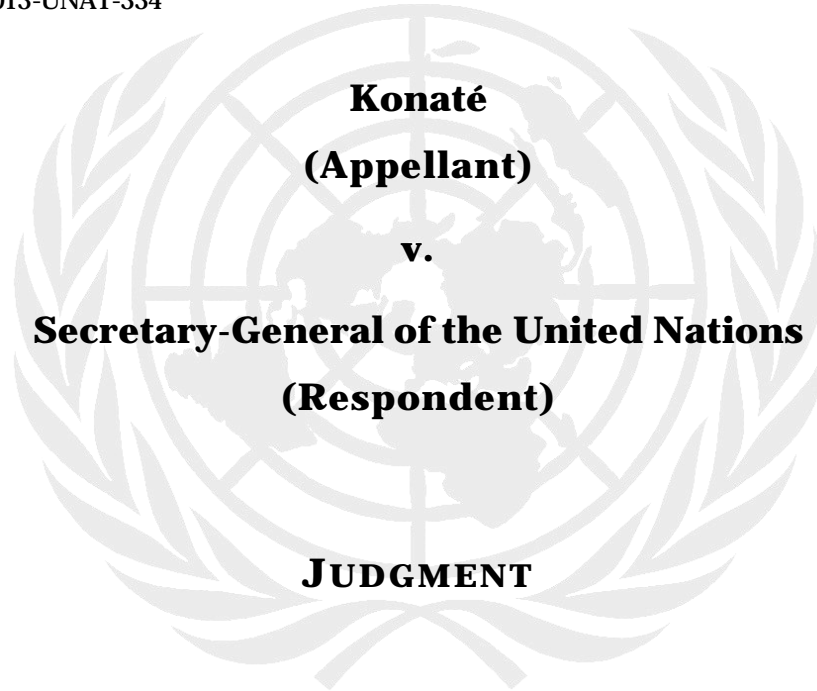




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-334



Before:	Judge Luis María Simón, Presiding Judge Sophia Adinyira Judge Richard Lussick
Case No.:	2012-364
Date:	21 June 2013
Registrar:	Weicheng Lin

Counsel for Appellant:	Michael Duttwiler
Counsel for Respondent:	Zarqaa Chohan

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Mamadou Konaté against Judgment No. UNDT/2012/089, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 14 June 2012 in the case of *Konaté v. Secretary-General of the United Nations*. Mr. Konaté appealed on 17 August 2012, and the Secretary-General answered on 22 October 2012.

Facts and Procedure

2. Mr. Konaté joined the United Nations Population Fund (UNFPA) as Operations Manager, Mali Country Office, on 1 April 2005. The Country Representative in Mali at that time, and until his resignation from UNFPA in April 2009, was Mr. Mamadou Diallo. He was succeeded by Mr. Makane Kane.

3. In March 2010, the International Operations Manager, Africa Regional Office, UNFPA, conducted a mission to the Mali Country Office to assess its business practices. In his ensuing briefing report, the International Operations Manager emphasised “Suspicion of fraud”, indicating that he had been given forged documents by Mr. Konaté in connection with the selection of a vendor, Sahel Transit, and that Mr. Konaté had indicated he had acted “to protect the previous ‘rep’”. Mr. Kane, the new Country Representative, then promptly reported the allegations to the Division of Oversight Services (DOS).

4. Mr. Konaté was placed on administrative leave on 22 March 2010. DOS investigated the allegations and, in its report dated 18 August 2010, concluded that the applicable UNFPA procurement processes had been circumvented and unfair advantages given to Sahel Transit. DOS found “evidence of possible misconduct by systematic violation of the procurement policies and procedures” as well as possible fraud. DOS recommended that action be taken against Mr. Konaté, “as evidence proves that it is reasonable to believe that a procurement process was intentionally driven towards ... Sahel Transit”, and that UNFPA consider “disclosing [its] report to the [United Nations Development Programme (UNDP)] Office of Audit and Investigations”, given Mr. Diallo’s role in the matter and the fact that he was subsequently employed by UNDP as Resident Representative for Eritrea.

