



Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

MARIKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Susan Maddox, ALS/OHRM

Kevin Browning, ALS/OHRM

Introduction

1. The Applicant is a former staff member of the International Criminal Tribunal for Rwanda (ICTR). She held a fixed term appointment at the GL-5/7 level as a Travel Assistant in the Travel Unit at the ICTR.

2. On 8 August 2012, she filed the present Application with the United Nations Dispute Tribunal (Tribunal/UNDT) challenging the Respondent's decision to separate her from service, with compensation *in lieu* of notice and with termination indemnity, for the following acts of misconduct: a/ falsifying travel quotes from vendors; b/ knowingly submitting the falsified travel quotes to the Chief of the Travel Unit, Mr. Moussa Sane, for approval and c/ for accepting free travel from a vendor.

3. The Respondent filed his Reply to the Application on 12 September 2012.

4. The Applicant filed her submissions in response to the Respondent's Reply on 9 October 2012.

5. On 25 November 2013, the Tribunal issued Order No. 256 (NBI/2013) advising the Applicant that the "services of counsel will assist the Applicant and the Tribunal in the management and conduct of this case". The Tribunal directed that the Order be served on the Office of Staff Legal Assistance (OSLA) to facilitate the process, and that the Applicant advise the Tribunal with particulars of counsel by 9 December 2013.

6. There was no response from the Applicant.

7. On 13 May 2014, the Tribunal issued Order No. 099 (NBI/2014) noting that the Applicant did not respond to, or acknowledge receipt of, Order No. 256 (NBI/2013), and directed the Parties to file joint submissions on the facts and issues in this case.

8. On 2 June 2014, the Applicant filed a Motion for Extension of Time to file the joint submissions ordered by the Tribunal on grounds that she had been unwell. The Respondent wrote to the Registry indicating that he did not object to the Applicant's Motion.

9. On 3 June 2014, the Tribunal issued Order No. 146 (NBI/2014) granting the Applicant's motion.

10. The Parties complied with Order Nos. 099 and 146 (NBI/2014) on 23 June 2014.

11. On 2 July 2014, the Tribunal issued a Notice of Hearing setting this matter down for trial from 23 to 25 September 2014.¹

12. On 19 September 2014, the Respondent filed his Request for Leave to Update and Supplement the Respondent's Reply. This Motion was granted on the same day.

13. On 22 September 2014, the Applicant filed her Response in compliance with Order No. 172 (NBI/2014).

14. The Applicant informed the Tribunal that she continued to be unwell and therefore "will not make herself available during the said hearing". The Applicant moved the Tribunal to proceed with the determination of this matter "in her absence" in accordance with art. 17.2 of the Tribunal's Rules of Procedure. In the same vein, the Applicant provided the Tribunal with a phone number at which to contact her so that she could testify remotely.

15. On 22 September 2014, the Tribunal issued Order No. 220 (NBI/2014) directing the Applicant to confirm "that she agrees to dispense with an oral hearing

¹ Order No. 172 (NBI/2014).

and to this matter being decided on the basis of the Parties' filing and written submissions".

16. The Applicant responded to the Tribunal's directions on the same day, stating that she agreed to "dispense with an oral hearing" and for this matter to be decided on the basis of the Parties' filings and submissions; and urged the Tribunal to "proceed as it deems necessary".

Hearing

17. Art. 16.2 of the Tribunal's Rules of Procedure provides that a "hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure."

18. The use of the word "normally" suggests that there is no mandatory requirement for a hearing in a matter involving a disciplinary matter.

19. The Tribunal refers and endorses its statement in *Iryumugabo* UNDT/2014/001

Article 16.2 states that a hearing shall "normally" be held. This is the all-important word of the section. There is no mandatory requirement to hold a hearing. However since the establishment of the new system of justice in 2009, the Tribunal has evolved a practice of holding hearings in disciplinary matters. This is justified by the fact that under the new rules relating to disciplinary matters coupled with the rules that obtain in the course of an investigation, an accused staff member does not have the right to confront witnesses and to cross examine them. The only right that such a staff member enjoys is to seek legal or other representation when charges have been filed against him/her and to submit a response. The Respondent then processes all the materials including the staff member's response and reaches a conclusion. The only time when a staff member has an opportunity to confront witnesses, if he/she is lucky enough to have the witnesses available, is in the course of a hearing before the Tribunal.

It must be emphasized however that a hearing is only possible if a staff member is available and cooperates with the Tribunal. The Tribunal cannot put a case, even one involving a disciplinary sanction, indefinitely on hold.

