



United Nations Dispute Tribunal

Case No.: UNDT/NBI/2015/088

Judgment No.: UNDT/2019/045

Date: 25 March 2019

Original: English

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**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

MOHAMED

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Brandon Gardner, OSLA

**Counsel for the Respondent:**

Miles Hastie, UNICEF

Bart Willemsen, UNICEF

## **INTRODUCTION**

1. The Applicant, a former staff member of the United Nations Children’s Fund (UNICEF), is contesting the Administration’s decision to “coerce” him into submitting a resignation letter.

2. At the time of the Contested Decision, the Applicant was serving in Garowe, Puntland, Somalia, as a Local Security Assistant (LSA) at the GS-6 level.

## **PROCEDURAL HISTORY**

3. The Applicant, acting for himself, filed an application against UNICEF’s decision to accept his resignation, which he claimed was coerced, with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi on 12 August 2015. The application was served on the Respondent on 13 August 2015 and on 27 August 2015; the Respondent filed a motion requesting that the Tribunal consider the receivability of the application as a preliminary issue.

4. The Respondent filed his Reply to the application on 14 September 2015. The Applicant filed a response to the Reply and the Respondent’s motion of 27 August on 6 October 2015.

5. At a case management discussion held on 6 October 2016, the Tribunal advised the Applicant to seek professional legal advice from the Office of Staff Legal Assistance to enable him to better conduct his case.

6. The Tribunal held another case management discussion on 1 December 2016, which was attended by Applicant’s counsel from OSLA and Respondent’s counsel. The Tribunal granted the Applicant an extension of time to amend his pleadings and his submissions on receivability.

7. The Applicant filed his amended Application on 30 January 2017 contesting the Administration’s decision to “coerce” him into submitting a resignation letter. The Respondent filed his amended Reply on 21 February 2017.

8. On 14 March 2017, the Applicant filed a motion seeking disclosure of the audio recording related to Annex 11 of the Respondent's submissions. The Respondent filed a response to the Applicant's motion for disclosure on 16 March 2016. The Tribunal subsequently refused the Applicant's motion because the Applicant could give evidence during the hearing to challenge parts of the transcript of the audio recording.

9. The Tribunal heard the matter on 28 and 29 March 2017. The Applicant gave evidence on his behalf while Messrs. Steven Lauwerier, UNICEF Representative in the Somalia Country Office, Barry Gibson, former UNICEF Senior Security Advisor in Somalia, and Imran Mirza, former member of the UNICEF Appointment and Placement Committee, gave evidence on behalf of the Respondent.

10. The parties filed their closing submissions on 28 April 2017.

#### **FINDINGS OF FACT**

11. It must be stated from the onset that the events that led to the separation of the Applicant from the Organization are not disputed. Rather, the Applicant claims that the manner in which he was made to leave amounted to an ambush and a coerced resignation and that it lacked fairness and transparency and that his due process rights were breached.

12. The Tribunal finds the following facts established based on the oral and documentary evidence before it and the submissions of the parties:

- a. Between 15 April 1987 and 20 May 2002, (a period of 15 years) the Applicant was imprisoned at Woodbourne Correctional Facility in New York State, United States of America, following a conviction on charges of rape in the first degree; unlawful imprisonment in the first degree; burglary in the second degree and assault in the second degree.<sup>1</sup>

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<sup>1</sup> Hearing bundle, pages 120 – 128.

b. In July 2009, the UNICEF Somalia office advertised several Local Security Assistant posts in Somalia, including one in Bossaso in the North-East Zone.<sup>2</sup> The Applicant applied for the post in Bossaso and after a written and oral assessment, was recommended for selection by UNICEF's Selection and Advisory Committee (SAC) on 16 September 2009.

c. The SAC minutes include a list and descriptions of the educational qualifications that the Applicant claimed in his curriculum vitae to have obtained which included: (i) a Bachelor's degree in behavioral science and a minor in counseling and group therapy; (ii) an advanced certificate in legal research; (iii) a diploma in legal research; (iv) a certificate in counseling and (v) training in peer education and counseling.

d. The Applicant's work experience was listed from the said curriculum vitae as including: (i) security guard with Wells Fargo in New York from 1989 -1991, (ii) legal clerk with a New York law firm from 1991-1997 and (iii) sales supervisor for a Dubai jewelry shop from 2001- 2004; etc.<sup>3</sup>

e. Based on these claims, the UNICEF Appointment and Placement Committee (APC) endorsed the SAC's recommendation between 29 September and 2 October 2009. The UNICEF Country Representative approved the APC's endorsement on 12 October 2009<sup>4</sup> and the Applicant was recruited.

f. The Applicant then entered service with UNICEF Somalia in Garowe, Somalia on 18 November 2009.

g. On 28 September 2012, the Human Resources office of UNICEF Somalia informed the Applicant that essential documents including his P-11 form were missing from his staff file. He was therefore asked to complete and submit them.<sup>5</sup> There is no documentary evidence that the Applicant ever

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<sup>2</sup> *Ibid*, pages 107 and 166.

<sup>3</sup> *Ibid*, page 108.

<sup>4</sup> *Ibid*, page 111.