5. On 29 October 2010, Mr. Konaté was charged with:
- a. including three false documents purporting to constitute three vendor quotations in the procurement stream for a transports/logistics contract, in violation of UNFPA Financial Regulation 14.8(b) and UNFPA Procurement Procedure A.4;
 - b. failing to apply formal methods of solicitation in respect of the transport/logistics contract, in violation of UNFPA Financial Regulation 14.8(c), Financial Rule 114.14(a) and UNFPA Procurement Procedures C.1 and C.4.2; and,
 - c. failing to refer the transport/logistics contract to the UNFPA Headquarters Contracts Review Committee, in violation of UNFPA Financial Rule 111.11(b)(ii) and UNFPA Procurement Procedure A.9.4.2 (in force in 2007/8) and E.2.5.1.
6. On 24 November 2010, the Executive Director of UNFPA advised Mr. Konaté that he was to be separated from service in accordance with Staff Rule 10.2(a)(viii), with compensation in lieu of notice. The Executive Director indicated that he had considered Mr. Konaté's defence, namely that he had no experience in procurement and had followed Mr. Diallo's orders in the matter, but concluded "if it were true that the former UNFPA Representative had instructed you to violate the rules, it would have been your duty as the UNFPA Operations Manager ... to bring the alleged instructions so clearly in contravention of the regulatory framework on finance and procurement to the attention of [DOS] or another appropriate office". Mr. Konaté appealed his separation from service to the UNDT in Nairobi.
7. In its Judgment No. UNDT/2012/089, the UNDT considered the three charges against Mr. Konaté. With respect to the first charge, the UNDT found that the three quotations, or bids, in question had "the appearance of being fake" but was not convinced that they were indeed forgeries, "[b]earing in mind the standard of proof in disciplinary matters". With respect to the second and third charges, however, the UNDT found against Mr. Konaté, holding:

Whilst a junior employee is entitled to follow or listen to the advice or instructions of a supervisor, he or she cannot be blind, more particularly, in such serious matters as procurement. Mr. Diallo may well have had his own reasons or agenda for the advice he gave to the Applicant and the latter may well have followed that advice in

good faith. But given the nature of the functions he was occupying he took a big risk. It was his duty to comply with the rule personally, the advice of Mr. Diallo notwithstanding.

8. Accordingly, the UNDT held that “[i]n the circumstances, the sanction of separation from service, whilst severe, was not unduly so”, and dismissed the application. With respect to Mr. Diallo, the Tribunal stated:

... Whilst he is not the subject of the present application, the Tribunal cannot help but remark upon the extraordinary unfairness in the prosecution of disciplinary proceedings against the Applicant, the Operations Manager, whilst the supervisor, the Country Representative, Mr. Diallo, appears to have escaped all inquiry, let alone sanction.

... It was pointed out ... that there was no evidence of any personal gain to the Applicant in the granting of the contracts to Sahel Transit. It seems to this Tribunal that there is cause for suspicion that there may have been some gain on the part of Mr. Diallo. No investigation has been carried out into Mr. Diallo’s conduct; he has not been disciplined, as far as this Tribunal is aware. Indeed, he has been given a top position in Eritrea with UNDP. It seems to this Tribunal that Mr. Diallo is escaping accountability by virtue of his move to UNDP, and that is something that cannot be condoned. The case of Mr. Diallo is hereby referred to the Secretary-General pursuant to Article 10.8, for investigation - the more so because the report of DOS indicated that there was evidence of gross negligence on the part of Mr. Diallo and recommended that the report be communicated to ... UNDP ...

Submissions

Mr. Konaté’s Appeal

9. Mr. Konaté submits that the UNDT erred in law in considering the sanction of separation from service proportionate, even though it did not uphold the allegation against him of forgery, and that the UNDT erred on the facts in rendering an unreasonable decision, as he held a subordinate position and acted under his supervisor’s instructions.