20. Since the Applicant has waived her right to a hearing, the Tribunal now proceeds to determine this matter on the filings and submissions of the Parties.

Facts

21. The Applicant joined the Organization as a Travel Assistant with the Travel Unit of the ICTR on 22 December 2006.

22. In May 2011, Mr. Sane discovered that a travel authorization form prepared by a Travel Assistant appeared to contain an incorrect travel quote from KLM (the airline), an ICTR vendor. Mr. Sane requested KLM to resubmit the travel quote and on receipt of the quote from KLM, he noticed that the fare quotation from KLM had been falsified with a view, according to him, to favour another ICTR vendor, Satguru.

23. After perusing additional Travel Authorization forms that appeared to contain falsified travel quotes, Mr. Sane requested all the ICTR vendors to resubmit their travel quotes. On examining the resubmitted travel quotes it became apparent to Mr. Sane that the quotes had indeed been altered thereby favouring a specific vendor.

24. By memorandum dated 26 May 2011, Mr. Sane reported the matter to Ms. Sarah Kilemi, Chief, Division of Administrative Support Services, ICTR.

25. On 30 May 2011, Ms. Kilemi requested that the Applicant and another staff member be placed on administrative leave pending the completion of an investigation into allegations that they had falsified the travel quotes submitted by the vendors.

26. On 2 June 2011, an Investigative Panel (Panel) was established to investigate the allegations that Travel Assistants posted at the ICTR Travel Unit, the Applicant

and the other staff member, had falsified travel quotes in order to favour a particular vendor.

27. On 13 June 2011, the Applicant and the other staff member were placed on administrative leave with pay.

28. The Panel interviewed a number of staff members working in the ICTR Travel Unit, the Chief of Procurement, Mr. Sane and Mr. Samir Din a Travel Consultant of Satguru.

29. Mr. Sane told the Panel that that there were no written guidelines or Standard Procedures for his unit. He added that he addressed issues by means of emails or Travel Unit meetings as and when required.

30. The Applicant confirmed that there were no written guidelines but only a job description.

31. Mr. Samir Din told the Panel that he had issued two free tickets for travel to Hong Kong and China, and one free ticket for travel to Dar es Salaam to the Applicant. He added that the Applicant made the request for free tickets. He explained that he provided the free tickets as he did not want to lose business from the ICTR. He also said that “as a standard practice, free tickets are a way of saying keep supporting us”.

32. The Panel also heard the Applicant. In the course of her interview, as the record shows, the Applicant stated to the Panel that the International Air Transport Association (IATA) regulations allow individuals working in the travel industry for ten years or more to benefit from free tickets. As she had worked for Swiss Port for over 16 years, she qualified for that facility but “that was not the basis on which she had requested for free tickets”.

33. The Manager of Satguru had indicated to all Travel Unit staff that there was some “award tickets available for their use, and also that the current manager of KLM had indicated to them, in Mr. Sane’s office, that there was some complimentary tickets available to travel anywhere”.

34. The Applicant also stated that “she was not the only member of staff from the Travel Unit who received free tickets”. In December 2007 Mr. Sane had given her, Ms. F and Ms. M free tickets provided by KLM for a weekend in Amsterdam and that they all travelled together”. She added that “although the trip was planned by KLM, it was done with the full knowledge and participation of Mr. Sane who allowed them to go without requesting for leave”. She also indicated that “the trip was presented as an official KLM, client relation trip, and that besides a two hour guided tour of Amsterdam Schiphol Airport, it was in the main a pleasure trip and was not related to the work of the ICTR Travel Unit”.

35. The Applicant explained that she had never approached Mr. Samir Din of Satguru for a free ticket but that the manager of Satguru, N, proposed a free ticket to her.

36. When Mr. Sane asked her whether she had falsified travel quotes she denied it. When shown the Travel Authorization forms with the travel quotes, PT.8-2011-TR-00685 of 20 December 2010, PT.8-2011-TR-01601 of 3 February 2011 and PT.8-2011-TR-01681 of 17 March 2011 she told the Panel that “there were some pages that she did not recognise specifically the pages which contained the original true quotations from the airlines/travel agents”. She “could not explain why the e-mail with the falsified quotations were part of the PT8 and why the emails which she recognised were the ones containing the falsified figures”.

37. At another appearance before the Panel, at her own request, the Applicant “apologised for misleading the panel during the previous interview and said that this

was because she had been shaken and confused by the allegations brought against her”.

38. She then asked to see the Travel Authorization forms with the travel quotes, PT.8-2011-TR-00685 of 20 December 2010, PT.8-2011-TR-01601 of 3 February 2011 and PT.8-2011-TR-01681 of 17 March 2011.