<sup>5</sup> *Ibid*, page 93.

submitted a P-11 form during the recruitment exercise in 2009<sup>6</sup> or in 2012 in response to the request from Human Resources.

h. Mr. David Cowey joined UNICEF Somalia as a Field Security Adviser in June 2013 and became the Applicant's First Reporting Officer. Mr. Cowey's duty station changed from Bossaso, Somalia, to Garowe, Somalia, in October 2013.

i. In September 2012, Mr. Barry Gibson had become UNICEF Somalia's Senior Security Advisor and was one of Mr. Cowey's supervisors. Mr. Gibson's duty station changed from Nairobi, Kenya, to Mogadishu, Somalia, in 2014.

j. Between February and April 2014, the Applicant and his supervisors, Mr. Cowey, Mr. Barry Gibson and Ms. Marianne Clark-Hattingh, the Applicant's Second Reporting Officer and Chief of Field Office, Garowe, UNICEF Somalia, had disagreements about various security and administrative issues, including UNICEF's decision to transport staff members in Garowe in soft skin buses instead of armored vehicles.<sup>7</sup>

k. In March 2014, Mr. Cowey assessed the Applicant's performance for September – December 2013 as “developing proficiency” on his Performance Evaluation Review (PER). Mr. Cowey also recommended the implementation of a Performance Improvement Plan (PIP) and for the Applicant's contract to be extended for six months pending further assessment. The PIP and the recommendation for a six-month contract extension were endorsed by Ms. Clark-Hattingh.<sup>8</sup> After the PIP period, in October 2014, the Applicant's contract was extended for one year.

l. Mr. Steven Lauwerier joined the Somalia Country Office as the UNICEF Country Representative in September 2014.

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<sup>6</sup> *Ibid*, page 169.

<sup>7</sup> *Ibid*, pages 112-115.

<sup>8</sup> Initial application, annexes 11 and 13.

m. In late 2014, Mr. Gibson, Mr. Lauwerier and Ms. Laila Pakkala who was UNICEF Regional Director, reported their concerns of possible misconduct by the Applicant to UNICEF's Office of Internal Audit and Investigation (OIAI).

n. Following a preliminary investigation in late 2014, OIAI informed Messrs. Lauwerier and Gibson and other senior managers that there were indications that the Applicant had a criminal record and had falsified his academic and professional credentials.

o. OIAI provided the senior managers with copies of the following documents: (i) an inmate information sheet for "Mohamed, Guled" from the website of the New York State Department of Corrections and Community Supervision; (ii) the Applicant's curriculum vitae; a signed UNICEF P.11 form for the Applicant with a 10 July 2014 date; (iii) a letter from New York City Commission on Human Rights stating that it had no employment record for the Applicant; (iv) an email from the State University of New York stating that it had no attendance record for the Applicant; a degree verification certificate from Mercy College confirming the Applicant's attendance; (v) and a photograph of the Applicant from the New York State sex offender registry.<sup>9</sup>

p. According to Mr. Lauwerier, after consultations with OIAI and the UNICEF Regional Director about the significant security implications associated with how the matter was addressed, he instructed Mr. Gibson to question the Applicant about his background.<sup>10</sup>

q. In early January 2015, Mr. Gibson, the UNICEF Senior Security Advisor, sent the Applicant an email asking him to travel to Nairobi for "routine background vetting". Mr. Gibson explained that this was a routine procedure requested by UNICEF headquarters in New York. Mr. Gibson asked the Applicant to bring background documentation for the vetting

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<sup>9</sup> Hearing bundle, pages 159 & 167.

<sup>10</sup> *Ibid*, page 167.

process but the Applicant did not comply with this request because he claimed his documents had ended up in another location on the UN flight. The venue was subsequently changed from Nairobi to Mogadishu, Somalia.

r. The Applicant met with Mr. Gibson in Mogadishu on 16 January 2015. The routine background vetting turned out to be a 2-hour long interview about the Applicant's academic credentials, work experience and criminal record. The interview was recorded by Mr. Gibson without the Applicant's knowledge. Another UNICEF staff member, Giorgio Figus, was present initially, but asked by the Applicant to leave when questions arose about his incarceration.<sup>11</sup> According to Mr. Gibson, he had contemporaneously typed the transcript that was submitted by the Respondent as the Applicant answered his questions.<sup>12</sup>

s. Mr. Gibson confronted the Applicant with the discrepancies in his academic and professional credentials and the Applicant sought to provide explanations. The Applicant claimed that he had been wrongly convicted and imprisoned for a crime he did not commit.

t. At the conclusion of the interview, Mr. Gibson told the Applicant that he had two options which were that he could resign and that if he did not, UNICEF would dismiss him. Mr. Gibson made it clear to the Applicant that it would be easier for him in the long-term if he resigned and sought employment elsewhere.<sup>13</sup> He gave the Applicant the opportunity to discuss the matter with his family and friends and return later with a decision.

u. The Applicant met again with Mr. Gibson at approximately 09:00hrs on 17 January 2015. At some point during the meeting, Mr. Gibson drafted a brief note in longhand that contained text the Applicant was to use in his resignation letter.<sup>14</sup> In Mr. Gibson's presence, the Applicant wrote and

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<sup>11</sup> Transcript of 28 March 2017, pages 24-26.

<sup>12</sup> *Ibid*, page 45.

<sup>13</sup> *Ibid*, page 49.