10. Mr. Konaté further submits that the UNDT failed to provide a reasoned opinion as to why the sanction was proportionate and did not weigh the competing interests in the case. The trust between UNFPA and him was not irreparably shattered after his failure to adhere to the procurement process and the sanction was evidently disproportionate.

11. Mr. Konaté contends that as he held a subordinate position and was one of several people responsible for the procurement process, he had a lower degree of responsibility. Moreover, he acted under the instructions of his supervisor, and the UNDT failed in not considering this as mitigating.

12. Mr. Konaté requests the Appeals Tribunal to vacate the Judgment of the UNDT and to substitute a less severe sanction and compensate him for the loss of income and moral damages he suffered since his separation.

The Secretary-General's Answer

13. The Secretary-General argues that Mr. Konaté established no errors warranting reversal of the UNDT Judgment.

14. The Secretary-General submits that the UNDT correctly concluded that the sanction was lawful and proportionate. Mr. Konaté's actions were properly investigated and found to amount to misconduct under the relevant Financial Regulations and Rules, the UNFPA Procurement Procedures and the Staff Regulations and Rules, which misconduct justified separation from service.

15. The Secretary-General further submits that, even absent the charge of forgery, the remaining procurement irregularities with which Mr. Konaté was charged justified his separation from service. All three charges concerned a fundamental breach of Article 101 of the United Nations Charter, Staff Regulation 1.2(b) and Staff Rule 10.1(a).

16. With respect to Mr. Konaté's argument that he held a subordinate position and acted under the instructions of his supervisor, the Secretary-General contends that Mr. Konaté is accountable for his own deficiencies in complying with the UNFPA Financial Regulations and Procurement Procedures.

17. The Secretary-General requests the Appeals Tribunal to affirm the UNDT Judgment and to dismiss the appeal in its entirety.

Considerations

18. In *Haniya*¹ and *Maslamani*,² this Court held that, when reviewing a disciplinary sanction imposed by the Administration, the role of the Appeals Tribunal is to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence.

19. Although not all the allegations of misconduct with which the staff member was charged were proven, it was established by the Administration and the UNDT that Mr. Konaté failed to apply formal methods of solicitation in respect of contracts, in violation of UNFPA Financial Regulations, Rules and Procurement Procedures, and also failed to refer a contract to the UNFPA Headquarters Contracts Review Committee, in violation of further norms.

20. The Appellant has not established any errors of fact or law warranting reversal of the impugned Judgment, in which the UNDT correctly declined to accept a defence based on alleged superior orders. No staff member working in procurement can be so naive as to believe that the procedures in place to ensure the proper administration of United Nations financial and economic resources and to prevent improper management can be set aside following orders to the contrary from his or her supervisor.

21. In analyzing the proportionality of the sanction, the first instance Judge considered that despite the fact that it was severe, it was not unduly harsh. This Court sees no reason to depart from that conclusion, as the sanction cannot be considered absurd or arbitrary.

22. The misconduct in question was committed by a procurement officer, a role in which the highest integrity is indispensable and which requires strict attention to the procedures designed to ensure the transparent and effective management of United Nations resources.

23. The sanction in such disciplinary cases must be apt not only to punish the wrongdoer but also to publicise the Organization's commitment to combat all forms of corruption.

¹ *Haniya v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-024.

² *Maslamani v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No.2010-UNAT-028.

24. Under these circumstances, separation from service does not appear to be disproportionate and corresponds with the logical loss of trust suffered by the Administration as a consequence of the Appellant's misconduct. The Administration's apparent lack of action with respect to other staff members who may have also been involved, even to a greater degree than the Appellant, does not reduce his accountability but does justify the UNDT's decision to refer the case to the Secretary-General for eventual further actions.

25. For the foregoing reasons, the Judgment under appeal is affirmed.

Judgment

26. The appeal is dismissed.

Original and Authoritative Version: English

Done in New York, United States.

(Signed)

Judge Simón, Presiding

28 June 2013

(Signed)

Judge Adinyira

21 June 2013

(Signed)

Judge Lussick

28 June 2013

Entered in the Register on this 26th day of August 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar