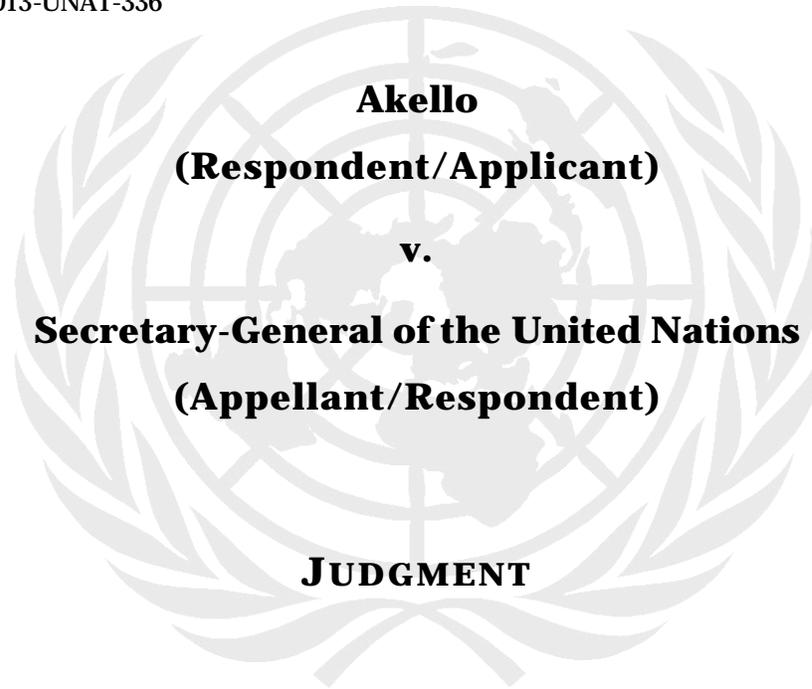




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2013-UNAT-336



**Akello  
(Respondent/Applicant)**

**v.**

**Secretary-General of the United Nations  
(Appellant/Respondent)**

**JUDGMENT**

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| Before:    | Judge Mary Faherty, Presiding<br>Judge Luis María Simón<br>Judge Rosalyn Chapman |
| Case No.:  | 2012-368   |
| Date:      | 28 June 2013   |
| Registrar: | Weicheng Lin   |

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| Counsel for Respondent/Applicant: | Alexandre Tavadian<br>Miles Hastie |
| Counsel for Appellant/Respondent: | John Stompor                       |

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2012/124, in the case of *Akello v. Secretary-General of the United Nations*, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 9 August 2012. The Secretary-General filed his appeal on 1 November 2012, and Ms. Anne Akello filed her answer on 26 December 2012.

### **Facts and Procedure**

2. On 4 June 2007, Ms. Akello joined the United Nations Department of Safety and Security (UNDSS) on a four-month fixed-term appointment at the G-4 level issued by the United Nations Development Programme (UNDP) as a Radio Operator in Moroto, Uganda. Her appointment was subsequently regularly renewed.

3. Due to the security situation in the Moroto region, it was mandatory for all United Nations' official travel to be under escort of armed military personnel driven in privately-owned vehicles. These vehicles were hired and coordinated through the UNDSS office in Moroto. UNDSS had a list of several vendors that provided vehicles for this purpose. Ms. Akello's functions as Radio Operator included the dispatch of such escort vehicles upon request by United Nations' entities in Moroto.

4. In March 2009, it came to the attention of UNDSS/Moroto that Ms. Akello was involved in the management of a company ("Blessed Seasons"), which owned a vehicle that was on UNDSS' list of companies providing escort vehicle services.

5. On 5 May 2009, a Board of Inquiry (BOI) was constituted to look into the allegations of conflict of interest against Ms. Akello and on 8 May 2009, the BOI issued its preliminary report, finding that Ms. Akello was involved in the management of Blessed Seasons.

6. The UNDSS Internal Affairs Unit (IAU) subsequently conducted an investigation into the complaints and issued its report on 6 July 2009. The investigation report concluded that from 24 July 2008 until 9 May 2009, Ms. Akello served as one of the signatories of the Blessed Seasons bank account; that on behalf of the company, she wrote and signed invoices and submitted them to the Office of the High Commissioner

for Human Rights (OHCHR) and collected checks from OHCHR; and that on 14 April 2009, she signed as “Managing Director” of Blessed Seasons a letter addressed to the United States Embassy in support of a request for an entry visa and stamped it with the official stamp of the company. The IAU concluded that Ms. Akello was guilty of misconduct and recommended that appropriate action be taken against her.