39. After examining them she “admitted altering the initial quotations”. The Report of the Panel recorded that evidence as follows:

She explained that in relation to PT.8 TR-01681 in favour of Judge H, the Judge had already purchased a ticket with Rajair for her spouse, and that it was her considered professional view that it was more practicable and convenient to purchase her ticket from the same agent, Rajair even though it was not the cheapest fare. Regarding PT.8-TR-00685 in favour of Mr. HJ she explained that the initial PT.8 was amended to include an additional dependent of the staff member, after the tickets had been purchased as per the initial PT.8 from Rajair. Here she indicated that in her professional judgment it was more practicable and convenient for the staff member to purchase the additional ticket from the same vendor even though Rajair did not quote the lowest fare. Regarding PT.8 TR-01601, she couldn't recall why she altered the figure since the requested itinerary was cheaper than the authorized itinerary.

40. The Applicant also made allegations of a sexual nature against Mr. Sane and produced a number of messages that Mr. Sane sent her from his phones addressing her “Bjour chérie” (Hello darling). As regards this allegation, the Panel found as follows:

The panel found the existence of inappropriate communications of a sexual nature from Mr. Sane to Ms. Mariki in support of the allegation by Ms. Mariki, that Mr. Sane had a reason to mount a crusade against Ms. Mariki when their relationship ended.

41. In regard to the allegations of falsifying the fare quotations, the Panel found that the Applicant falsified the figures for fare quotations received from qualified

airline/travel agents with the intention of favouring two specific travel agents, namely Satguru and Rajair.

42. On the allegation of receiving free tickets, the Panel seems to have lumped the finding that the Applicant received such free tickets with the conduct of Mr. Sane who authorised the travel of the Applicant and other staff members of the Travel Unit to Amsterdam in 2007. This is what the Panel had to say:

The panel found that the Chief of the Travel Unit Mr. Moussa Sane, did in agreement with KLM, authorise and assist staff in the Travel Unit, namely [the Applicant], Ms. A.M and Ms. F to travel to Amsterdam, Holland from 7-10 December 2007, on a pleasure trip on free tickets issued by KLM. The trip and circumstances under which it was undertaken, irresistibly suggest that it was a reward to staff in UN ICTR Travel Unit for services rendered in the course of their employment, or an incentive to the UN ICTR Travel Unit to award services to an airline, namely KLM, in preference to the other airlines appointed to provide services to the UN ICTR.

The Charges

43. Following the findings of the Panel, charges were proffered against the Applicant and by memorandum of 8 February 2012 the charges were communicated to her.

44. The charges were:

(i) falsifying travel quotes in Travel Authorizations, PT.8-2011-TR-00685, PT.8-2011-TR-01601 and PT.8-2011-TR-01681;

(ii) knowingly submitting the falsified quotes along with the Travel Authorization forms to the Chief of the Travel Unit for approval thereby causing the Organization to incur approximately \$1,136.00 in additional expenditures;

(iii) accepting free travel from a vendor.

45. The Applicant was given two weeks to respond and was also advised that she could contact counsel if she so wished. She was also warned that the case would proceed even in the absence of a response from her.

46. On 22 March 2012 the Applicant submitted her response to the charges.

47. On the alteration of the travel quotes, the Applicant admitted that she made alterations to the quotes but added that she was following a “copy and change” procedure “which was shown to me by my colleagues and Mr. Sane. Everybody applies these procedures in travel unit. I was not told to do otherwise”.

48. On the charge of accepting free tickets from a vendor, the Applicant stated that she did accept free travel tickets, but that Mr. Sane and other staff members from the Travel Unit had also accepted free travel tickets from vendors. She also stated that during a meeting with Mr. Sane and a KLM representative she proposed that discount on tickets be given to the staff but Mr. Sane rejected this claim and said that free tickets should be given. The statement of the Applicant reads:

KLM’s new Manager had a meeting with all travel Unit staff at Mr. Sane’s office. I proposed to KLM to give ICTR staff member some discount for private travel like Ethiopian Airlines does but Mr. sane rejected the proposal and said that we should request for free tickets for ourselves. In front of our Chief (Mr. Sane), the KLM Manager said that he will give us free tickets to go anywhere in the world.

49. There was no specific response to the charge of knowingly submitting the falsified quotes. In her response on the falsification of the travel quotes, the Applicant explained that in following the “copy and change” procedure she had caused the Organization to make savings.

Supplemental Information

50. Given the allegations contained in the Applicant’s response, the Office of Human Resources Management (OHRM) sought further clarification from the ICTR.