<sup>14</sup> *Ibid*, page 147.

signed another one in longhand that stated he had not been coerced into resigning.<sup>15</sup>

v. At 12:41 hours on 17 January 2015, the Applicant sent an email to Mr. Lauwerier informing him of his decision to resign for personal reasons and requesting approval to take 30 days' annual leave "before friendly departure".<sup>16</sup> Mr. Lauwerier acknowledged receipt of the Applicant's email and accepted his resignation by email dated 18 January 2015.

w. By a memorandum dated 19 January 2015, the Head of Human Resources, UNICEF Somalia, provided the Applicant with detailed administrative procedures and information concerning his entitlements upon his separation from UNICEF on 17 February 2015.

x. By a memorandum dated 21 January 2015, Mr. Lauwerier acknowledged receipt of and accepted the Applicant's resignation, effective 17 February 2015.

y. The Applicant was separated from service on 17 February 2015.

z. Thereafter, on 18 March 2015, the Applicant filed a Management Evaluation Request (MER) of the decision by UNICEF to accept his resignation. He alleged in his MER that he had been coerced by Mr. Gibson to tender his resignation.

aa. In a management evaluation response dated 10 May 2015, Mr. Martin Mogwanja, Deputy Executive Director, UNICEF, affirmed the decision to accept the Applicant's resignation and informed him of the decision to pay him an amount equivalent to what he would have been paid had his appointment been terminated. Accordingly, UNICEF paid the Applicant, *inter alia*: (i) his salary and allowances for a period of 30 calendar days in lieu of notice, in accordance with United Nations staff rule

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<sup>15</sup> Transcript of 28 March 2017, page 27.

<sup>16</sup> Hearing bundle, page 149.



9.7(b); and (ii) three months' gross salary as a termination indemnity, in accordance with staff rule 9.8.

## **CONSIDERATIONS**

13. The legal issues arising for consideration in this case are:

- a. Is the application receivable?
- b. Was UNICEF aware of the misrepresentations in the Applicant's personal history of age, educational background, employment background and criminal record on 16 September 2009 when he was recommended for recruitment and if so, should this have estopped it from initiating a preliminary investigation in January 2015?
- c. Did UNICEF follow proper procedures when it allowed the Senior Security Advisor for UNICEF Somalia to question the Applicant on 15 January 2015 instead of initiating a disciplinary process under CF/EXD/2012-005 (Disciplinary process and measures) or termination under Staff Rule 9.6(c) (v)?
- d. Should the Applicant be granted the remedies he seeks?

### ***Is the application receivable?***

14. The Respondent submits that the application is not receivable because:

- a. The Applicant is contesting an administrative decision to allegedly "coerce" him into submitting a resignation letter. The alleged coercion supposedly took place on 16 January 2015. The Applicant requested management evaluation on 18 March 2015, which was outside the 60-day delay set out in staff rule 11.2(c).
- b. There is no administrative decision under article 2.1 of the UNDT Statute in UNICEF's acceptance of the Applicant's resignation letter. Resignation itself cannot be challenged as an administrative decision as it is

an action by a staff member and not a unilateral decision by the Administration.

c. The Applicant filed his application to the UNDT on 12 August 2015, which was outside the 90-day delay set out in art. 8.1(d) (i) (a) of the UNDT Statute. Additionally, the Applicant did not file for an extension of time to file his application either before the deadline or before the UNDT application was filed.

d. The application is moot because UNICEF, by way of its management evaluation, gave the Applicant the benefits associated with a “facts anterior” termination.

15. The Applicant submits that the application is receivable because:

a. Although the Applicant’s deadline for filing his application with the Tribunal was 10 August 2015 and he attempted to file his application by way of the Tribunal’s e-Filing portal (CCMS) on 6 August 2015, he was not successful due to technical issues with CCMS. He was in regular email communication with the CCMS technical support team (CCMS Support) until he finally filed his application on 12 August 2015.

b. The communications from CCMS Support acknowledging his attempted e-filing on 6, 7 and 10 August 2015 constitute constructive receipt of the application on behalf of the Tribunal since CCMS is tasked with assisting the Tribunal’s Registries with the filing of documents.

c. The United Nations Appeals Tribunal (UNAT/the Appeals Tribunal) has acknowledged that technical delays brought to its attention may warrant an extension or waiver of time, especially if accompanied by evidence of those delays, such as correspondence with CCMS Support.<sup>17</sup>

d. There was an administrative decision because his resignation was not voluntary and should therefore not have been accepted by UNICEF.

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<sup>17</sup> *McClusky* UNAT/2013/332 and *Balan* Order No. 163 (UNAT/2013).

16. There is agreement between the parties that the meeting at which the Applicant alleges he was “coerced” by Mr. Gibson into drafting a resignation, who also gave him a draft resignation letter, took place on 16 January 2015. There is also no dispute that the Applicant waited until the next day, 17 January 2015, to submit a resignation letter to the Country Representative.

17. Since the Applicant is contesting a decision to “coerce him into **submitting** a resignation letter (emphasis added)” which he submitted on 17 January 2015, the Tribunal finds that the deadline for submitting a request for management evaluation started running on 17 January 2015. Consequently, he had until 18 March 2015 to request management evaluation, which he did. The Tribunal finds that the Applicant complied with staff rule 11.2(c).

18. With respect to the Applicant’s adherence to the deadline in art. 8.1(d) (i) (a) of the UNDT Statute, the Respondent provided evidence on 26 August 2015<sup>18</sup> showing that the Applicant received the response to his management evaluation request on 11 May 2015. Thus, the Applicant had until 9 August 2015 to file an application to the Dispute Tribunal. The UNDT Registry in Nairobi received his application on 12 August 2015. He subsequently submitted email correspondence between himself and CCMS Support between 6 and 11 August 2015 regarding the technical difficulties he was having with the e-Filing portal.