7. By letter dated 12 January 2010, Ms. Akello was charged with misconduct for engaging in outside activities, engaging in a serious conflict of interest, and bringing the Organization into disrepute. She was also charged with breaching the highest standards of integrity, given that in addition to the above, she had misrepresented facts to the IAU investigators. By letter dated 17 May 2010, Ms. Akello was summarily dismissed for misconduct pursuant to Staff Rule 10.2(a)(ix).

8. Ms. Akello filed an application with the UNDT in Nairobi contesting the decision to dismiss her. On 9 August 2012, the UNDT disposed of her application by Judgment No. UNDT/2012/124. While the UNDT found that she had engaged in outside activity and that her outside activity provided her personal financial gain, it concluded that her unauthorized outside activity did not result in an actual conflict of interest. The UNDT further held that the investigators had the obligation to notify Ms. Akello of her right to the assistance of counsel during the investigation, and that, in light of the failure to notify her, the charge that Ms. Akello had breached the highest standards of integrity by lying/attempting to lie to the investigators was not sustainable. In addition, the UNDT concluded that the summary dismissal of Ms. Akello was “a grossly disproportional sanction” and ordered that it be reduced to a written censure. The UNDT ordered Ms. Akello’s reinstatement with retroactive effect or, in the alternative, payment of compensation in the amount of two years’ net base salary.

9. The Secretary-General appeals the UNDT Judgment. Upon Ms. Akello’s request, the Appeals Tribunal held an oral hearing on 20 June 2013.

## **Submissions**

### **The Secretary-General's Appeal**

10. The UNDT erred in concluding that Ms. Akello did not violate the applicable standards on conflicts of interest. In accordance with former Staff Regulation 1.2(m), a conflict of interest exists even if there is only a possibility that a staff member could benefit from an association with any profit-making or transactions due to his or her official position with the Organization. Similarly, the UNDP Legal Framework for Addressing Non-Compliance with United Nations Standards of Conduct (UNDP Legal Framework) in conjunction with the Standards of Conduct for the International Civil Service provides that a staff member engages in a conflict of interest if there is a mere appearance that he or she benefits improperly from an association with any profit-making activities or transactions.

11. Ms. Akello, as managing director of Blessed Seasons, was involved in the running of Blessed Seasons and benefitted financially. Through her position as radio operator for UNDSS in Moroto, she could choose Blessed Seasons to provide the escort vehicle service and, thus, the possibility of a conflict of interest existed. In addition, other vendors recognized the possibility of such interference and complained to the Organization about Ms. Akello's association with Blessed Seasons.

12. Furthermore, the UNDT erred in concluding that there was an obligation to inform Ms. Akello of a right to the assistance of counsel during the investigation phase. None of the applicable documents, the UNDP Legal Framework or the Investigation Guidelines of the UNDP Office of Audit and Investigations (OAI Guidelines), establish such a right.

13. Lastly, the UNDT erred in concluding that the disciplinary measure imposed on Ms. Akello was disproportionate to the offences she had committed. The UNDT's conclusion that the disciplinary measure of dismissal was grossly disproportionate is flawed, as it is based upon the erroneous conclusions that there was no conflict of interest and that the investigators had an obligation to inform Ms. Akello of her right to assistance of counsel during the investigative phase. The UNDT also failed to consider the impact that Ms. Akello's conduct had on the reputation of the Organization.

14. The Secretary-General requests the Appeals Tribunal to annul the Judgment in its entirety.

**Ms. Akello's Answer**

15. The UNDT correctly held that Ms. Akello did not violate the applicable provisions on conflict of interest. Former Staff Regulation 1.2(m) prohibits only actual conflicts of interest. There was no legal provision prohibiting potential or perceived conflicts of interest at the time of Ms. Akello's involvement with Blessed Seasons.

16. The UNDT did not err in concluding that Ms. Akello had a right to counsel during the second investigation. Contrary to the Secretary-General's contention, the IAU's investigation was not a preliminary investigation. A preliminary investigation cannot include an interview of the prime suspect. At the time of the interview with the IAU, Ms. Akello had a right to be assisted by counsel and the IAU failed to inform her of that right.

17. The UNDT did not err in concluding that the disciplinary measure imposed was grossly disproportionate. The UNDT examined the evidence and the facts of the case, weighed the arguments of both parties and came to the conclusion that the sanction was not proportionate to the offense. The Secretary-General does not address the UNDT's factual considerations, but merely disagrees with its conclusion. Staff Rule 10.2 lists ten forms of disciplinary measures. Not every misconduct warrants dismissal of the staff member and the disciplinary measure imposed on Ms. Akello was disproportionate to the alleged offence.

18. Ms. Akello requests that the Appeals Tribunal dismiss the appeal without costs.

**Considerations**

19. The Appeals Tribunal has considered the arguments raised in the course of both parties' written submissions and at the oral hearing on 20 June 2013.

20. The Secretary-General filed this appeal on the grounds that the UNDT erred in law and fact in concluding that;

- i. Ms. Akello did not violate any of the applicable standards on conflicts of interest;
- ii. there was an obligation to inform Ms. Akello of her right to the assistance of counsel during the investigation phase; and
- iii. the disciplinary measure was disproportionate to the offence.

*The conflict of interest issue*

21. The UNDT found no evidence before it to show that Ms. Akello had used her position with the Organization to benefit her business and ruled that she was not involved in the procurement process that awarded the security contract to Blessed Seasons, nor had she improperly influenced the procurement process.

22. At paragraph 53 of its Judgment, the Dispute Tribunal stated:

The evidence before the Tribunal is that the Applicant gave no preferential treatment to Blessed Seasons when discharging her duties even though it is very likely that she obtained personal gain from the company's profits derived from the provision of services to the [United Nations] agencies. The Tribunal, therefore, finds that the Applicant's unauthorized outside activity whilst providing her personal financial gain, did not result in an actual conflict of interest as defined by the applicable rule.

23. The Secretary-General submits that the Dispute Tribunal, although finding Ms. Akello to have engaged in "unauthorized outside activity", erred in finding that there was no conflict of interest on her part. The prohibition on staff members becoming involved in businesses or activities which may give rise to a conflict of interest is set out in former Staff Regulation 1.2(m) (in force at the time of the events, the subject matter of the present case) as follows:

Staff members shall not be actively associated with the management of, or hold a financial interest in, any profit making business or other concern, if it were possible for the staff member or the profit making, business or other concern to benefit from such association or financial interest by reason of his or her position with the United Nations.

24. The Secretary-General maintains that the clear meaning of the wording of the former Staff Regulation is that a conflict of interest may exist even where there is only the possibility that the staff member or the private business with which he or she is associated could benefit from such association. In support of his argument, the Secretary-General relies on a series of administrative issuances which do not require there to be evidence of actual benefit or profit for a conflict of interest to exist. In particular, the Standards of Conduct for the International Civil Service provide that

[c]onflict of interest includes circumstances in which international civil servants, directly or indirectly, would appear to benefit improperly, or allow a third party to benefit improperly, from their association in the management or the holding of a financial interest in an enterprise that engages in any business or transaction with the organization.

25. It is submitted on behalf of Ms. Akello that at the relevant time, Staff Regulation 1.2(m), a) did not include potential or perceived conflict of interest, or b) was not sufficiently well-defined to determine whether potential conflicts of interest were covered by this provision. In support of this submission, Ms. Akello relies on the fact that over a period of several years, the General Assembly had noted that the notion of conflict of interest was not clearly defined in the Staff Regulations and Rules and repeatedly requested the Secretary-General to provide an official definition. Ms. Akello submits that there was no legal provision prohibiting a perceived conflict of interest at the time of the impugned acts and that she cannot thus be held accountable for breaking a rule which was either undefined or did not exist at the time. It is further submitted that any ambiguity in the provision has to be interpreted in favour of Ms. Akello.

26. The Agreed Core Facts show that Ms. Akello was actively involved in the running of Blessed Seasons. This was an enterprise which gained financially from its contract with the Organization and, as indeed acknowledged by the UNDT, an enterprise from which Ms. Akello likely obtained personal gain from the company's profits derived from the provision of services to the Organization. In those circumstances, we do not find merit in Ms. Akello's claims and we are satisfied that Ms. Akello's involvement in Blessed Seasons meets the standard of business activity and enterprise prohibited by former Staff Regulation 1.2(m). The Organization should not be put in a position whereby the provision of military vehicles escort to staff members is tainted by any

actual or perceived conflicts of interest. We are thus satisfied that Ms. Akello's activities, viewed against the unambiguous provision of former Staff Regulation 1.2(m), amounted to a conflict of interest. The UNDT, in ruling otherwise, erred in law and fact. The Secretary-General's appeal succeeds on this ground.

*The claimed right to be advised of the right to the assistance of counsel during the investigation phase*

27. The Secretary-General submits that the Dispute Tribunal erred in concluding that "investigators had an obligation, in accordance with the universal principles of natural justice, to inform [Ms. Akello] of her right to the assistance of counsel during investigations". The Secretary-General further maintains that neither the UNDP Legal Framework nor the OAI Guidelines refer to an obligation to inform staff members of such a right during the investigation phase and he argues that the OAI Guidelines merely require that witnesses or suspects may have legal counsel and investigators "are not required to interact with" such counsel.