51. On 3 April 2012, Mr. Sane provided a written statement. He denied that there was “an approved practice” within the ICTR Travel Unit to accept free travel from vendors as alleged by the Applicant. He also stated that he “never raised a matter of free tickets for [himself] or the staff members [of the Travel Unit] during a meeting with a KLM airline representative”.

52. As to the allegation that other staff members of the Travel Unit also received free travel tickets from vendors, four staff members gave written statements denying the allegation.

53. Ms. AM, a Travel Assistant, told the Panel that “she was unaware of any complimentary tickets given to members of the Travel Unit and that she had never received any free tickets”.

54. With regard to the trip to Amsterdam, she “indicated that it was educational trip involved a familiarisation (sic) visit around Amsterdam Schipol (sic) Airport which she felt was of benefit to her especially in relation to dealing with staff members who were transiting through a particular airport”. She also stated “that no OTR had been raised in respect of the trip and admitted that they left on a Friday afternoon and did not return until Monday evening taking Monday off work and that they did not lose any leave although...Monday was a not public holiday”.

55. Travel Assistant Mr. SU stated that he was “unaware of any free or complimentary flight tickets being available to Travel Unit staff”.

56. Ms. JN, a Travel Assistant also stated that “she was unaware of any free flight tickets that were made available to Travel Unit staff”. She added that she was aware of “complimentary tickets from KLM to the ICTR organization and that KLM also offered 10% discount on certain booking made by the organization and that the money was refunded to ICTR”.

57. Ms. SK, another Travel Assistant stated that “due to her experience of working in the industry she was well aware of the availability of complimentary/free tickets for travel, but that shortly after being recruited to the ICTR, during a meeting with all staff from Travel Unit and the KLM Manager from Dar, she asked if they were entitled to free tickets and was told by Mr. Sane that they were not”. She indicated that “since starting her employment with the ICTR she has never asked for any free tickets and has never been offered any free tickets”.

58. Investigators showed Ms. SK a copy of several tickets issued to her from Rajair and a letter dated 19 April 2011 from Rajair indicating that she owed them a substantial amount of money for the purchase of air tickets. She answered that “she had used all the tickets, but that she had paid for them in full over a period of time” and that she did not owe Rajair any money. When asked whether she could produce any receipts she indicated that she had never been issued with any receipts.

59. On 5 April 2012, OHRM forwarded the supplemental information to the Applicant and requested her to provide explanations.

60. On 3 May 2012 the Applicant responded

About the issue of KLM representative that offered tickets, all of the Travel Unit Staff members (Ms. JM (former SM), Ms. SK (former SM), Mr. BM (former SM) and Ms. AM are aware of that, but none of them will testify because Mr. SANE has mobilized (sic) them to be against me”. The Applicant also suggested in her response to the charges on 22 March 2012 “that KLM Headquarters in the Netherlands should be contacted they will provide all the air tickets for Mr. Sane and his dependents by differentiating Free, Paid and Frequent Travel awards tickets.

Further Investigation

61. On 16 May 2012, the Travel and Transport Section in New York contacted KLM, on behalf of OHRM, concerning the Applicant’s allegations that other staff

members of the ICTR Travel Unit, including Mr. Sane, had been provided free tickets by KLM. As at September 2012, no response had been received from KLM.

62. By memoranda of 14 February 2012, 27 March 2012 and 27 June 2012, OHRM addressed these allegations with ICTR. In the memorandum of 27 June 2012, ICTR was urged to investigate the matter. The ICTR advised OHRM that the matter had been referred to OIOS for investigation.

Allegations of Sexual Harassment against Mr. Sane

63. The Applicant was advised to speak to the ICTR Sexual Harassment Focal Point about the allegations of sexual harassment against Mr. Sane. She was also advised by OHRM, by email, on 6 June 2012 and 13 August 2012, that sexual harassment complaints should be directed to the Head of Office at the ICTR, pursuant to paragraph 5.11 of ST/SGB/2008/5, Prohibition of discrimination, harassment, including sexual harassment and abuse of authority.

Applicant's submissions

64. The Applicant has made a number of submissions which are not relevant to the charges that led to her separation from service. The Tribunal can understand this as she was not represented. This is the kind of difficulty that the Tribunal faces when it has to deal with unrepresented litigants. The Tribunal must go through the pleadings and try to separate the wheat from the chaff.

Administrative leave

65. The Applicant submits that the decision to place her on administrative leave was premature unless the allegation of misconduct was well founded as required by section 3 of ST/AI/371. The investigation was completed after one year and therefore

the allegation was not well-founded. Instead of placing her on administrative leave, the Respondent should have reassigned her to some other position.

Free Travel

66. On the issue of free tickets, she submits she was the whistleblower and gave evidence on how Mr. Sane was also facilitating the granting of free tickets. Mr. Sane also “cherished free tickets from vendors”. Mr. Sane was fully aware of free tickets being given to staff members.

Falsification of travel quotes and knowingly submitting them to the Chief of the Travel Unit

67. On the charge of alteration of the travel quotes, the Applicant does not deny that she made alterations to the quotes. She submits however that she was only following a “copy and change” procedure “which was shown to [her] by [her] colleagues and Mr. Sane. Everybody applies these procedures in travel unit. [She] was not told to do otherwise”. Mr. Sane was aware of this procedure. The “copy and change” procedure was a normal practice in the Travel Unit. She also submits that Ms. AM and Mr. Sane “did the same when initiating the booking” of a judge at the ICTR. If a “forensic investigation” is done the truth will be discovered.

68. The alteration that she made was done to facilitate the travel of staff members’ relatives. Though she may have exercised “poor judgment” in this respect she cannot be charged with having “provided falsified information”.

Sexual Harassment

69. She submits that the Respondent has been silent or has not acted on her allegation of sexual harassment by Mr. Sane. All that has happened to her is her refusal “to submit herself” to her former supervisor Mr. Sane.

The Investigation

70. The investigators altered her version and distorted the information she put before them. As such their credibility, competence and objectivity are questionable. The Applicant states that she never apologized to the investigators for having misled them and that her statement has been improperly recorded and documented. She also submits that Mr. Sane has manipulated the investigation.

71. In the absence of a conclusive investigation the decision to impose disciplinary measures on her was flawed. At its best, OHRM had done nothing more than to arrive at an erroneous decision to impose a disciplinary sanction on her.

OHRM

72. OHRM failed to take into account the explanations that she gave during the investigation. The action of the Respondent has tarnished her dignity and reputation. The decision of the Respondent to impose disciplinary measures against her was the “outcome of a series of arbitrary and discriminatory actions taken in bad faith as it lacked due process and was motivated by improper, offensive or other extraneous factors and factual errors”.

73. Accordingly the Respondent has failed to establish the allegations by clear and convincing evidence due to the fact that information relied upon was incomplete. In the absence of such complete information, Respondent cannot claim that the case against her has been established by clear and convincing evidence.

Respondent’s submissions

Administrative leave

74. The Respondent submits that placing a staff member on administrative leave is an administrative decision which must first be challenged by way of management

evaluation. As the Applicant has not submitted a request to challenge the administrative decision of placement on leave that claim is not receivable.

Free Travel

75. The Applicant does not deny that she accepted free tickets from a vendor. Her justification for having accepted the free travel from a vendor is that IATA regulations allow it and at any rate the acceptance of free travel tickets was widespread within the ICTR Travel Unit. Satguru confirms having given the Applicant free tickets.

76. Even if the Applicant was unaware that accepting free tickets from a vendor was an act of misconduct in violation of the applicable Staff Rules and Regulations and Administrative Instructions, this would not justify her conduct as ignorance of the Rules and Regulations is no excuse. A staff member has the duty and responsibility to be acquainted with the Rules and Regulations of the Organization.

77. By accepting the free tickets, the Applicant violated Staff Regulations 1.2(e), (f), (g) and (l), Staff Rule 1.2 (1) and sections 1.2, 3.1, and 3.3 of ST/AI/2010/1.

Falsification of travel quotes and knowingly submitting them to the Chief of the Travel Unit

78. The Applicant has admitted that she altered travel quotes. The Applicant claims that in making those alterations she was following internal Travel Unit procedures but could not provide any evidence that such an internal procedure existed. According to the ICTR, no one else at the Travel Unit was aware of such a procedure.

79. With regard to travel quote PT.8-2011-TR-01681, the Applicant explained that she made the alterations to the travel quote to facilitate the travel of a staff

member's dependents. Even if that were to be the case falsifying travel quotes was not the appropriate manner for the Applicant to facilitate such travel. The explanation of the Applicant on this score is far from satisfactory.

80. With regard to PT.8-2011-TR-01601, the Organization suffered no loss. The Applicant had altered a fare quoted by KLM from \$7,813.00 to \$8,613.00, both of which were higher than the \$7,273.00 by Rajair. The Respondent submits that Rajair should have been awarded the travel as it was the lowest bidder. The Applicant could not explain why this alteration was made at all.

