

(iii) Was misconduct by the Applicant established and if so was demotion a proportionate sanction?

105. When a disciplinary sanction is imposed by the Administration, the role of the Tribunal is to examine whether:¹⁰

(i) the facts on which the sanction is based have been established by clear and convincing evidence.

(ii) the established facts qualify as misconduct,

(iii) the sanction is proportionate to the offence.

(iv) Were the facts on which the demotion was based established by clear and convincing evidence?

106. The demotion was made because the decision maker, the Deputy Executive Director for Management, found that there was sufficient proof that the Applicant had engaged in a physical altercation with Ms. H by grabbing and pushing her out of his office and that he had yelled at her and used inappropriate and offensive language when demanding that she leave his office. The Deputy Executive Director for Management concluded that he had breached the standards of conduct expected of a civil servant.

107. The Tribunal has reviewed the evidence gathered by OIA and considered by the decision maker and heard also from the Applicant who recounted what happened at his office on the day of the altercation.

¹⁰ *Molari* UNAT-2011-164, para. 30

108. In the light of this evidence there is no doubt at all that there was a physical altercation at the Applicant's office between him and Ms. H, and that he did grab and push her out of the office. The Applicant accepts all of this. He also accepts that he used strong language as alleged by the complaint.

109. The Tribunal finds that the facts on which the decision to demote him was based were established by clear and convincing evidence.

(v) Did the established facts amount to misconduct?

110. On the face of it the behaviour of the Applicant as found amounted to misconduct. Misconduct takes many forms and degrees.

from doing so because of the paternity test. The Applicant suffered the detriment of being kept out of his promotion from that date which was 5 months and 19 days longer than the 2 years imposed.

115. The Tribunal finds that although the sanction of 2 years demotion was proportionate in all the circumstances, the calculation of 2 years should commence from 19 September 2011 ending on 19 September 2013.

(vii) The Tanzanian Post

116. The Applicant was short-listed, interviewed but not selected for the Tanzanian post. The vacancy was cancelled and another person was later appointed from the Talent Group.

117. The Applicant made a number of serious allegations about the process and the motivation of the decision-makers. Those allegations are for him to substantiate. He has not done so.

118. The Tribunal accepts the Respondents submission that this claim is moot. The Applicant had been appointed to the Uganda position before he learned of the cancellation of the Tanzanian post. Even if any breaches in relation to this selection exercise had been established, the Applicant has suffered no prejudice that can be linked to this claim.

119. This claim is dismissed.

(viii) Remedies

119. The Tribunal may only award compensation for damage caused as a result of specific breaches. In this case the breaches that have been proven are:

a. the condition that the Applicant should submit to a paternity test before assuming his new duties in Uganda was inappropriate.

a. The 25 August 2011 reprimand by which UNICEF tried to compel the Applicant to take the test against his will;

b. The refusal to issue a Travel Authorization for the Applicant to take up his duties was unlawful.

c. The two year demotion which should have been calculated from 19 September 2011 rather than 9 March 2012.

120. The Applicant requested payment of costs associated with the delay to his travel arrangements for 17 September 2011 made in reliance of his acceptance of the position of Chief Child Survival and Development, P5 in Kampala.

127. He gave evidence of the stress and anxiety he has suffered as a result of the events in this case. The Tribunal accepts this evidence but finds that although the reprimand and denial of the TA were sources of humiliation and anxiety to him he was, to a considerable extent, the author of his own misfortune.

128. The Tribunal finds that due to his contribution to the events leading to this case, the Applicant is not entitled to any moral damages.

Conclusion

129. In view of the foregoing, the Tribunal DECIDES:

a. The period of the demotion of the Applicant is from 19 September 2011 rather than from 9 March 2012 and therefore shall end on 19 September 2013.

b. The Respondent is to pay the Applicant TD0 T78Responsuan fromriod

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becomes executable. Interest will accrue on the abs e amount from the date of this Judgment at the current US Primrate until payment. If the above amount is not 6-0d within7D 0 Tw (10.6(t)6.3(h)-.o2)Tj6b.ys period an additi02 Tw [n7D 0 Tal five per cent sh Rate until the date of payment.

(Signed)

Judge Coral Shaw

Dated ^{1st} May 2013

Entered in the Register on TD0 T78Re 2 (f) M 20 13

(Signed)