



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

Judgment No. 2022-UNAT-1281

**Hoyce Temu
(Respondent/Appellant)**

v.

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

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Kanwaldeep Sandhu Judge Martha Halfeld
Case Nos.:	2021-1611 & 2021-1614
Date of Decision:	28 October 2022
Date of Publication:	7 December 2022
Registrar:	Juliet Johnson

Counsel for Ms. Temu: Julia Kyung Min Lee, OSLA

Counsel for Secretary-General: Noam Wiener

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. Before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), Ms. Hoyce Temu challenged the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity. By Judgment No. UNDT/2021/090 dated 28 July 2021, the UNDT dismissed the application and upheld the disciplinary decision. It, however, found unlawful the decision that in light of Ms. Temu's separation from service, she was no longer eligible for maternity leave, and referred the matter to the Secretary-General for action on accountability pursuant to Article 10(8) of the Statute of the UNDT.

2. The Secretary-General and Ms. Hoyce Temu both appealed to the United Nations Appeals Tribunal (UNAT or Appeals Tribunal). For the reasons given below, the Secretary-General's appeal is granted and Ms. Temu's appeal is dismissed. Judgment No. UNDT/2021/090 is modified to set aside the referral of the matter to the Secretary-General for action on accountability and is otherwise affirmed.

Facts and Procedure

3. Ms. Temu commenced employment with the Organization on 2 January 2014 as Partnership Development Specialist (Communication Specialist), National Professional Officer Level C, on a fixed-term appointment, with the Country Office of the United Nations Development Programme (UNDP) in Tanzania. She was promoted to National Officer Level D in February 2016.

4. Two internal investigations conducted by the Office of Audit and Investigations (OAI) revealed that Ms. Temu may have engaged in the following misconduct: i) In July 2014, she accepted an appointment as the managing director of a private market public relations firm "Anderson PR" in Tanzania, and in which she had an equity stake, without seeking or obtaining authorization from UNDP to engage in this outside activity; ii) she used her position at UNDP for the pursuit of business with entities that had also been engaged as partners of UNDP in Tanzania; iii) on 9 February 2016 Ms. Temu sent her sister, who served at the time as an executive at the Ramada hotel chain (Ramada), confidential commercial information from a UNDP procurement exercise, including the rates quoted by competing hotel vendors to the Organization as bids within the context of the procurement exercise, with the aim of providing

Ramada, through her sister, with a competitive advantage in future solicitations by the Organization; iv) on 19 October 2016, she disclosed to agents of the Tanzanian government and two other persons internal correspondence from the Country Resident Representative/Resident Coordinator (RR/RC) to UNDP staff, despite the correspondence specifically including an admonition that internal correspondence should not be shared with individuals outside of the Organization; and v) on 21 October and 7 November 2016, she misrepresented her position with UNDP by signing correspondence as “Head of Communications – United Nations, Tanzania” instead of using her official title “Partnership Development Specialist”.

5. On 18 December 2018, the UNDP Associate Administrator informed Ms. Temu that, at the conclusion of an investigation and disciplinary proceedings, he had found sufficient evidence to support a finding that she had engaged in misconduct by improperly disclosing confidential information obtained in the course of her functions to third parties, had engaged in the misuse of her office and its assets to advance her personal interests, had engaged in unauthorized outside activities, and had not taken appropriate action to avoid potential conflicts of interests. The UNDP Associate Administrator, therefore, decided to impose on Ms. Temu the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity (the disciplinary decision).

6. Ms. Temu was on maternity leave on that date.

7. A few weeks later, on 4 January 2019, Ms. Temu sent an e-mail to the UNDP Deputy Country Director – Operations, asking whether medical leave, which she had requested in addition to her maternity leave, had been approved. On 8 January 2019, the UNDP Deputy Country Director – Operations informed her that pursuant to the imposition of the disciplinary measure of separation from service she was no longer eligible from that date for the benefits and rights of staff members employed by the Organization, including maternity and sick leave (the maternity leave decision).

8. On 21 February 2019, Ms. Temu requested management evaluation of both the disciplinary decision and the maternity leave decision.

9. On 1 April 2019, the UNDP Assistant Administrator and Director of Bureau for Management Services responded to the request for management evaluation and informed Ms. Temu of the decision to uphold both the disciplinary decision and the maternity leave decision.

10. Ms. Temu then filed two separate applications with the UNDT, one challenging the disciplinary decision, filed on 25 March 2019, and the other challenging the maternity leave decision, filed on 2 July 2019.

11. On 30 September 2020, the UNDT issued Judgment No. UNDT/2020/172 (the first UNDT Judgment) dealing with the maternity leave decision. It held that the application was not receivable *ratione temporis* because it was filed late. On 30 November 2020, Ms. Temu appealed the UNDT Judgment and by Judgment No. 2021-UNAT-1174, on 29 October 2021, UNAT dismissed the appeal and affirmed the first UNDT Judgment.

12. About one year later, on 28 July 2021, the UNDT issued Judgment No. UNDT/2021/090 (the second UNDT judgment) in relation to the disciplinary decision. While it did not confirm all the charges of misconduct, it held that the proven misconduct had rendered the continuation of the employment relationship untenable and thus it dismissed the application and upheld the disciplinary decision. However, inconsistently with the finding of the first UNDT Judgment, it held that the maternity leave decision was unlawful and referred the matter to the Secretary-General for action on accountability pursuant to Article 10(8) of the Statute of the UNDT.

13. The UNDT examined the evidence in relation to the following charges against Ms. Temu: i) disclosure of confidential information contrary to Staff Regulation 1.2(i); ii) copying internal e-mails contrary to Staff Regulation 1.2(q); iii) misrepresentation of her functions by incorrectly referring to herself as Chief of Communications; and iv) engaging in a conflict-of-interest contrary to Staff Regulation 1.2(m).

14. Staff Regulation 1.2 in relevant part provides:

...

(g) Staff members shall not use their office or knowledge gained from their official functions for private gain, financial or otherwise, or for the private gain of any third party, including family, friends and those they favour. Nor shall staff members use their office for personal reasons to prejudice the positions of those they do not favour;

...

(i) Staff members shall exercise the utmost discretion with regard to all matters of official business. They shall not communicate to any Government, entity, person or any other source any information known to them by reason of their official position that they know or ought to have known has not been made public, except as appropriate in the normal course of their duties or by authorization of the Secretary-General. These obligations do not cease upon separation from service;

...

(m) A conflict of interest occurs when, by act or omission, a staff member's personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member's status as an international civil servant. When an actual or possible conflict of interest does arise, the conflict shall be disclosed by staff members to their head of office, mitigated by the Organization and resolved in favour of the interests of the Organization.

...

(q) Staff members shall use the property and assets of the Organization only for official purposes and shall exercise reasonable care when utilizing such property and assets[.]

15. The UNDT held that the charge against Ms. Temu of disclosing the rates to Ramada via her sister was not sustainable because there was no evidence that the United Nations rates were not accessible to the public and they could thus have been discovered by Ramada if it had done simple research. In its opinion, there was no clear and convincing evidence of any harm done because Ramada could have offered the relevant rates after doing research. Further, the UNDT was not persuaded that the charges of copying of internal e-mails and the inappropriate use of the UNDP's letterhead were the kind of charges that would attract "dismissal". It also considered that the inappropriate use of the designation of Chief of Communications "was a minor misrepresentation which showed a level of unprofessional behaviour but nothing requiring more than a reprimand".¹

16. The UNDT took a different view of the charge that Ms. Temu had a conflict of interest and involved herself in non-work-related activities where permission should have been sought and was not.

¹ Impugned Judgment, para. 48.

17. It was not disputed before the UNDT that Ms. Temu maintained her ownership interest in Anderson PR. She in fact admitted to having a continued interest in the performance of Anderson PR's business while she worked at UNDP. Moreover, she continued business activities in support of Anderson PR by using her UNDP e-mail account, including sending e-mails from it to the Head of the European Union (EU) delegation to Tanzania who awarded an EU contract to Anderson PR. Ms. Temu also received a representative of a UNDP partner and vendor in her UNDP office shortly before e-mailing him (using her official UNDP e-mail) regarding Anderson PR business. She was later provided with privileged information concerning a tender that was later awarded to Anderson PR by that UNDP partner and vendor. The UNDT was thus persuaded that Ms. Temu improperly used her position to solicit business for Anderson PR and that this more serious charge had been proved by clear and convincing evidence.

18. This misconduct alone in the opinion of the UNDT was of such a nature and order that continued employment with the UNDP had become untenable. Although it did not expressly state as much, the UNDT clearly considered the disciplinary measure of termination to be proportional in the circumstances. It accordingly refused to grant the application for rescission of the disciplinary decision.

19. However, the UNDT puzzlingly directed its attention again to the maternity leave decision, the application in relation to which it had dismissed as not receivable a year earlier. It had regard to *The International Labour Organization Maternity Protection Convention No 183* (the ILO Convention). This instrument prohibits employers from terminating the employment of a woman during pregnancy or absence on maternity leave, except on grounds unrelated to pregnancy, childbirth and its consequences, or nursing. The UNDT expressly disapproved the decision to separate Ms. Temu during maternity leave and maintained that the Administration's argument that having been separated she was no longer eligible for any benefits conflicted with the clear social benefit of maternity leave, not only to Ms. Temu but also to the child. While noting that the ILO Convention permitted the "dismissal" of a woman on maternity leave on grounds unrelated to pregnancy and that such grounds existed in this case (self-evidently as it had held as much), the UNDT opined, without much in the way of reasoning or discussion of doctrine, principle or the evidence, that the "dismissal" of Ms. Temu was "clearly not the kind of dismissal which was required without notice of any kind".² And

² *Ibid.*, para. 71.

without substantiation added: “her maternity leave was seen to be an opportune time to carry out the dismissal”.³

20. In line with this reasoning, the UNDT held that despite Ms. Temu’s serious misconduct, her maternity leave “should have been respected and allowed to be completed”. It then noted that it would consider an award of moral damages. However, it failed to discuss such an award or to make any ruling on the matter, and instead, perhaps having thought better of it, opted to refer the matter to the Secretary-General for action on accountability pursuant to Article 10(8) of the Statute of the UNDT.⁴

21. On 27 September 2021, the Secretary-General appealed to this Tribunal against the holding of the UNDT referring the matter for accountability. On the following day, Ms. Temu filed an appeal against the findings of the UNDT in relation to the disciplinary decision.

Submissions

Ms. Temu’s appeal and answer to the Secretary-General’s appeal

22. In her appeal, Ms. Temu contends that the UNDT erred on the issue of the proportionality of the sanction by failing to consider and attach appropriate weight to mitigating factors, including her unblemished record of employment and the absence of repeated acts of serious misconduct.

23. She submits further that the UNDT and the Administration erred in viewing her seniority as an aggravating factor given past practice of UNDP in disciplining a more senior official.

24. She also challenges the substantive issues in relation to the maternity leave decision and argues that the UNDT erred by failing to award damages despite making a finding that it was unlawful to separate her from service during maternity leave.

25. In her answer to the Secretary-General’s appeal, Ms. Temu submits that the UNDT was correct to again adjudicate the maternity leave decision by which she was separated from service while on approved maternity leave as it was necessary to address the merits of the case since this had not been done in the first UNDT Judgment. In addition, she contends that the UNDT correctly

³ *Ibid.*

⁴ *Ibid.*

relied on the ILO Convention as persuasive authority and an applicable standard to determine the lawfulness of the maternity leave decision.

26. Ms. Temu requests this Tribunal to: i) vacate the Judgment of the UNDT to the extent that it imposes the sanction of separation from service; ii) substitute the imposed sanction with a lesser sanction; iii) award her three months' net base salary as moral damages for the harm, anxiety and stress; and iv) dismiss the appeal of the Secretary-General and uphold the referral for accountability.

The Secretary-General's appeal and answer to Ms. Temu's appeal

27. In his appeal the Secretary-General contends that the UNDT erred by adjudicating the legality of the maternity leave decision in this case as the matter was *res judicata* and *lis pendens* by virtue of the first UNDT Judgment and the appeal pending against it.⁵

28. He submits further that the UNDT had no competence to consider the maternity leave decision when the issue of its legality had not been pleaded and contested in this case.

29. Therefore, the Secretary-General submits that there was no legal basis for the UNDT to have referred the matter of the maternity leave decision for accountability.

30. He argues also that the ILO Convention does not form part of the internal law framework applicable to the staff members of the Organization, and insofar as it may be persuasive, Ms. Temu was separated on grounds unrelated to her maternity and there was accordingly no breach of either the letter or spirit of the ILO Convention.

31. In his answer to Ms. Temu's appeal, the Secretary-General maintains that there was clear and convincing evidence that Ms. Temu had committed repeated acts of serious misconduct that rendered the continuation of the employment relationship untenable; and the UNDT properly considered the gravity of the offences, the personal circumstances of Ms. Temu, and the other relevant mitigating and aggravating factors.

⁵ At the time of the Secretary-General's appeal, the appeal was still pending before UNAT. However, at the time of the Secretary-General's answer to Ms. Temu's appeal, UNAT had already disposed of the appeal. The submission that the case was *lis pendens* is therefore not sustainable.

32. The Secretary-General accordingly requests this Tribunal to reverse the referral for accountability and to affirm the balance of the second UNDT Judgment.

Considerations

33. It will be convenient to dispose first of the appeal of the Secretary-General against the UNDT order referring the maternity leave decision for accountability.

34. The second UNDT Judgment on this question is flawed in several respects. Firstly, the UNDT erred by adjudicating the question at all. Ms. Temu challenged the maternity leave and the disciplinary decisions before the UNDT in two separate applications. The first UNDT Judgment determined the dispute regarding the maternity leave decision. Thus, in adjudicating the same issue a second time, as the Secretary-General rightly argues, the UNDT exceeded its competence in three different ways. Firstly, the maternity leave decision was not challenged before the UNDT in the instant case. The UNDT has no competence, *propriu motu*, to expand the cause of action pleaded by Ms. Temu. Secondly, the first UNDT Judgment, handed down by the same judge who presided in this dispute, held that the application in relation to the maternity leave decision was not receivable *ratione temporis* and hence the UNDT lacked jurisdiction to determine the dispute. In Judgment No. 2021-UNAT-1174, the Appeals Tribunal affirmed the first UNDT Judgment. With that, the dispute about the maternity leave decision, having been decided, became *res judicata*. Ms. Temu was therefore collaterally estopped from raising that issue in the application in this case, and in fact, and in any event, as just explained, had not done so. The UNDT acted on its own inclination and exceeded its jurisdiction by reconsidering the maternity leave decision in the second UNDT Judgment.

35. Moreover, the UNDT erred in applying the ILO Convention and concluding that the maternity leave decision was unlawful because it contravened its provisions. The UNDT's holding is erroneous for two principal reasons. First, the ILO Convention is not a part of the applicable legal framework, and secondly, even if it were, the maternity leave decision would nonetheless be lawful. The United Nations is not a member of the ILO, which is a treaty organization created by its Member States in accordance with the provision of its Constitution. The United Nations is also not a party to the Constitution of the ILO. The Member States in the General Assembly of the United Nations, in establishing regulations governing the appointment and conduct of staff members of the United Nations, pursuant to Article 101(1) of the Charter of the United Nations, have not resolved to adopt the standards codified in the

various conventions of the ILO. Consequently, the standards set forth in the various ILO conventions do not create legal obligations directly binding the Administration of the United Nations. But even accepting that such standards may serve as directive principles of interpretation, the ILO Convention explicitly provides that a termination on grounds that are not related to the pregnancy may be lawful even during maternity leave. Ms. Temu's termination had nothing at all to do with her pregnancy. She was terminated for serious impropriety. There were clearly disciplinary reasons unrelated to her pregnancy that justified separating her from service. Furthermore, contrary to the UNDT's holding that this was not a termination that should have been effected without notice, Ms. Temu in fact did receive compensation in lieu of notice of termination.

36. For these reasons, the UNDT's holding that the maternity leave decision was unlawful was plainly wrong and the appeal of the Secretary-General against the referral for accountability must be upheld. It follows that there is no basis in Ms. Temu's appeal to award her moral damages for any harm allegedly caused by the maternity leave decision.

37. Ms. Temu has not taken issue with the UNDT's findings regarding her misconduct and has limited her appeal to: i) the submission that the sanction of separation from service with compensation in lieu of notice and without termination indemnity was disproportionate; and ii) a claim that the UNDT having found that the maternity leave decision was unlawful ought to have granted her moral damages in addition to referring the matter for accountability. Given our finding that Ms. Temu's challenge to the maternity leave decision was not before the UNDT in this case and is *res judicata* before the Appeals Tribunal, the latter claim is unsustainable in this appeal.

38. The only issue remaining in this appeal, therefore, is whether the sanction was proportionate.

39. Ms. Temu submits that a lesser sanction would have been more fitting. She contends that the Administration did not appropriately consider mitigating factors when imposing the sanction. She claims that she was a devoted UNDP staff member who had an unblemished record of employment since 2014 and had not been subjected to any other disciplinary process. Her superior testified that she was "a star performer" who deserved to be credited for the success of outreach activities of his office. Ms. Temu contended further that the findings of the UNDT confirmed that there were no aggravating or repeated acts of serious misconduct. Apart

from “the conflict of interest” charge, the charges were either not established by clear and convincing evidence or were of a nature that did not attract “dismissal”.

40. We hold that Ms. Temu’s submissions are not sustainable and that the UNDT properly exercised its discretion holding that the disciplinary measure was proportional to her misconduct. The disciplinary measure imposed in the instant case correctly reflects the severity of Ms. Temu’s impropriety. She violated Staff Regulation 1.2(o) by continuously, over a period, engaging in an outside activity, as the owner and manager of a public relations firm, without seeking or receiving permission. She also violated Staff Regulation 1.2(m) when she engaged in a conflict of interest and used her position with UNDP for her own personal profit, when on numerous occasions she conducted business, on behalf of Anderson PR, with the European Union, and another partner of UNDP in Tanzania.

41. Ms. Temu’s stated grounds for mitigation are not convincing. The mere fact that a staff member has adhered to her obligations in the past does not lessen the gravity of her misconduct in this instance. A clean record can be mitigating in some instances, but certain acts of impropriety are so damaging to the trust relationship that the continuation of employment may become untenable, even intolerable, by one act. Moreover, one should not lose sight of the fact that Ms. Temu commenced with her improper course of conduct a mere six months after she commenced service with the Organization. She commenced service in January 2014 and in July 2014 started to engage in unauthorized outside activity as the Managing Director of Anderson PR, which continued throughout her tenure with the Organization. Two years after her recruitment, on 9 February 2016, Ms. Temu further misconducted herself by disclosing confidential information from a procurement exercise to her sister to use in future solicitations. Thus, it is somewhat disingenuous for Ms. Temu to claim that she had an unblemished record.

42. The submission that the Administration erred in regarding her seniority as aggravating is not convincing. Seniority, and the concomitant trust that comes with it, invariably should be regarded as an aggravating factor where there has been impropriety and a breach of trust. However, there is no evidence that the Administration did rely on that factor. Insofar as an argument of historical inconsistency has been made with reference to the discipline of other unidentified senior staff members, that cannot form a basis for exculpation and mitigation in relation to wrongdoing of the order found in this case.