19. The Tribunal finds that the Applicant’s situation was similar to the one in *Balan*<sup>19</sup> where delay was occasioned in filing the application due to technical difficulties associated with the e-Filing portal. In *Balan*, the Appeals Tribunal held that delays caused by technical difficulties associated with the e-Filing portal warrant an extension or waiver of time, especially if supported by evidence (e.g. production of delivery failure messages or correspondence with CCMS Support). The Applicant has supported his claim of exceptional circumstances with evidence that the Tribunal finds satisfactory. The Tribunal therefore deems the application as properly and validly filed.

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<sup>18</sup> Annex A to the Respondent’s motion to consider receivability *ratione temporis* as a preliminary issue and to suspend the deadline for the Respondent to submit his reply on the merits.

<sup>19</sup> Order No. 163 (UNAT/2013).

20. Lastly, the Tribunal will examine the Respondent's assertion that the application is not receivable because there was no administrative decision under article 2.1 of the UNDT Statute. The Respondent submits that a staff member's resignation cannot be challenged as an administrative decision as it is an action by the staff member and not a unilateral decision by the Administration. For reasons set out below, the Tribunal finds that the Applicant contests an administrative decision within the meaning of article 2.1 of the UNDT Statute.

21. It has been previously stated that the facts in this case relating to how the Applicant tendered his resignation are not in dispute. It is not contested that late in 2014 after preliminary investigations into alleged misconduct by the Applicant and rumors concerning his criminal record, the OIAI uncovered certain serious and concerning facts which could have affected his recruitment if known to UNICEF and its senior managers in Somalia when the Applicant joined UNICEF in November 2009 as a Local Security Assistant.

22. The concerning facts that came to light included a previous undisclosed conviction and incarceration of the Applicant for rape and other violent offences in the United States and the falsification of academic and professional credentials by him. There is evidence that consultations were held in this regard between the OIAI, the Regional Director and other senior UNICEF managers in Somalia as to how to deal with the issue without endangering the security of staff in the war-torn country which was prone to violence.

23. With advice from the OIAI, the Regional Director and the Country Representative mandated the Senior Security Advisor, Mr. Gibson, who was based in Mogadishu to meet with the Applicant and to confront him with what had been uncovered about him. Mr. Gibson decided to do so outside of the Applicant's duty station of Garowe, Puntland.

24. A meeting to which the Applicant was invited by Mr. Gibson in Nairobi for what was termed "routine background vetting" was aborted because the Applicant did not bring any documentation. The meeting was then rescheduled to Mogadishu for 16 and 17 January 2015. At the meeting of 16 January 2015 which was recorded, the Applicant was confronted with facts pertaining to his previous conviction and

incarceration and the falsification of several academic qualifications and previous jobs in his curriculum vitae.

25. When late into the interview, the Applicant finally admitted the facts of his previous conviction and incarceration and the falsification of his some of his qualifications and employment record and sought Mr. Gibson's cooperation to cover it up; Mr. Gibson told him that he would not be part of a cover-up and that he would recommend his dismissal. After further discussion the next day, he drafted a resignation letter for the Applicant. The Applicant tendered his resignation to the UNICEF Country Representative in a hand-written letter and by email on 17 January 2015.

26. After a review of the transcript of the meeting between Mr. Gibson and the Applicant on 16 January 2015 and the circumstances leading to the said meeting, the Tribunal is not in any doubt that when the Senior Security Advisor told the Applicant that he would recommend his dismissal, it was an invitation to take the soft landing of resignation. He was also indirectly conveying the yet unspoken **decision** of the senior UNICEF managers in Somalia that because of the false claims and undisclosed felonious conviction and incarceration regarding the Applicant, he could not be expected to continue in the services of UNICEF.

27. The crux of the Applicant's case is that he was badgered, threatened and harassed and then coerced into resigning his position by Mr. Gibson. In his sworn oral testimony, the Applicant told the Tribunal that after threatening him, Mr. Gibson gave him a hand-written draft resignation letter which he told him to copy in tendering his resignation. The transcript of the meeting between the Applicant and Mr. Gibson does not disclose any form of coercion. The Tribunal heard the Applicant's sworn testimony and finds that he was not coerced, threatened or harassed in any way into tendering his resignation to UNICEF. The Applicant clearly understood that a resignation would spare him an embarrassing need to respond to charges of misconduct and a likely dismissal from service.

28. As to whether the apparent resignation of the Applicant was instigated by the action of Mr. Gibson, this cannot be denied. As already stated, the Applicant understood that he would have an easier passage out of the Organization if he

tendered a resignation based on “personal reasons.” It does not serve any useful purpose to engage in an academic exercise to examine the meaning of “resignation” under the Staff Rules and whether it is a process “initiated by a staff member” in order to determine whether there is in fact an administrative decision which the Applicant is contesting in this case. To the extent that the resignation of the Applicant was instigated by the Respondent or his agents, it was in fact, an administrative decision capable of being challenged.

***Was UNICEF aware of the misrepresentations in the Applicant’s personal history of age, educational background, employment background and criminal record on 16 September 2009 when he was recommended for recruitment and if so, should this have estopped it from initiating a preliminary investigation in January 2015?***

29. In his amended pleadings, the Applicant stated that in October 2009 when he originally applied for a Local Security Officer position, he submitted a P-11 form in which information was requested about his possible criminal background. He stated that in response to question 32 in the said form as to whether he had ever been arrested, convicted, fined or imprisoned for the violation of any law, he marked the box “yes” and underneath wrote “will provide particulars upon request.” The Applicant tendered his Annex A in support of this pleading.

30. The Applicant continued that on 28 September 2012 whilst in UNICEF’s employment, he received an email from UNICEF HR asking him to submit a P-11 form and other documents for his personnel file. The Applicant stated that he resubmitted a copy of the previous P-11 form that he had initially submitted in October 2009 which included the information that he had a criminal background. He tendered his Annex B as the P11 form he claimed he had resubmitted in 2012.

31. In pleadings and through his witnesses, the Respondent has maintained that the Applicant did not disclose his criminal conviction and did not submit any P-11 forms to the Respondent in 2009 and 2012 and put the Applicant to strict proof of the submission of his Annexes A and B and his criminal and employment history. He pled that the Applicant submitted false personal history information in his CV

regarding his date of birth, the educational institutions he attended, certificates he obtained and employment history.

32. In support of his pleadings, the Respondent tendered several documents including the P-11 form which the Applicant had completed and submitted to UNICEF on 10 July 2014 in support of a renewal of his contract, a CV provided by the Applicant before his recruitment by UNICEF in September 2009, minutes of its Selection and Advisory Committee which recommended the Applicant for employment in September 2009 and another P-11 form provided by the Applicant to the Food and Agricultural Organization (FAO) while applying for another position.

33. Regarding the Applicant's claim that the Respondent was aware of his background and criminal record in 2009 when he was recruited as a Local Security Assistant, the Tribunal will now review the evidence placed before it in order to determine whether this claim has been established and proven.

34. One Nicholas Koskei, a Senior Operations Assistant with UNICEF made a witness statement dated 23 March 2017 for the purposes of this case and in support of the Respondent's case. He stated that in March 2017 he was tasked with retrieving the personnel file (official status file) of the Applicant and all documents relating to the Applicant and his recruitment in the files of the Somalia Country Office's Nairobi desk.

35. He continued that the documents he retrieved included: (a) The Applicant's curriculum vitae (CV) tendered as Amended Reply Annex 2, (b) the minutes of UNICEF's Selection and Advisory Committee dated 16 September 2009 and tendered as Koskei Annex 2 in which the Applicant was evaluated with another candidate and recommended for recruitment. From the Applicant's personnel file in Garowe, he retrieved one signed P-11 form dated 10 July 2014 and tendered as Koskei Annex 3. He stated that the Applicant's Annexes A and B to the Amended Application were not among documents in the Applicant's personnel files in either Nairobi or Garowe.

36. The Tribunal has examined the Applicant's CV. Regarding his education, he claimed to have attended four post-high school institutions in the United States and to have obtained a diploma and degrees from them. The CV states that between June 1990 and 1992, the Applicant studied at the Southern Institute of Florida and obtained a degree in Advanced Legal Research; in May 1992, he obtained a degree in Social Science from Ulster Community College, New York; in May 1994, he obtained a Legal Research Diploma from Albany Legal Research, New York and in May 1997, he then added a Bachelor's degree in Behavioral Science with a Minor in Psychology in Counseling and Group Therapy from Mercy College, New York, USA to his academic achievements.

37. A response by email to enquiries made by the OIAI to Ulster College, State University of New York (SUNY) on 14 November 2014 informed that the Applicant did not attend the college. In answer to a question in cross-examination, the Applicant suggested that Ulster Community College may have lost some of its records if it could not find his name and said he could send his original certificate from the College to the Tribunal. When Mr. Gibson asked the Applicant at their meeting on 16 January 2015 whether he had original his certificate from Ulster, he responded that he didn't and that the college would have it. The Applicant never sent his promised Ulster College certificate to the Tribunal.

38. When Mr. Gibson put it to the Applicant during their meeting that the Albany Legal Research and Southern Florida Institute which he claimed to have obtained certificates from were fictitious colleges and did not exist, the Applicant said he studied at those institutions by correspondence and that he had the certificates in his luggage. Under cross-examination, it was again put to him that the two institutions did not exist but the Applicant's answer was that at the time he studied in them, they existed. He never tendered the certificates.

39. It was however confirmed that the Applicant obtained the degree in Behavioral Science at Mercy College of SUNY in August 1997 while he was an inmate at Woodbourne Correctional Facility in New York State.

40. With regard to information concerning his employment background, the Applicant stated in his CV that from February 1989 to March 1991, he worked as a



security guard at Wells Fargo Security Service in New York; from April 1991 to March 1997, he was a legal clerk in Harry C. Batchelor Legal Firm in New York; and from January 1998 to February 2001, he worked as a Human Resources Officer at the New York State Department of Labor. All this information was found to be false especially since he was incarcerated for about sixteen years covering those years he claimed to be employed.

41. It was found also that at different times, the Applicant had used different dates of birth in different documents. In his CV and the signed P-11 form dated 10 July 2014; his date of birth was stated to be 24 October 1968 while in a P-11 form prepared for the FAO it was given as 24 October 1972. In the P-11 forms (Annexes A and B) tendered by the Applicant, his date of birth was stated to be 1965 while in the official prisons record in New York where he was incarcerated, it was 1963. In his meeting with Mr. Gibson, the Applicant admitted that 1963 is his correct year of birth. He also admitted in cross-examination that his correct year of birth is 1963.