81. The Applicant knowingly submitted falsified travel quotes to the Chief of the Travel Unit for approval.

Deliberations

Is the challenge to place the Applicant on administrative leave receivable?

82. Staff rule 10.4 provides:

Administrative leave pending investigation and the disciplinary process

(a) A staff member may be placed on administrative leave, subject to conditions specified by the Secretary-General, at any time pending an investigation until the completion of the disciplinary process.

(b) A staff member placed on administrative leave pursuant to paragraph (a) above shall be given a written statement of the reason(s) for such leave and its probable duration, which, so far as practicable, should not exceed three months.

(c) Administrative leave shall be with full pay unless, in exceptional circumstances, the Secretary-General decides that administrative leave without pay is warranted.

(d) Placement on administrative leave shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure. If administrative leave is without pay and either the allegations of misconduct are subsequently not sustained or it is

subsequently found that the conduct at issue does not warrant dismissal, any pay withheld shall be restored without delay.

(e) A staff member who has been placed on administrative leave may challenge the decision to place him or her on such leave in accordance with chapter XI of the Staff Rules.

83. The placement of a staff member on administrative leave is within the discretion of the Secretary-General. It is an administrative decision for the purposes of art. 8.1 (c) of the Statute and within the well settled meaning of an administrative action as laid down in *Andronov*.² The Tribunal cannot assume jurisdiction to determine the validity of an administrative decision unless it has been first referred to the Management Evaluation Unit pursuant to art.11.2 of the Staff Rules. The only exceptions to this requirement are where a contested decision is taken by the Secretary-General following advice from a technical body or where a decision is “taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process” pursuant to Staff rule 11.2 (b).

84. In the absence of management evaluation of the decision to place the Applicant on administrative leave, the matter is not receivable.

The power of the Tribunal in disciplinary matters

85. In the case of *Abu-Hamda* 2011-UNAT 022, the United Nations Appeals Tribunal (UNAT) held that in exercising judicial review in disciplinary cases, the Dispute Tribunal has to examine:

(1) whether the facts on which the disciplinary measure was based have been established; (2) whether the established facts legally amount to misconduct under the [...] Staff Regulations and Rules; and (3) whether the disciplinary measure applied was disproportionate to the offence.

² UN Administrative Tribunal Judgment No. 1157, *Andronov* (2003).

86. The Tribunal is required therefore to consider not only the administrative decision of the Secretary-General to impose a disciplinary measure but should also review the evidence placed before him on which the decision was taken.

87. This exercise requires the Tribunal to determine whether a proper investigation into the allegations was conducted.³ In *Nyambuza* 2013-UNAT-364, UNAT stated that “judicial review of a disciplinary case requires the Dispute Tribunal to consider the evidence adduced and the procedures utilized during the course of the investigation by the Respondent.

The Investigation

88. The Applicant has alleged that the investigators altered what she told them and distorted the information she gave them thereby raising serious concerns about their credibility, competence and objectivity. She denied that she apologized to the investigators for having misled them and added that her statement had been improperly recorded and documented. She also submits that Mr. Sane manipulated the investigation.

89. The Applicant appeared before the Panel three times - on 14, 17 and 20 June 2011. The third meeting was at her request.

90. On 14 June 2011 she was questioned about the free travel and the alteration to the travel quotes. On 17 June 2011 she was questioned about the group trip to Amsterdam. On 20 June 2011 she made a further statement about the altered travel quotes.

91. The Tribunal will set out the evidence as they appear in the investigation report and compare them with the replies of the Applicant to the charges in order to

³ *Hallal* 2012-UNAT-207.

determine whether there has been any impropriety by the investigators as claimed by the Applicant.

92. On 14 June 2011, the Applicant told the Panel that according to IATA regulations she would be entitled to free tickets and that “having worked with Swiss Port for over 16 years she qualified for that facility but that was not the basis on which **she had requested for ‘free tickets’**”.⁴ She added that “**she was not the only member of staff from the Travel Unit who received ‘free tickets’**” (emphasis supplied).⁵

93. She also stated that she had not falsified travel quotes “**but instead favoured an agent, i.e. Rajair by hiding fares** and that she had done that from time to time with Satuguru and with Emslies” (emphasis supplied).⁶

94. On 17 June 2011, the Applicant informed the Panel that the trip to Amsterdam was planned by KLM and “was done with the full knowledge and participation of Mr. Sane”. On the falsification of the travel quotes, she was shown the relevant documents and after examining them “she indicated that there were some pages that she did not recognize, specifically the pages which contained the original true quotations from the airlines/travel agents”. She could not explain why the e-mail with the falsified quotations were part of the PT.8 and why the only emails which she recognised were the ones containing falsified figures.”⁷

95. On 20 June 2011, she apologised “for misleading the panel during the previous interview”. She asked to have a look at the falsified travel quotes and “after examining them, admitted altering the initial quotations”.⁸

⁴ Page 18 of Investigation Report.