43. Furthermore, the UNDT most likely erred by finding that Ms. Temu's disclosure of confidential information from a procurement exercise did not amount to misconduct. The charge against Ms. Temu was that she disclosed to her sister, who was an executive at Ramada, information from the commercial bids submitted by hotel chain vendors pursuant to a procurement exercise. Ms. Temu did not challenge the factual basis for this allegation and the UNDT did not find that the facts were not established by the evidence. Instead, the UNDT held that Ms. Temu's actions did not constitute misconduct because the disclosed information was not confidential and therefore no harm was done to the Organization. The Secretary-General was unable to appeal or cross-appeal against this finding in terms of our jurisprudence because he prevailed in the application before the UNDT which ultimately upheld the contested decision.⁶ However, it is permissible for the Secretary-General to challenge the incorrect reasoning of the UNDT in support of his contention that the sanction in this case was indeed proportional. Thus, he maintains that the UNDT evidently failed to appreciate that the disclosure of confidential procurement information constituted serious misconduct and erred in fact when it found that it was not established by any evidence that the United Nations rates were not accessible to the public, and that, therefore, no confidential information was shared by Ms. Temu and no benefit was gained by her sister in receiving this information.

44. The Secretary-General contends that the UNDT's holding reflects a misunderstanding of both the evidence that was presented to it and of the procurement processes of the United Nations. The information shared by Ms. Temu was not "UN Rates", but rather the confidential commercial bids submitted by two hotel services vendors, "White Sands" and "Kunduchi Beach", which vendors competed with Ramada in a procurement exercise. The undisputed evidence reveals that Ms. Temu's e-mail to her sister, who worked for Ramada, stated: "Check your competitors! Try to have the UN Rates!". The information disclosed by Ms. Temu to her sister was not public "UN Rates", but rather confidential financial information included in the commercial bids submitted, in the context of a procurement exercise, by vendors competing directly with the firm for whom Ms. Temu's sister worked.

45. Staff Regulation 1.2(i) provides that staff members "shall not communicate to any Government, entity, person or any other source any information known to them by reason of their official position that they know or ought to have known has not been made public, except as appropriate in the normal course of their duties". Vendors who participate in procurement

⁶ *Sefraoui v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-048, para. 18.

exercises, as set forth in the United Nations Procurement Manual, expect that their commercial bids will be kept confidential to maintain their ability to effectively compete in future solicitations. Competitive bids submitted by vendors in the context of a procurement exercise are considered confidential information in terms of ST/SGB/2007/6 (Information sensitivity, classification and handling), which provides in Article 1.2(f) that information deemed sensitive includes documents containing commercial information, if disclosure would harm either the financial interests of the United Nations or of other parties involved.

46. Consequently, when Ms. Temu disclosed to her sister the commercial information contained in the bids, she acted in violation of the prohibition to disclose confidential information as set forth in the Staff Regulations and in ST/SGB/2007/6. The UNDT, therefore, erred when it found that the leaked information was not confidential, and that Ms. Temu had breached no obligation when she disclosed it patently to benefit her sister or to improve Ramada's prospects at future solicitations.

47. The misconduct and impropriety of Ms. Temu, consisting, as it does, in a measure of underhand duplicity was serious, and inevitably would have undermined the trust substratum of the employment relationship, as the UNDT correctly found, in manner that rendered the continuation of the employment relationship untenable. The sanction was therefore undoubtedly proportional.

48. In the premises, Ms. Temu's appeal stands to be dismissed.

Judgment

49. The appeal of the Secretary-General (2021-1611) is granted and the appeal of Ms. Temu (2021-1614) is dismissed. Judgment No. UNDT/2021/090 is modified to set aside the referral of the matter to the Secretary-General for action on accountability and is otherwise affirmed.

Original and Authoritative Version: English

Decision dated this 28th day of October 2022 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Sandhu

(Signed)

Judge Halfeld

Judgment published and entered into the Register on this 7th day of December 2022 in New York, United States.

(Signed)

Juliet Johnson, Registrar