28. Section 8.8 of the OAI Guidelines, which describes who should be present during an interview states that: "[u]nder special circumstances, witnesses or suspects can request to be accompanied by an observer (who has no connection to the investigation and is readily available). Considering the cultural context, gender balance and other elements of the case, the investigator may approve the request and select the observer (e.g. field security officer, lawyer etc.)."

29. Ms. Akello's submissions on this issue are to the effect that the particular facts of the present case imposed an obligation on the Administration to advise her that she had the right to seek the assistance of counsel, and that "[a]s soon as the [IAU] investigators met with [Ms. Akello], the disciplinary process had reached a stage which could no longer be called preliminary. Therefore, [Ms. Akello's] right to counsel was triggered as soon as [she] was invited to an interview with the Internal Affairs Unit". It is also asserted that Ms. Akello was subjected to "a full-fledged investigation after a preliminary investigation had already been completed".

30. Furthermore, it is submitted that the jurisprudence of this Tribunal relied upon by the Secretary-General,<sup>1</sup> cannot be determinative of the issue of whether a staff member should be informed of his or her right to seek the assistance of counsel during the investigation phase. Ms. Akello submits that while this Tribunal ruled in *Applicant* that “ST/AI/371 and former Staff Rule 110.4 apply once the disciplinary proceedings have been initiated”,<sup>2</sup> this ruling does not cover the present case, which is governed by Staff Rule 10.3(a). This latter Rule provides that disciplinary proceedings are initiated when the “findings of an investigation indicate that misconduct may have occurred”. On behalf of Ms. Akello, it is maintained that “the first investigation, conducted unlawfully and irregularly, had already generated sufficient grounds to believe that misconduct may have occurred” and that “during the second investigation, the investigators undoubtedly knew that misconduct may have occurred”, thus necessitating Ms. Akello’s right to counsel during the second investigation.

31. The Statement of Agreed Core Facts indicates that the BOI Report presented to UNDP in May 2009 recommended “follow-up actions to terminate [Ms. Akello’s] contract”. There was an acknowledgement by the Chief of the IAU that UNDP policies required that the investigation into Ms. Akello’s activities be carried out according to definite legal procedures and that, consequently, the IAU would need to review the preliminary assessment carried out by the BOI. Following a review of the BOI Report by the IAU, it found that the matter needed to be reinvestigated.

32. The Statement of Agreed Core Facts also indicates that the person who conducted the initial investigation and who was the author of the BOI Report was not subsequently involved in the investigation process initiated under the UNDP Legal Framework.

33. The investigation duly conducted by the IAU pursuant to the UNDP Legal Framework led to Ms. Akello being charged with (i) engaging in the unauthorized outside activities, through her active involvement in the running of Blessed Seasons; (ii) engaging in a serious conflict of interest in light of her position with UNDSS and her concurrent involvement in Blessed Seasons; (iii) bringing the Organization into

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<sup>1</sup> *Haniya v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-024 and *Applicant v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-209.

<sup>2</sup> *Applicant, ibid.*, para. 43.

disrepute, as [Ms. Akello's] behaviour created the perception that UNDSS (staff) owned vehicles that competed with other vendors in the running of the escort duties and (iv) breaching the highest standards of integrity, given that, in addition to the above, she also misrepresented facts to the IAU investigators.

34. The issue for this Tribunal is whether the very fact that the IAU investigation (conducted as it was pursuant to the UNDP Legal Framework), but having been preceded by a procedurally flawed and irregular earlier investigation, compelled the IAU investigators to advise Ms. Akello (the alleged suspect) of her right to seek the assistance of counsel. Notwithstanding the arguments made on her behalf, we do not find that the circumstances of this particular case gave right to the legal entitlement sought. Other than the fact that the personnel who conducted the second investigation knew of the existence of a previous flawed investigation, we do not accept as necessarily logical or certain that the investigators had advance knowledge that the second investigation would be detrimental notwithstanding Ms. Akello's identification as an alleged suspect.

35. Furthermore, it has not been suggested that as soon as Ms. Akello was identified as a wrongdoer (that is post the IAU investigation), she was not afforded a right to counsel. Paragraph 99 of the UNDP Legal Framework provides:

The charge letter initiates the disciplinary proceedings. In that letter, the staff member is notified in writing of the formal charges ... [and the staff member is] given a specified period of time ... to answer the charges and produce countervailing evidence, if any. The staff member shall also be notified of his or her right to counsel to assist in his or her defence, and be informed as to how to obtain the assistance of the Panel of Counsel.