⁵ Page 19 of Investigation Report.

⁶ Page 18 of Investigation Report.

⁷ Pages 23-24 of the Investigation Report.

⁸ Pages 25 of the Investigation Report.

96. In her responses to the charges, the Applicant made statements similar to those she made to the Panel. She did not deny that she made alterations to the quotes and added that she was only following a “copy and change” procedure which was a procedure in force at the Travel Unit at the ICTR. The “copy and change” procedure was a normal practice in the Travel Unit. The alteration that she made was done to facilitate the travel of staff members. On the issue of free tickets she stated that she was a whistleblower and that Mr. Sane was also facilitating the granting of free tickets and was fully aware of free tickets being given to staff members.

97. Having carefully reviewed the record of investigation and the Applicant’s response to the charges, the Tribunal is unable to conclude that the investigators did not properly record the testimony of the Applicant. A comparison of the statements that the Applicant gave to the Panel with the responses she provided in answer to the charges does not at all give credence to her allegations against the investigators.

98. Litigants before the Tribunal should be reminded and indeed warned that while allegations are easy to make, they must equally be prepared to substantiate them with credible evidence; failing which serious consequences may follow.

Have the charges been established

Burden and Standard of Proof

99. In *Liyarachchige* 2010-UNAT-087, UNAT held that “the Respondent bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.”

100. In *Molari* 2011-UNAT-164, UNAT held that “when the termination or dismissal of a staff member is a possible sanction, the ‘misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable.’”

Facts relied upon by Respondent

101. In *Diakite* UNDT/2010/024, this Tribunal laid down the legal principle that should guide it in assessing the evidence in disciplinary matters. The Tribunal had this to say:

The Tribunal has first to determine whether the evidence in support of the charge is credible and sufficient to be acted upon. Where there is an oral hearing and witnesses have been heard the exercise is easier in the sense that the Tribunal can use the oral testimony to evaluate the documentary evidence. Where there is no hearing or where there is no testimony that can assist the court in relation to the documentary evidence the task may be more arduous. It will be up to the Tribunal to carefully scrutinise the evidence in support of the charge and analyse it in the light of the response or defence put forward and conclude whether the evidence is capable of belief or not. In short the Tribunal should not evaluate the evidence as a monolithic structure which must be either accepted or rejected en bloc. The Tribunal should examine each piece of relevant evidence, evaluate its weight and seek to distinguish what may safely be accepted from what is tainted or doubtful.

Falsification of Travel quotes

102. OHRM accepted the evidence and conclusions reached by the Panel. OHRM found the charges of falsification of travel quotes to have been substantiated. The defence of the Applicant was that she did not deliberately and knowingly alter the quotes but that she was only following a practice of “Copy and Change” that was used in the ICTR Travel Unit. It has not been established that the Applicant coined or invented that particular formula.

103. The Respondent submitted that the Applicant did not prove that such a procedure existed at the Travel Unit. The Tribunal is unable to agree. It was for the Respondent to establish by clear and convincing evidence that such a procedure did not exist. Instead of probing the matter further, the Respondent simply relied on the word of Mr. Sane, against whom serious allegations, although unsubstantiated as yet,

and the word of other staff members who also allegedly accepted free travel, to conclude that such a procedure did not exist.

104. It would appear that matters the ICTR Travel Unit were being managed in a haphazard manner without proper guidelines. That a Copy and Change “procedure” did or did not exist as a guide for the staff members is open to serious doubt and the Tribunal cannot dismiss the word of the Applicant outright on that issue.

105. The Tribunal therefore finds that the charges of falsification of the travel quotes cannot stand.

Free Travel

106. The Applicant admitted to requesting free travel. Mr. Samir Din told the Panel that he had issued two free tickets for travel to Hong Kong and China and one free ticket for travel to Dar es Salaam to the Applicant. He added that the Applicant made the request for free tickets. The Manager of Satguru had indicated to all Travel Unit staff that there were some “award tickets available for their use” and that they have been told by KLM that there were “some complimentary tickets available to travel anywhere”.

107. The Applicant has admitted that she did request free travel. She added however that she was not the only member of staff who received free tickets. What the Applicant is saying is that while she did request and receive free tickets, this was a practice within the Travel Unit.