42. The Tribunal here turns its attention to the Applicant's claim that he had provided a P-11, his Annex A to the Respondent in 2009 when he was first appointed as Local Security Assistant and at question 32 had checked the box "YES" to disclose his criminal conviction. Even considering this claim to be true, a review of the Applicant's Annex A shows that the Applicant gave his year of birth to be 1965 in that document. He also omitted one page of the P-11 form containing questions 24, 25, 26 and 27. The first three questions on that page required that he provide the names of educational institutions attended and the years spent at the institutions. These schools were therefore not provided in Annex A.

43. With regard to the crucial question 32 on the P-11 form, it reads as follows: "HAVE YOU EVER BEEN ARRESTED, INDICTED OR SUMMONED INTO COURT AS A DEFENDANT IN A CRIMINAL PROCEEDING, OR CONVICTED, FINED, OR IMPRISONED FOR THE VIOLATION OF ANY LAW (excluding minor traffic violations)? There were two boxes after this question. Beside the first box was written "YES" and beside the second box was the word "NO." On Annex A, the first box "YES" was checked. Question 32

continued, “If ‘yes’, give full particulars of each case in an attached statement.” The response stated on Annex A is, “Will provide the details upon request.”

44. Question 33 of the P-11 form is the certification part of the document and states “I certify that the statements made by me in answer to the foregoing questions are true, complete and correct to the best of my knowledge and belief. I understand that any misrepresentations or material omission made on a Personal History form or other document requested by the Organization renders a staff member of the United Nations liable to termination or dismissal.” The Applicant signed under this certification clause and dated the document “October 2009.”

45. It must be underscored that the Respondent tendered the UNICEF HR email dated 28 September 2012<sup>20</sup> to the Applicant. The said email informed him that a review of his staff files showed that certain essential documents were missing. It then requested that the Applicant complete and send his P-11 form, marriage certificate, copy of his valid national passport and advanced security certificates. It was in response to this email that the Applicant claimed he resubmitted his P-11<sup>21</sup> in 2012. The Applicant is however unable to exhibit any email from him to UNICEF HR submitting the P-11 or any email from UNICEF HR acknowledging receipt of Annex B.

46. Even if the Tribunal were to accept that the Applicant had provided his Annex A to the Respondent in 2009 and the identical Annex B in 2012, he had clearly not provided the full particulars of his conviction and imprisonment in an attached statement as required of him. The response he claims he gave to question 32 which is: “will provide the details upon request”, falls far short of what he was required to do. In the same document, he misrepresented his date of birth as 1968 rather than 1963, as he had told the Tribunal, and he did not fill out the questions regarding his educational background. He did not put a date on the document since October 2009 does not show the day he signed the form.

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<sup>20</sup> Annex 6

<sup>21</sup> Annex B

47. During cross-examination, the Respondent's counsel pointed out to the Applicant that his identical Annexes A and B which he claimed to have submitted in 2009 and 2012 to UNICEF did not have the pages with questions 24, 25, 26 and 27 in which his academic background was to be stated. Counsel also asked the Applicant if his criminal background was common knowledge at UNICEF. While he had no answer as to why the page with questions concerning the academic institutions he attended was missing, the Applicant's response was that his criminal conviction was not a big issue for UNICEF even though there was no documentation concerning it.

48. He continued that his hiring manager knew about it and told him during discussions that everyone deserved a second chance. He stated also that when Mr. Gibson first joined UNICEF, they used to discuss his prison experience and Mr. Gibson's police life in the United Kingdom together. He added that even Ms. Hattingh-Clark knew about his previous conviction and he told them that he was innocent and did not commit any crime although he underwent incarceration.

49. The minutes of the UNICEF Selection and Advisory Committee meeting on 16 September 2009 at which the Applicant was unanimously recommended for appointment shows that the Applicant and another candidate were reviewed for selection. In that review, the Committee summarized the Applicant's educational background and work experience as presented in his CV. No mention was made of his previous criminal conviction. It is not in any doubt that the Committee took the information submitted by the Applicant at face value.

50. In answer to the question as to whether UNICEF knew of the Applicant's previous conviction before he was recruited, the Tribunal finds that the evidence is crystal-clear that contrary to the claims of the Applicant, UNICEF was not aware of it. Even if it is to be believed that the Applicant submitted the P-11 form, Annex A as he claims, that document was dated October 2009 and was not submitted to UNICEF by 16 September 2009 when recommendation was made for his recruitment following an oral interview which took place earlier that month. The Applicant told the Tribunal in answer to a question in cross-examination that

UNICEF would not shortlist any candidate before it had that candidate's P-11 and CV.

51. There was only one P-11 form for the Applicant in his official personnel file in Garowe dated 10 July 2014 and signed by him. In answer to question 32 regarding any previous conviction and the details of such convictions, the answer provided on that P-11 form is "NO," thus denying any previous conviction. Also, in his CV, the Applicant falsely claimed that he was variously employed as a Human Resources Officer, a Security Guard and a Legal Clerk during the period of his incarceration.

52. The Tribunal does not believe the Applicant's explanation during cross-examination that the P-11 form dated 10 July 2014 was made by him for training purposes. When during their meeting on 16 January 2015, Mr. Gibson showed him the said P-11 as one he had submitted for his extension of contract in 2014, the Applicant acknowledged it. Even if it were to be believed that Annex A was submitted by him to UNICEF in 2009, the misrepresentations and material omissions on that form rendered the Applicant liable to termination or dismissal.

