



**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko, Acting Registrar

MACHANGUANA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Alexandre Tavadian, OSLA

**Counsel for Respondent:**

Tamara A. Shockley, UNICEF

## **Introduction**

1. The Applicant is a staff member currently serving in the United Nations Children's Fund ("UNICEF") in Maputo, Mozambique, on a fixed-term appointment as a Senior Information, Communication and Technology (ICT) Assistant at the G-7 level.

2. He filed an Application dated 20 June 2012 contesting the administrative decisions to demote him from GS-7 to GS-6 and to censure him vide a letter of censure placed in his Official Status File.

3. The Respondent's Reply was filed on 6 August 2013 asserting that:

a. It is immaterial whether the Applicant worked the additional hours claimed as overtime on the altered form. He altered the number of hours after the authorized official's written approval, which amounts to an intentional misrepresentation of a material fact aimed to induce the Respondent to release funds the Applicant was not entitled to.

b. The authorized official's written approval is a condition to the subsequent release of funds in accordance with established procedure.

## **Facts**

4. The Applicant joined UNICEF on 1 March 1999 and up until the time of the impugned decision held the position of Senior ICT Assistant at the GS-7 Step 10 level at the Maputo, Mozambique duty station. He is currently on a fixed-term appointment which is due to expire on 31 December 2013.

5. In the UNICEF Mozambique Country Office (MCO), there existed an unwritten understanding that the three Information Technology (IT) staff would rotate working weekend overtime amongst themselves in order to deal with the management of the IT systems. Usually, IT staff would work from 7:00 a.m. or 8:00 a.m. and finishing at around 10:00 a.m. or 11:00 a.m.

6. The Applicant worked on Saturday, 1 October 2011, Sunday, 2 October 2011, Saturday, 15 October 2011 and Sunday, 16 October 2011 and submitted his claims for overtime to Mr. Hezborne Onyango, the Applicant's supervisor, for approval. He subsequently altered the number of hours on the overtime claim as follows:

Saturday	- 1 October 2011	- 07:00-1600	(9 hours)
Sunday	- 2 October 2011	-07:30-1400	(6hours, 30 minutes)
Saturday	- 15 October 2011	-07:30-1600	(8 hours, 30 minutes)
Sunday	- 16 October 2011	-08.00- 14:00	(6 hours)

Total overtime - 30 hours

7. On or around 20 October 2011, when processing the Applicant's overtime claim forms relating to the hours worked overtime on 15 and 16 October 2011, Mr. Onyango noticed that the number of hours on the overtime claim forms differed from the number of hours he had earlier approved in his function as the authorized official. When Mr. Onyango confronted the Applicant with these findings, he offered his apologies and admitted to altering the overtime claim forms relating to hours worked overtime on 1 and 2 October 2011.

8. Upon Mr. Onyango's request, the Applicant sent a memorandum to Ms. Monique Linder, Chief of Operations of the Country Office, in which he again expressed remorse and explained that he had forgotten to record all the hours worked as overtime prior to his supervisor's approval.

9. When he was interviewed on 6 January 2012 by the Office of Internal Audit (OIA), the Applicant again explained that after submitting the forms, he remembered that he had failed to record some of the overtime hours he had worked. Once again he apologised for making the changes on the forms without having been authorised to do so.

10. On 24 January 2012, the OIA investigation concluded, based on the Applicant's statements, that the Applicant had altered two overtime claim forms.

11. On 19 March 2012, the Applicant was charged with fraud, as defined in UNICEF Executive Directive 2006-2009, Anti-Fraud Policy, section 4, by knowingly submitting two fraudulently altered overtime claim forms for his personal benefit.

12. On 10 April 2012, the Applicant responded to the charges and stated that, after submitting the forms, he remembered that he had failed to record some of the overtime he had worked.

13. On 19 April 2012, Mr. Martin Mogwanja, the UNICEF Deputy Executive Director, found the Applicant guilty of misconduct and sanctioned him with a censure and demotion from GS-7 to GS-6.

14. On 6 August 2013 he filed the present Application challenging the administrative decision to demote him from G-7 to G-6.

15. The Respondent filed a Reply on 6 August 2013.

16. The Tribunal heard this case on 14 May 2013 and 15 May 2013 during which time live evidence from Mr. Hezborne Onyango, ICT specialist, UNICEF Mozambique, and Ms. Monique Linder, former UNICEF Chief of Operations were provided for the Respondent while the Applicant testified for himself.

### **Applicant's case**

17. The Applicant's case is summarized as follows:

18. The Applicant submits that he did not commit the fraud for which he has been found guilty and that the decision demoting and censuring him was disproportionate.

19. The Applicant submits that the facts upon which the disciplinary case was based have been established but these established facts do not amount to misconduct which could justify demotion from G-7 to G-6.

20. The Applicant submits that by making alterations to the two overtime claim forms he did not intend to misrepresent his overtime hours, because the

alterations he made only reflected the overtime hours he had actually worked and that simply making the unauthorized alterations did not, in and of itself, amount to fraud.

21. The Applicant submits that there was not sufficient evidence to prove the fraud for which he was found guilty and that the UNICEF Administration has even admitted that they had insufficient evidence.

22. The Applicant concedes that he should have gone through the appropriate channels in order to rectify his overtime claim forms, and, while accepting responsibility for altering them unilaterally, in the absence of proof that he did not actually work the claimed overtime hours, UNICEF cannot find him guilty of fraud based on a misrepresentation of his hours.

23. UNICEF has incurred no injury or damage: UNICEF has paid him for the overtime hours he actually worked, in accordance with the principle of equal pay for equal work. UNICEF cannot claim that in having paid him for hours he actually worked it has suffered any detriment, injury or damage. In the absence of injury or damage to UNICEF, the Applicant's actions do not amount to fraud.

24. In the alternative, the Applicant submits that in light of UNICEF's inability to prove that he did not work the overtime hours claimed, it must follow that UNICEF has failed to prove that he intentionally misrepresented the hours he had worked.

25. The Tribunal is consequently asked to find that the sanction of demotion and censure in this case is disproportionate and to set it aside.

### **Respondent's case**

26. The Respondent's case is summarized as follows:

27. It is immaterial whether the Applicant worked the additional hours claimed as overtime on the altered form. He altered the number of hours after the authorized official's written approval, which amounts to an intentional misrepresentation of a material fact aimed to induce the Respondent to release

funds the Applicant was not entitled to. This amounts to fraud as defined in Section 4 of UNICEF Executive Directive 2006-009.

28. The Applicant misrepresented the number of hours the authorized official had approved as overtime, with the authorized official's written approval as a condition to the subsequent release of funds in accordance with established procedure.

29. The Applicant's assertion that UNICEF has not suffered injuries or damages as he worked the additional hours claimed as overtime in accordance with the principle of equal pay for equal work is misleading as the release of funds for overtime is contingent upon the authorized official's approval. Without such approval, there is no entitlement to be paid for overtime. It follows that the Applicant's actions would therefore have resulted in injuries or damages to UNICEF had the attempt to defraud not been uncovered. In this connection, the Respondent notes that Section 2.6 of CF/AI/2008-008, which implements (former) Staff Rule 103.12, confirms that overtime work must be authorized in advance.

30. The Respondent concedes that the memorandum dated 19 April 2012 transmitting the impugned decision contains an apparent contradiction in that in paragraph 17 it is stated that it had been established that the Applicant claimed overtime for hours "[he] did not actually work" whilst in paragraph 19 it is stated that there was "not sufficient evidence to provide that [he] did not actually perform the work [he] claimed on the overtime forms". However, it is clear from the terms of paragraph 19 of the memorandum that in adjudicating the Applicant's actions, the Respondent operated on the assumption that the Applicant worked all the hours claimed on the altered forms notwithstanding the absence of the required documentation to support this position.

31. In assessing whether a sanction was proportionate to the misconduct as established, the UNDT held in *Yisma* UNDT/2011/061 (paras. 27, 29 and 40) that it must accord "due deference to the decision-maker" unless the sanction is "manifestly unreasonable, unnecessarily harsh, obviously absurd or flagrantly arbitrary". In the instant case, the Applicant altered the number of hours on four

(4) overtime claim forms after the authorized official's written approval of a different number of hours on the same four (4) overtime claim forms. The Applicant's actions were considered fraudulent and thus amounted to misconduct, which category of actions warrants a dismissal from service, even if the injuries or damage to the Respondent would be, or would have been, minimal.

32. The Applicant was found to have expressed honest remorse and in combination with his record of service and the assumption that he worked all the additional hours claimed on the altered forms, it was determined that his actions did not warrant dismissal from service and that a combined sanction of a written censure and a demotion of one grade was an appropriate and proportionate sanction for his actions.

33. The Respondent notes that UNICEF is not bound by the practices adopted in the United Nations Secretariat as the discretion to impose sanctions on staff members of UNICEF rests with the Executive Director of UNICEF. An overview of the sanctions imposed within UNICEF during the period 31 July 2010 – 31 December 2011 demonstrates that the combined sanction cannot be said to have been disproportionate to the established misconduct, without prejudice to the aggravating and mitigating circumstances of those other cases.

34. The evidence demonstrates that the Applicant engaged in fraudulent actions that amount to misconduct. In determining the appropriate sanction, UNICEF took into account mitigating circumstances and concluded that in accordance with its practice in similar cases a combined sanction of a written censure and a demotion of one grade was an appropriate and proportionate sanction for the established misconduct.

### **Issues for determination**

35. Having reviewed the entire case record, the Tribunal finds that the following legal issues arise for consideration in this case:

- a. Whether the facts on which the disciplinary case was based have been established;
- b. Whether the established facts legally amount to misconduct under the Staff Regulations and Rules; and
- c. Whether the sanction is proportionate to the offence

### **Consideration**

*Whether the facts on which the disciplinary case was based have been established*

36. The following facts are not disputed:

- a. The Applicant worked on Saturday, 1 October 2011, Sunday, 2 October 2011, Saturday, 15 October 2011 and Sunday, 16 October 2011 and submitted his claims for overtime to Mr. Onyango for approval. He subsequently altered the number of hours on the overtime claim after they were approved.
- b. When he was interviewed on 6 January 2012 by OIA, the Applicant admitted that he altered the number of hours on two overtime claim forms which he submitted between February 2011 and October 2011 without the written approval of his supervisor

37. The Tribunal finds that the facts on which the disciplinary case was based are established as they are not disputed.

*Whether the established facts legally amount to misconduct under the Staff Regulations and Rules*

38. Staff regulation 1.2(b) states that:

Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is



not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

39. Staff rule 10.1 stated in part:<sup>1</sup>

**Misconduct**

(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 misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct...

(c) The decision to launch an investigation into allegations of misconduct, to institute a disciplinary process and to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority.

40. The UNICEF Executive Directive 2006-009 defines “fraud” as follows:

**Section 4**

Fraud means the actual or attempted use of deceit, falsehood or dishonest means to secure direct or indirect financial or material gain, personal advantage or other benefit...Fraud can also include falsely claiming entitlement to financial benefits or allowances under the UN Staff regulations and Rules.

41. The Applicant submitted that in making alterations to the two overtime claim forms he did not intend to misrepresent his overtime hours because the alterations he made only reflected the overtime hours he had actually worked. He further submits that simply making the unauthorized alterations did not, in and of itself, amount to fraud.

42. The Respondent submitted that it is immaterial whether the Applicant worked the additional hours claimed as overtime on the altered form and that what is important is the fact that the Applicant altered the number of hours after the authorized official’s written approval which amounts to an intentional misrepresentation of a material fact aimed at inducing the Respondent to release funds the Applicant was not entitled to.

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<sup>1</sup> ST/SGB/2009/7.

43. It is the considered view of the Tribunal that the Applicant's submission that the alterations made were not intended to misrepresent the overtime hours he had worked does not diminish his responsibility for making the alteration without informing his first reporting officer as defined in Section 1.5 (a) of UNICEF Executive Directive 2006-009.

44. The acts of the Applicant amounted to inexcusable alteration of official documents and material misrepresentation of facts.

45. In the circumstances the Tribunal finds and holds that there is clear and convincing evidence that the acts of the Applicant amounted to misconduct.

*Whether the sanction is proportionate to the offence*

46. The Applicant submits that he obtained no unlawful gain from his actions and that he had no intention to defraud the Organization or to obtain financial gain to which he was not entitled. He further submits that he was only trying to ensure that he was paid for the hours that he had actually worked and as such the sanctions of demotion and censure are disproportionate and should be set aside.

47. The Respondent, on the other hand, submits that the Applicant's actions were considered fraudulent and thus amounted to misconduct, which category of actions warrants a dismissal from service, even if the injuries or damage to the Respondent would be, or would have been, minimal. The Applicant was found to have expressed honest remorse and in combination with his record of service and the assumption that he did work all the additional hours claimed on the altered forms, it was determined that his actions did not warrant a dismissal from service and that a combined sanction of a written censure and a demotion of one grade was an appropriate and proportionate reaction to the Applicant's actions.

48. As stated in *Sanwidi* UNDT/2012/169 the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is found to be excessive.

49. The Tribunal disagrees with the Applicant's arguments that the sanction of demotion and censure was unfair and disproportionate.

**Conclusion**

50. The Application is dismissed in its entirety

51. The Tribunal finds that the said Application is an abuse of court process and accordingly imposes costs on the Applicant in the sum of 300 USD.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 28 day of November 2013

Entered in the Register on this 28 day of November 2013

*(Signed)*

Abena Kwakye-Berko, Acting Registrar, Nairobi