108. There is also evidence that she had received free tickets from Mr. Samir Din. The latter who may have been labouring under the belief that staff members of the Organization are entitled to free tickets is no doubt an accomplice. As a vendor, the witness should have cleared the matter with the Chief of Travel Unit or Procurement at the ICTR. Mr. Din stated that Applicant was the only one who requested free

tickets and explained that he provided the free tickets as he did not want to lose business from the ICTR.

109. There is no doubt that Mr. Din is an accomplice and the evidence of an accomplice though admissible must be treated with caution. Some questions arise from the testimony of Mr. Din? Why did he single out the Applicant as the one staff member who requested free tickets? What was his motive in so doing? Was he trying to shield others who may have also benefitted from free tickets?

110. The Tribunal rejects the statement of Mr. Din that the Applicant was the only one who benefitted from free tickets from him as being preposterous. How is it possible to believe that by providing or accepting requests from the Applicant a vendor would have secured his business with the ICTR?

111. The Applicant also received free travel on the trip to Amsterdam. Although she was not alone in benefitting from the free travel and though, as the Panel found, that the trip was arranged by Mr. Sane on free tickets issued by KLM, the fact remains that she accepted and used free travel, without the authorization of the Secretary-General in violation of Staff Regulations 1.2 (e), (f), (g) and (l), Staff Rule 1.2(1) and Sections 1.2, 3.1 and 3.3 of ST/AI/2010/1.

112. In *Konate* 2013-UNAT-334 UNAT stated that the “the Respondent’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.

113. The Tribunal endorses this reasoning for the purposes of the present case.

Conclusions

114. The Tribunal finds the charge that the Applicant accepted free travel proved.

The Sanction

115. The Applicant was separated from service with compensation *in lieu* of notice and termination indemnity. OHRM informed the Applicant that the indemnity was awarded because the investigation had taken a long time.

116. The Tribunal finds that the Applicant was treated fairly and that the sanction of separation is not disproportionate to the act of misconduct.

117. The Applicant was occupying a position of trust and was in part responsible for the manner in which the funds of the Organization were being used for travel purposes. Such a position requires strict adherence to rules and regulations and a high sense of integrity and a sense of good governance. If individuals occupying positions of trust in the Organization cannot show integrity and a sense of good governance, the very basis and aim of the Organization can be greatly damaged. The separation from service of the Applicant is not therefore disproportionate.

Further Observations

Sexual harassment

118. The Applicant was advised that she should refer her complaint to the appropriate authorities in ICTR and the Tribunal has no jurisdiction to consider that head of complaint.

The management of the ICTR Travel Unit

119. This case has brought to light the levity with which the Travel Unit was being managed by the Chief of the Unit, Mr. Moussa Sane. That the ICTR and the Travel and Transport Section in New York were unaware or did not have a proper supervisory control on that unit is deplorable. It is the earnest hope of the Tribunal that remedial measures have been taken to ensure proper management of the Travel

Unit at the ICTR and that the vendors with whom the ICTR are dealing are given appropriate instructions on favours that they might be tempted to offer staff members to keep their business flourishing.

Mr. Sane and other Staff Members

120. The Investigation panel found on the evidence presented that the Chief of the Travel Unit, Mr. Sane agreed with KLM to authorise and assist staff members in the Travel Unit, namely the Applicant, Ms. AM and Ms. F to travel to Amsterdam in December 2007 on a pleasure trip. That the Applicant made use of this free travel along with two other colleagues is amply proved. The complicity of Mr. Sane is glaring.

121. As far back as 16 May 2012, the Travel and Transport Section in New York contacted KLM, on behalf of OHRM, concerning the allegations of the Applicant that other staff members of the ICTR Travel Unit, including Mr. Sane, had been provided free tickets by KLM. As at September 2012, no response had been received from KLM.

122. By memoranda of 14 February 2012, 27 March 2012 and 27 June 2012, OHRM addressed these allegations with ICTR. In the memorandum of 27 June 2012 to the ICTR, ICTR was urged to investigate the matter. The ICTR has advised OHRM that the matter has been referred to OIOS for investigation.

123. The ICTR and the Travel and Transport Section in New York should follow this up with the Office of Internal Oversight Services. It is unfortunate that the delay in taking appropriate measures in regard to the investigation has enabled Mr. Sane to retire from the Organization and thus get away scot free.

Conclusion

124. The Application is dismissed.

(signed)

Judge Vinod Boolell

Dated this 2nd day of December 2014

Entered in the Register on this 2nd day of December 2014

(signed)

Abena Kwakye-Berko, Registrar, UNDT, Nairobi