36. While the statutory instruments governing the investigation and disciplinary process in the present case are different instruments to those which governed the *Applicant* case,<sup>3</sup> our jurisprudence remains that the due process entitlements, which every staff member has, come into play in their entirety once a disciplinary process is initiated. Furthermore, we have held in *Powell* that at the preliminary investigation stage, only limited due process rights apply.<sup>4</sup>

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<sup>3</sup> *Ibid.*

<sup>4</sup> *Powell v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-295.

37. In all the circumstances of this case, we are not persuaded that Ms. Akello has put forward any compelling argument to merit a departure from the established jurisprudence of this Tribunal.

38. We thus find that the UNDT erred in law in concluding that there was a right to be apprised of the assistance of counsel during the investigation stage. The Secretary-General's appeal on this ground is allowed.

*Did the Dispute Tribunal err in concluding that the disciplinary measure imposed on Ms. Akello was disproportionate to the offence she committed?*

39. Given that the Dispute Tribunal found Ms. Akello only to have engaged in "unauthorized outside activity", and that she should have been informed of her right to the assistance of counsel during the investigation stage, it determined the summary dismissal imposed to be grossly disproportionate and held that "[t]he doctrine of proportionality is applicable in this case to reduce [Ms. Akello's] summary dismissal to a written censure in line with the Secretary-General's practice in disciplinary cases".

40. In light of our determinations that Ms. Akello's unauthorized activities also constituted a conflict of interest and that her due process rights were not breached, we hold, with Judge Faherty dissenting, that her summary dismissal was a proportionate discipline.

41. In *Sanwidi* we stated:

In the context of administrative law, 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 excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective.<sup>5</sup>

42. We do not find that the Secretary-General exceeded the constraints on his discretion which *Sanwidi* imposes.

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<sup>5</sup> *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 39.

43. This Tribunal is satisfied that the Secretary-General was entitled to view Ms. Akello's actions, and the manner in which she initially sought to deal with the IAU investigation, as misconduct of a serious nature that could properly result in summary dismissal.

44. We are satisfied that, in deciding that the case merited a sanction other than dismissal, namely a written censure (the mildest of the sanctions available to the Secretary-General), the Dispute Tribunal erred in law and fact in not attaching any or sufficient weight on the negative effect Ms. Akello's actions had on the Organization's reputation and image. This is so in circumstances where the complaints about Ms. Akello emanated from other vendors who provided services similar to that of Blessed Seasons to the Organization. Moreover, we accept as reasonable the Secretary-General's submission that he should not be put in a position whereby the provision of military vehicles escort to staff members is tainted by any actual or perceived conflicts of interest. The sanction of dismissal is further proportionate due to the fact that Ms. Akello was involved in Blessed Seasons for a period of at least ten months during the period of time she worked for the Organization before her involvement with the enterprise in question came to light.

45. Given the circumstances, by majority with Judge Faherty dissenting on the ground referred to above, we do not find the sanction of summary dismissal was excessive and accordingly, the Secretary-General's appeal is upheld on this ground.

### **Judgment**

46. The Judgment of the Dispute Tribunal is reversed and the administrative decision imposing summary dismissal is affirmed.

Original and Authoritative Version: English

Dated this 28<sup>th</sup> day of June 2013 in New York, United States.

*(Signed)*

Judge Faherty, Presiding

*(Signed)*

Judge Simón

*(Signed)*

Judge Chapman

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

*(Signed)*

Weicheng Lin, Registrar

**Partial Dissent by Judge Faherty**

To the extent that the Dispute Tribunal erred in determining that the circumstances of the case merited only a written censure, I agree with the majority decision and I agree there were grounds for removing Ms. Akello from the Organization. My agreement on these issues notwithstanding, I am satisfied that the Secretary-General, who, it is accepted, enjoys a wide discretion in applying sanctions for misconduct, nonetheless offended the concept of proportionality set out in *Sanwidi*, in imposing summary dismissal. Regard should have been taken of Ms. Akello's rank as a G-4 staff member within the Organization and of the fact that in carrying out her duties she did not give preference to Blessed Seasons' vehicle when selecting vehicles for escort. Thus, I am satisfied that the circumstances of this case lent themselves to a sanction of separation from service with notice or compensation in lieu of notice, and with termination indemnity, a sanction which in my view achieves the Secretary-General's objective in protecting the interests of the Organization against the type of activity and conflict of interest which gave rise to this case.

Original and Authoritative Version: English

Dated this 28<sup>th</sup> day of June 2013 in New York, United States.

*(Signed)*

Judge Faherty, Presiding

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

*(Signed)*

Weicheng Lin, Registrar