53. The Applicant is an inveterate liar and has consistently lied on oath throughout his testimony before the Tribunal. His pleadings are riddled with lies. His CV is a study in falsehood. His Annexes A and B are clearly forgeries made for the purposes of this case. His claims that his superiors at UNICEF always knew that he was a convicted felon and told him he was entitled to a second chance is the stuff of fiction. There is no doubt that this Application is one last gamble by a thoroughly dishonest man at getting whatever money he can from an Agency that somehow failed in its due diligence duties before employing him.

54. This Tribunal finds and holds that there is no proof that UNICEF was aware of the Applicant's misrepresentations concerning his personal history, his education, work experiences and criminal conviction at the time of the decision to appoint him a Local Security Officer in 2009.

*Did UNICEF follow proper procedure in mandating its Senior Security Advisor to question the Applicant on 15 January 2015 rather than initiate a disciplinary process under CF/EXD/2012-005 (Disciplinary process and measures) or termination under Staff Rule 9.6(c)(v)?*

55. It was submitted on behalf of the Applicant that if the Respondent had clear and convincing evidence that the Applicant had withheld information related to his criminal background, he should have terminated him pursuant to the facts anterior clause of the Staff Rules. It was his case that the decision to terminate the Applicant based on facts anterior must be premised on clear and convincing evidence after instituting disciplinary proceedings against him. In support of his submission, the Applicant's counsel cited the UNDT decision in *D'Hooge*,<sup>22</sup> where it was held that due process rights attach to staff members who are alleged to have withheld facts anterior.

56. The Respondent for his part argued that the Applicant had received the benefits of a facts anterior separation and that the obligation to establish the facts of the Applicant's misrepresentations and omissions to the standard of clear and convincing evidence apply only in situations where an investigation is required. He continued that in all other cases, the burden lies upon the Applicant to demonstrate illegality.

57. Staff rule 9.6, which relates to termination, provides in relevant part:

**Definitions**

- (a) A termination within the meaning of the Staff Regulations and Staff Rules is a separation from service initiated by the Secretary-General.
- (b) Separation as a result of resignation, abandonment of post, expiration of appointment, retirement or death shall not be regarded as a termination within the meaning of the Staff Rules.

**Reasons for termination**

58. Under Staff Rule 9.6(c), the Secretary-General may terminate any staff member for any of the reasons enumerated under the subsection including:

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<sup>22</sup> UNDT/2010/044

(v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter of the United Nations, have precluded his or her appointment;

59. In other words, a staff member may be terminated when he/she fails to disclose relevant facts that existed prior to his/her appointment and which facts, if known, would have precluded that staff member's appointment.

59. Staff Regulation 9.3(c) provides for the payment of an indemnity and giving of notice in those instances where the Secretary-General terminates the appointment of a staff member.

60. CF/EXD/2012/005 is UNICEF's Executive Directive that provides for the Agency's disciplinary processes and measures.

61. Pursuant to section 3.1(a) of CF/EXD/2012/005, the onus is on UNICEF managers to undertake a timely preliminary review upon receipt of allegations of misconduct; section 3.2 explains that the purpose of the preliminary review is to establish basic facts of a matter and to preserve or safeguard basic evidence. It does not normally involve interviewing the subject(s) in the case. Section 3.3 obliges the manager to report his/her findings to OIAI if a preliminary review indicates that misconduct may have occurred. Under section 3.4, OIAI should undertake a preliminary assessment upon receipt of information about possible misconduct.

62. Section 6.4 of CF/EXD/2012/005 explains the authority and role of UNICEF managers in the handling of allegations of misconduct. Section 6.4(d) authorizes UNICEF managers to assist in investigations under the guidance of the Director/OIAI.

63. To what extent did UNICEF comply with its own Executive Directive here? There is evidence that after preliminary investigations in late 2014 into alleged misconduct by the Applicant and into the rumors that he had a criminal record, the OIAI uncovered that the Applicant had misrepresented his personal history, academic qualifications and employment background and had withheld information on a former criminal conviction whilst applying for employment with UNICEF. The Applicant had evidently been recommended and then appointed based on these

misrepresentations as can be gleaned from the minutes of the UNICEF Selection and Advisory Committee of 16 September 2009.

64. Section 3.5 of CF/EXD/2012/005 provides that after its assessment of the evidence gathered during the preliminary review, the OIAI ought to conduct an investigation with the assistance of other staff as appropriate and under section 3.7 should send a copy of the investigation report and related exhibits to the staff member for his comments. In accordance with section 3.8, the OIAI should, based on the investigative findings, forward the investigation dossier, together with the staff member's comment to the Director/DHR to initiate a disciplinary process if the allegations are substantiated.

65. In this case, after the OIAI had conducted investigations into the allegations of misconduct against the Applicant by making inquiries as necessary and obtaining documentary evidence from outside bodies and persons contacted regarding the Applicant's education, previous employments and criminal background, it was further assisted by Mr. Gibson who held the meeting of 16 January 2015 with the Applicant. In the recorded meeting, Mr. Gibson was able to obtain admissions from the Applicant about most of the misrepresentations he had made to UNICEF before his recruitment.

66. The evidence before the Tribunal shows that the next step of sending the investigation dossier with the Applicant's comment to the Director/DHR to issue formal charges to him was truncated by Mr. Gibson suggesting to the Applicant after the admissions he made at their meeting that he was better off resigning because his dismissal was likely. The Applicant then tendered his resignation the very next day after discussions with his family and lawyer. The Tribunal has already found that he was not coerced or under duress when he did so. It needs be underscored that at the time that the Applicant tendered his resignation, he knew he was taking the better of two options.

67. The crux of the issue here is whether UNICEF had breached its own Executive Directive by suggesting resignation to the Applicant and accepting his resignation when he tendered it. The Applicant's case is that UNICEF did not conduct any form of inquiry into alleged irregularities in the Applicant's P-11 form,

had failed to grant him his due process rights and had not acted fairly, justly and transparently.

68. The Tribunal does not accept this claim and finds that UNICEF did not breach its Executive Directive. OIAI duly investigated the Applicant with regard to the false claims in his P-11 of July 2014 and the CV he submitted to UNICEF when he applied for his job and followed it up with the interview in which it was assisted by Mr. Gibson.

69. In choosing the option to avoid a disciplinary process, the Applicant resigned and his resignation was accepted by the Country Director. The said resignation was to take effect thirty days after it was received which was enough time for the Applicant to withdraw it if he felt that his rights had been breached in any way. He was later separated with full entitlements. No duty existed on the part of UNICEF in the face of the Applicant's resignation to continue to the issuing of charges after the resignation was tendered.

70. In the case of *D'Hooge*, the applicant had entered on duty at the P-4 level as Chief of the Protection Coordination Unit (PCU) in the Department of Security and Safety (DSS) in January 2007. Following an anonymous allegation that he was unsuitable for the post due to unprofessional behavior in a previous employment and that he had overstated his academic qualifications, he was placed on special leave with pay during the pendency of an investigation into the allegations.

71. His appointment was later terminated and the reasons given were that he listed his "Police Diploma" as a university degree in his PHP and did not disclose that he was reprimanded when he worked as an investigator at the International Criminal Tribunal for the former Yugoslavia (ICTY). The applicant requested an administrative review of the termination decision on 14 May 2008. He was not given a copy of the investigation report or the material upon which it was based and his suggestions for certain enquiries to be made to vindicate his conduct and character were ignored. The investigation report was later provided him on 6 August 2008 without attachments after his repeated request for the report in June.



72. One of the submissions of the applicant in that case was that his rights were violated because he was not informed of the allegations against him during the investigations and that his due process rights were violated because he was never provided the documents that formed the basis for his termination. The respondent submitted that the applicant was terminated based on non-disclosure of facts anterior such as his previous employment with ICTY, his reprimand there and misrepresentation of his academic qualifications.

73. The Tribunal held that good faith and fair dealing required that the applicant be given an opportunity to respond to any adverse findings of fact and any adverse recommendations before the decision to terminate was made. The Tribunal held further that if decision-making is to be legitimate, it must be rational and that in that instance, it was irrational of the decision-maker not to provide the investigation report or any meaningful particulars to the applicant.

74. The case of *D'Hooge* must be distinguished from the present one. Mr. D'Hooge was never interviewed following the investigation into an anonymous petition against him concerning his previous employment and a degree he claimed to have acquired before he was terminated. The Applicant here was extensively interviewed by Mr. Gibson after the OIAI had amassed documentary evidence that showed he made false claims as to his academic and employment history and did not disclose his previous criminal conviction.

75. The Judge observed in *D'Hooge* that “adverse findings by the decision-maker in large part depended upon facts which were certainly capable of dispute, witnesses many of whom could not be regarded as completely objective, occasionally relying on hearsay and sometimes even hearsay upon hearsay not verified by the investigators, and whose opinions were reported as facts. The report is replete with generalizations and tendentious statements, which frequently beg the question.”

76. On the contrary, in this case, the investigators had obtained documentary evidence of the Applicant’s conviction and incarceration for rape and unlawful imprisonment in the first degree and burglary and assault in the second degree. They also had documentary evidence that the Applicant did not attend three of the

institutions he claimed to have attended and did not obtain any degrees from them. The investigators also obtained documentary evidence showing that the Applicant was never employed in some offices and firms as stated on his CV. It was also shown that some of the academic institutions stated on the Applicant's CV as schools he attended did not exist. When Mr. Gibson confronted him with the false claims on his CV and P-11, the Applicant admitted them.

77. In other words, the adverse findings against this Applicant were not capable of dispute. The Applicant did not dispute them even during his oral testimony before the Tribunal. The Tribunal's decision in *D'Hooge* cannot avail the Applicant.

***Should the Applicant be granted the remedies he seeks?***

78. The Applicant asks for rescission of the decision to accept his resignation. In the alternative, he asks for a compensatory award of twelve months' net-based salary and moral damages for the failure of the Administration to fulfil its obligations towards him.

79. The Respondent urges that the Applicant has received the benefit of both a resignation and a facts anterior termination and is not entitled to further compensation.

80. Upon separation, the Applicant was paid: (i) his salary and allowances for a period of 30 calendar days in lieu of notice; and (ii) three months' gross salary as a termination indemnity.

81. The Tribunal agrees with the Respondent that the Applicant has been overly compensated. He is not entitled to any compensation.

**JUDGMENT**

82. This Application fails.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 25<sup>th</sup> day of March 2019

Entered in the Register on this 25<sup>th</sup> day of March 2019

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi