



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

AKTHER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Karen M. Farkas, UNHCR

Introduction

1. By application filed on 19 February 2014 with the New York Registry of the Tribunal, the Applicant contests the decision of the High Commissioner for Refugees to separate her from service of the United Nations High Commissioner for Refugees (“UNHCR”) for misconduct, with compensation in lieu of notice and with termination indemnity pursuant to para. (c) of Annex III to the Staff Regulations.

2. The decision was notified to the Applicant by letter dated 18 November 2013, from the Director, Division of Human Resources Management (“DHRM”), and received by the Applicant on 28 November 2013.

Procedure

3. The application was served on the Respondent who filed his reply on 28 March 2014.

4. By Order No. 136 (NY/2014) of 6 June 2014, the Tribunal requested the parties to file reasoned objections, if any, on transferring the case to the Geneva Registry. The Applicant did not revert back to the Tribunal and the Respondent consented to the transfer. By Order No. 142 (NY/2014) of 13 June 2014, on change of venue , the case was transferred to the Geneva Registry.

5. The Applicant filed comments on the Respondent’s reply on 16 November 2014.

6. By Order No. 187 (GVA/2014) of 28 November 2014, the Tribunal convoked the parties to a hearing, which was held in Geneva on 16 December 2014; the Applicant attended via phone and Counsel for the Respondent attended in person.

7. On 12 December 2014, the Respondent filed a motion to file additional documents, on an *ex parte* basis, and attached them to his submission.

Facts

8. The Applicant joined UNHCR in November 1999 as Administrative Clerk, on a short-term appointment. She was granted an indefinite appointment in April 2000 and, in January 2002, she was promoted to the G-5 level, as Senior Administrative Clerk. In January 2007, the Applicant was promoted to the G-6 level, as Administrative Assistant. Her fact sheet shows that she was in charge, *inter alia*, of establishing documentation on Government regulations, including timely processing of duty free passbooks and vehicle registration.

Purchase and use of car

9. From 2006 to 2009, Mr. P., an Administrative and Finance Officer at UNHCR, Dhaka, was the Applicant's supervisor. When he left Bangladesh in 2009 for a new assignment, he "sold" his car—which he had previously "bought" from Mr. M., former Deputy Representative in 2005—to the Applicant. While the Applicant paid Mr. P. in cash, the evidence shows that in fact, Mr. P. never did the required paper work to register the car in his name and, as such, Mr. M. remained its legal owner. When the Applicant "bought" the car from Mr. P., the latter issued and signed a note dated 16 June 2009, entitled "Permission to drive the vehicle No. AJN 20018", by which he authorized the Applicant "to use his personal vehicle", which, according to the note, she could drive in his absence anywhere in Bangladesh as required.

10. A document on file entitled "Bill of Sale", on UNHCR letterhead, dated 6 June 2010, contains a signature from the Applicant, as buyer, and a forged signature from Mr. M., as seller of the car. The Bill of Sale states that "the office of the Representative of the UNHCR in Bangladesh [(the Representative)] intends to sell a vehicle ... to [the Applicant]". The Applicant admits that this document was established for the purpose of regularizing the ownership of the car. While during the interview with the Inspector General's Office ("IGO/UNHCR") she admitted having forged Mr. M.'s signature, in her application to the Tribunal she

states that she contracted an agent who forged it, as well as her signature, on the Bill of Sale, without her knowledge. On the basis of the Bill of Sale, the Government of Bangladesh, National Board of Revenue (“NBR”), established a document dated 1 July 2010, entitled “Subject: Regarding the permission of selling/handover of vehicle of UNHCR Deputy Representative ... purchased as duty free”, providing that said vehicle could be sold/transferred to the Applicant. The Applicant drove the car with its diplomatic plates from when she received the document from NBR until September 2012, when the UNHCR Branch Office, Dhaka, requested her to surrender the diplomatic plates; as of that moment, the car remained parked in a garage, and since the Applicant could not pay a considerable amount of taxes related to the car, she was informed in January 2013 that the Government had ultimately sold it at an auction.

Purchase of air tickets

11. By email dated 6 February 2011, entitled “personal request” the Applicant ordered the booking of air tickets for her and her relatives with a UN contracted travel agent. It appears that between October 2010 and October 2011, the Applicant bought several private air tickets with this travel agent for a total amount of USD12,800. At each instance, she received the tickets without immediately paying the invoice, and settled the outstanding invoices only on 3 June 2012.

Use of passbooks

12. Documents on file show that on 7 February 2012, a considerable quantity of Whisky was bought at a Duty free warehouse, with the passbook of Ms. W. and Mr. v. N., two international staff members who by then had permanently departed Bangladesh. The orders contained the Applicant’s signature. An outstanding amount of USD1,000 was ultimately settled by the Applicant on 12 December 2012, at the initiative of the Representative, by using the passbook of Ms. W., this time with the latter’s consent.

Procedure

13. The case came to light at the level of the country office, where an initial fact-finding was conducted before the IGO/UNHCR initiated an investigation.

Fact finding by Representative

14. In September/October 2012, the Representative, assisted by the Applicant's first reporting officer ("FRO") and a Senior Protection Officer, started a fact-finding into reports on possible misconduct by the Applicant through, *inter alia*, meetings with the Applicant on 16 and 18 October and 29 November 2012 and email communications with Mr. P. and Mr. M., as well as with two internationals staff members who had earlier permanently departed Bangladesh and whose Passbooks had subsequently been used by the Applicant to buy some duty-free items. While the initial concern was about the Applicant privately using a car with diplomatic plates and unreasonable delays in reimbursing private air travel, it later extended to the illegal use of passbooks for purchase of duty-free alcoholic items.

15. In two emails of 16 and 17 October 2012 from Mr. P. to the Representative, the former stated that he had bought the car from Mr. M. and later sold it to the Applicant [for Tk120,000.00] and that he had not kept any documents relating to the sale. He further admitted that he had no confirmation of the transfer of the ownership of the car to the Applicant but that "when [he] purchased it from [Mr. M.], [he] as the new owner handled the transfer of the registration." He also stated that he did not remember or keep any record of any exchanges he may have had with the Applicant after his departure, and noted that he "remember[ed] the car registration being transferred to [him] and [him] paying the fee after [he] purchased it from [Mr. M.]." He added that the Applicant was assisting him with this, and that he believed that she had the files. He also noted that if this was about a case of use of UN plates by local staff, "this [was] not the first case" and that "at his time there [he] had collected two UN plates, one from the former secretary and the other [he believed] from [the Applicant]."

16. Mr. M., by emails of 16 and 17 October 2012 to the Representative, expressed his surprise that he appeared to still be the owner of the car and noted that Mr. P. had taken the responsibility to register the car in his name. Mr. M. stressed that he had not kept any registration papers of the purchase.

17. In an email of 18 October 2012 to the Representative, the Applicant while “apologis[ing] for [her] mistake” stated that she did not drink nor did any of her associates; therefore, she did not use anybody’s passbook even with permission. In the note for the file (“NFTF”) of the meeting of 29 November 2012, unsigned by the Applicant, she supposedly admitted having used the passbooks for personal use on 7 February 2012, and that she sold the 120 bottles of Whisky to a friend; according to the NFTF, she supposedly also admitted having “copied” Mr. M.’s signature on the Bill of Sale without his knowledge. She again admitted “guilt” in an email of 2 December 2012 addressed to the Representative.

18. Ms. W., in an email of 10 November 2011, responded to the Representative, stressing that she did not recall having given her consent to anyone for the use of her passbook, either before or after her departure from Bangladesh. She also stressed that when she arrived in Bangladesh and once she obtained the passbook, she had noted that alcohol had been purchased from it in her name, and that she asked administrative staff about it and “vaguely recall[ed] [to have been] told that other international staff might have used [her] book if they used up their allowance” and that she had asked “that this not happen again in the future”. Mr. v. N. equally confirmed by email that he had not given his consent for the use of his passbook.

Investigation by the IGO

19. On 29 November 2012, the IGO/UNHCR received a complaint that a national staff member of the UNHCR Branch Office Dhaka, Bangladesh, had allegedly engaged in misconduct.

20. On 20 December 2012, the IGO/UNHCR received a memorandum from the Representative providing a summary of the fact-finding conducted by his office. The memorandum referred to possible misconduct by the Applicant.

21. By email of 14 February 2013, the IGO/UNHCR informed the Applicant that she was the subject of an investigation. She was interviewed by the IGO/UNHCR on 18 February 2013.

22. During her interview with the IGO/UNHCR, the Applicant admitted to have illegally used the passbook of two international staff members who had already left their assignment in Bangladesh, without their knowledge, for the purpose of buying duty-free alcoholic drinks and food at the Sabir Traders Ltd. warehouse, for a total of USD1,000. The Applicant further admitted that she had driven the car she had “bought” from Mr. P. with diplomatic plates since 2010 until 2012, and to have forged the signature of the former Deputy Representative on a memorandum dated 6 June 2010, to transfer the ownership of the car to her and to be able to pay the government taxes. She also admitted delays in reimbursing outstanding dues for private air tickets, which she had bought from the UNHCR designated travel agency, Saimon Overseas, LTD, but stressed that she clearly had notified the agency that the transaction was of a private nature. The interview record was signed by the Applicant on 7 April 2014.

23. The IGO/UNHCR draft investigation report was shared with the Applicant on 12 April 2013, for her comments; by email of 15 April 2013 the Applicant stated that she did not have any comments on it.

24. The IGO/UNHCR issued its report on 2 May 2013.

Charge letter and disciplinary measure

25. By memorandum of 24 June 2013, the Director, Division of Human Resources Management (“DHRM”)/UNHCR, forwarded the IGO/UNHCR Investigation Report to the Applicant, and informed her that she faced allegations of misconduct, namely that she:

1. engaged in the unlawful use of the government-issued Customs Passbooks ... of two international staff members to purchase duty-free items;

2. failed to transfer the ownership of, and pay the government tax for, the duty-free car [she] purchased from an international staff member, and that [she] drove the car with the diplomatic license plates for at least three years;

3. falsified the signature of Mr. [M.], the former Deputy Representative, on a Bill of Sale on UNHCR letterhead dated 6 June 2010; and

4. acted improperly when, on six occasions, [she] purchased air tickets for personal use from a UN-contracted travel agency without settling the bills in a timely manner.

26. The Applicant was invited to submit comments within two weeks of receipt of the latter, and was informed about her right to be assisted by counsel.

27. On 7 July 2013, the Applicant acknowledged receipt of the charge letter and the investigation report; she did however not file any comments.

28. By memorandum of 1 November 2013, the Director, DHRM, UNHCR, recommended to the High Commissioner for Refugees the separation of the Applicant for misconduct, which the latter approved on 13 November 2013.

29. By memorandum of 18 November 2013, the Director, DHRM, UNHCR, informed the Applicant that the High Commissioner for Refugees had decided to impose on her the disciplinary measure of separation from service, with compensation in lieu of notice and with termination indemnity pursuant to para. (c) of Annex III to the Staff Regulations, effective on the date of her acknowledging receipt of the letter. She also informed the Applicant of the basis for the decision. The Applicant received the letter on 28 November 2013, and she was separated on the same day.

Parties' submissions

30. The Applicant's principal contentions are:

- a. After receipt of the memorandum on 28 November 2013, she was expelled from the office within 15 minutes and her official email address was deleted, which made it impossible for her to collect important documents and emails relating to the actual facts relevant for her defence;
- b. Prior to the memorandum of 24 June 2013, she was interviewed by the Representative, a Senior Protection Officer and her FRO in a “preliminary investigation”; once she had received the memorandum of 24 June 2013, her FRO advised her not to contact anybody and that if she kept low profile, nothing would happen to her;
- c. The decision is discriminatory and flawed since based on inaccurate and incomplete findings; the investigators failed to take into account important facts, and asked questions in such a way that she could not properly explain many things and, thus, kept silent as per her FRO’s advice; she has always acted in good faith, with the aim to redress the wrongdoing of others;

Use of passbooks

- d. While she first admitted having used the passbooks of Ms. W. and Mr. v. N., both in her interview with the IGO/UNHCR and in her application, she later, in a subsequent filing to the Tribunal said she was not sure which passbooks were used;
- e. In her application she noted that while she used the two passbooks on 7 February 2012, she did not use them for herself, but for international staff members stationed in UNHCR Sub-Office Cox’s Bazar, where there is no warehouse; she had received an order for a large quantity of alcoholic beverages by email from two senior international staff members of the Sub-Office; since her access to the email account had been cut, she was not able to provide that email, which she had however shared with the Representative; since these staff members’ passbooks were not enough to purchase the quantity of items they had required, she used the passbooks of Ms. W. and Mr. v. N. to be able to meet their demands; she admits not

having asked Ms. W. and Mr. v. N.'s permission to use their passbooks, which she notes was "an office practice";

f. The Office, her FRO and previous supervisors were aware of that practice and never questioned her about it; she thought she should not question the practice; she simply acted upon instruction; now, the Office makes it look as if it was not aware of such practice;

g. She was obliged to buy the alcohol on credit, since the senior colleagues who had made the order sent her the money only a few months later;

h. Legally, only the person in the name of who the passbook was issued is allowed to purchase at the duty free shop; however, it is an open secret that it is local practice by many international staff members to lend their passbooks to friends to make use of quota and to even sell duty free items. The Office assigned her to assist international staff members to purchase alcohol from the duty free shop, and she never used the passbooks for her personal benefit; she merely complied with instructions from a senior colleague; any item purchased using passbooks is sent to the Sub-Office and a Gate pass is issued by the office for each delivery; she cannot provide the Gate pass since she has no longer access to her office;

i. Her supervisor was fully aware of the foregoing;

Purchase of car

j. She bought the car from Mr. P., on the presumption that he was its owner and that she would transfer the ownership once he provided her with the requisite information; at that time, she underwent a difficult pregnancy and could not concentrate on the purchase; she simply paid Mr. P. in cash (Tk170,000.00), who acknowledged receipt of the payment in a lesser amount (Tk.120,000.00) by email of 16 October 2012 to the Representative; she had the car parked in her garage since September 2009 because she was waiting for the ownership documents; she wrote an email to Mr. P.

sometime in early 2010 asking him to send her the relevant documentation to regularize the situation; she cannot provide such email because she does not have access to her email any longer; since Mr. P. did not respond to her, she found some documents in the Office and understood that the car was still registered to Mr. M., former Deputy Representative; she again wrote an email to Mr. P. who never replied to her; when they met at a workshop in Bangkok, Mr. P. said to her that he would send her the documents but he never did;

k. While in her interview with the IGO/UNHCR she admitted having forged the signature of Mr. M., in her application she stated that she contracted an agent to do the paper work to regularize the situation of the ownership of the car and provided him with the bill of entry, packing list, and a copy of Mr. M.'s passbook; he did all the paperwork for her and only once she received a letter from NBR dated 1 June 2010, she started using the car; she had not used it before the ownership had been transferred to her, and the failure to transfer the vehicle was not her fault; since 16 October 2012, the car was again parked in her garage until it was sold at an auction by the Government;

l. Her agent also processed the taxation matter, and the papers in this respect are in UNHCR Regional Office in Dhaka; the file is "confiscated by [her] immediate supervisor";

m. It appears that national authorities misplaced the file several times and the agent had to remind them to complete the process; NBR sent her another letter on 23 January 2013, asking her to pay Tk.967,182.34, which she told them she was unable to pay;

n. She would never have agreed to buy a car for Tk.170,000.00 if she had known that she would have to pay this amount of taxes; she was cheated since she had not been informed about the consequences of the purchase by Mr. P.;

o. By letter of 30 September 2013, the national authorities advised her to opt for an auction of the car; copy of that letter is “confiscated by [her] supervisor”; the car was auctioned on 24 October 2013; all of this was never explained to the investigator(s), since her supervisor had told her “not to speak much”; it took five years to transfer the ownership of six cars of UNHCR Sub Office Cox’s Bazar;

p. Her agent falsified her signature and that of Mr. M. on the Bill of Sale, without her knowledge, in order to obtain the transfer letter; he copied the letterhead she had sent to him; when asked by the investigator(s) whether she had forged Mr. M.’s signature, she responded in the affirmative on the one hand, because her FRO had told her that this was just a formality and, on the other hand, because she felt responsible for it since she had appointed said agent; she did not have any knowledge or intention of falsifying any signature prior to receipt of the allegation of misconduct;

q. She was the victim of a situation she had been put in by Mr. P., who had falsely pretended to be the owner of the car and who had used the car for five years without transferring ownership to him; when he “sold” the car to the Applicant, he did not inform her about that; the investigator(s) did not mention that it is illegal to sell a car with diplomatic plate without paying taxes;

r. Although it was fully aware of her purchasing the car from an international staff member, the Office did not undertake the necessary legal formalities before it allowed a senior international staff member to sell the car to a local staff member;

Personal air tickets

s. The allegation of not paying personal air tickets in a timely manner was triggered from a note from a UN contracted travel agent concerning pending bills, which contained several names of local and international staff members, including the Representative; although she settled the bill—unlike some international staff members who left the country without settling it,

and did so only upon being required to so in writing—she was singled out; the late payment was an oversight since she bought the tickets for her relatives and did not ask them whether they had settled them;

Remedies

t. She requests the Tribunal to declare the contested decision null and void, to order the Office to reinstate her, and to issue any other orders it deems appropriate.

31. The Respondent's principal contentions are:

a. The investigation was fair and transparent, the misconduct by the Applicant was established and the sanction is proportionate;

b. the Applicant admitted to IGO/UNHCR that she misused the passbooks and, accepted the investigation report; however, in her application, she alleges that she did not use the passbooks for her personal use, but to buy duty-free items for international staff member who had exceeded their allowances, in accordance with common practice; such allegation and the argument that she did not explain this to IGO/UNHCR "to save senior colleagues from embarrassment" is not credible, even less so since the Applicant settled the outstanding amount from her own personal funds, without requesting to be reimbursed by these international staff members;

c. The allegation that her supervisor introduced a system where only the total quantity of duty free items with names was required, without mentioning who needed how much, is refuted; the Applicant's FRO arrived in Dhaka only in May 2012, after the Applicant purchased duty free items in an amount of USD1,024, by using the Passbooks of Ms. W. and Mr. v. N., in February 2012;

d. The documentary evidence and the Applicant's admission show that she failed to take prompt administrative action to transfer the ownership of the car and that she failed to pay government taxes due on the vehicle,

which would have allowed her to drive the car with local plates; the Applicant drove the car with diplomatic plates for around three years;

e. During the interview with IGO/UNHCR, the Applicant unambiguously admitted to have forged the signature of Mr. M. on the Bill of Sale to regularize the ownership; her argument in the application, that the agent she contracted forged Mr. M.'s and her own signature on the Bill of Sale, without her knowledge, is not credible; she did not mention the agent at any stage of the investigation, nor does the agent's name figure on any of the documents, particularly on the communication with NBR; however, the Respondent took the circumstances and Mr. P.'s failure to register the car under his name into account as a mitigating factor, when he determined the disciplinary sanction applied to the Applicant;

f. In view of her functions, the Applicant was well aware of the regulations and normal practice in Bangladesh with respect to the administrative handling of international staff and their entitlements, including visa application, duty free passbook, vehicle registrations etc.;

g. The Applicant, though she did not abuse her position as a UN staff member, acted improperly when she failed to settle dues with respect to personal air tickets for a period of up to 20 months;

h. The Applicant's FRO denies having advised the Applicant not to contact anyone upon receipt of the charge letter and the investigation report; when the Applicant received the charge letter on 7 July 2013, the FRO was on home leave, and she had not returned from home leave when the comments to the charge letter were due on 21 July 2013;

i. With respect to the procedure followed, the case is different from Judgment UNDT/2013/086 and the Representative, when meeting with the Applicant, did not exceed his competence; he kept a full record of the meeting and clarified that it was not an investigation but rather a follow-up on his request for clarification on the issue of driving the car with diplomatic plates and the outstanding invoices from the duty free

warehouse; even if the Tribunal were to find otherwise, any defects of due process were subsequently cured by IGO/UNHCR investigation, and it was at the interview with IGO/UNHCR—duly signed by the Applicant—that she admitted the misconduct;

j. In determining the sanction, the Respondent took into account as mitigating factors the Applicant’s long and satisfactory service and Mr. P.’s failure to regularize the ownership of the car; and

k. The three incidents together establish a lack of integrity, which is particularly serious in view of the Applicant’s functions. The Applicant breached the trust and confidence of her employer; the sanction was proportionate and the application should be dismissed.

Consideration

32. Article X of the United Nations Staff Regulations provides in regulation 10.1(a) that “the Secretary-General may impose disciplinary measures on staff members who engage in misconduct”.

33. Staff rule 10.1(a) under Chapter X provides that:

Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

and staff rule 10.1(c) reads:

The decision to launch an investigation into allegations of misconduct, to institute a disciplinary process and to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority.

34. With respect to the standards expected from staff members, staff regulation 1.2, in subsections (b) and (f) stipulates that:

(b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status;

(f) Staff members shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status.

35. Further, staff regulation 1.1(f) reads:

The privileges and immunities enjoyed by the United Nations by virtue of Article 105 of the Charter are conferred in the interests of the Organization. These privileges and immunities furnish no excuse to the staff members who are covered by them to fail to observe laws and police regulations of the State in which they are located ...

36. Moreover, the Code of Conduct of UNHCR notes that staff members shall:

Uphold the integrity of UNHCR by ensuring personal and professional conduct is, and is seen to be, of the highest standard (Principle 2).

37. The Standards of Conduct for the International Civil Service provide that:

The privileges and immunities that international civil servants enjoy are conferred upon them solely in the interests of the organizations. They do not exempt international civil servants from observing local laws, nor do they provide an excuse for ignoring private legal or financial obligations.

38. According to the established jurisprudence of the United Nations Appeals Tribunal, the role of the Tribunal in reviewing disciplinary cases is limited to examine (i) whether the facts on which the disciplinary measure was based have been established; (ii) whether the established facts legally amount to misconduct

under the Regulations and Rules of the United Nations; and (iii) whether the disciplinary measure applied was proportionate to the offence (see *Mahdi* 2010-UNAT-018; *Abu Hamda* 2010-UNAT-022; *Haniya* 2010-UNAT-024; *Aqel* 2010-UNAT-040; *Maslamani* 2010-UNAT-028; *Nasrallah* 2013-UNAT-310).

39. Moreover, with respect to the required standard of proof in cases involving termination, the Appeals Tribunal stressed in *Molari* 2011-UNAT-164 that:

Disciplinary cases are not criminal. Liberty is not at stake. But when termination might be the result, we should require sufficient proof. We hold that, when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt – it means that the truth of the facts asserted is highly probable.

Whether the facts on which the disciplinary measure was based have been established

On the use of passbooks

40. While the Applicant changed her explanations with respect to the different allegations over time, in her application to the Tribunal she admitted having used the passbooks of Ms. W. and Mr. v. N., albeit not for her own benefit, but for the benefit of two international staff members of Cox's Bazar sub-office. She stated to have used the passbooks of Ms. W. and Mr. v. N., who at that time had already departed Bangladesh, without their knowledge, on the basis of what she states was "an office practice", known to her current and previous supervisors and about which nobody had ever questioned her.

41. The Tribunal stresses that there are several invoices on file, dated 7 February 2012, showing that on that date, a large quantity of alcoholic beverages and some food was bought at a Duty free bonded warehouse for diplomats and privileged expatriates, which were to be "billed to" Ms. W. and Mr. v. N., respectively. These invoices, under "for & on behalf of" are signed by the Applicant.

42. The file also contains “order slips” of the same date, signed by the Applicant, confirming the use of Ms. W. and Mr. v. N. passbooks, respectively, on 7 February 2012 for said duty free alcoholic beverages and food items at said warehouse. The Tribunal cannot but find that the documents on file do not leave any doubts as to the Applicant’s use of Ms. W. and Mr. v. N.’s passbooks on 7 February 2012, for the purpose of buying duty free items at said warehouse.

43. Therefore, and in view of the Applicant’s clear admission during the interview with IGO/UNHCR and in her application to the Tribunal, it finds her latest submission, in which she expressed doubts as to which passbooks were used and when, not credible and irrelevant.

44. In view of the foregoing, the Tribunal concludes that there is clear and convincing evidence that the Applicant, unlawfully, used Ms. W. and Mr. v. N.’s passbooks on 7 February 2012 to buy duty free items.

Failure to transfer ownership and pay taxes and driving car with diplomatic plates

45. With respect to the second charge, the Tribunal notes that the Applicant admits to have failed to transfer the ownership of and pay the government tax for the duty free car she “bought” from Mr. P., and to have driven the car with diplomatic licence plates from 2010 to 2012. While the Applicant provides reasons to explain her actions, the Tribunal notes that this has no impact on the question whether the facts on the basis of which this charge was made were established, and is satisfied that the required standard of proof with respect to this charge is met.

Falsification of Mr. M.’s signature

46. In this respect, the Tribunal notes that while the Applicant, in her interview with IGO/UNHCR, admitted having forged the signature of Mr. M. on the Bill of Sale on UNHCR letterhead, dated 6 June 2010, she submitted in her application and at the hearing that she had, in fact, contracted an agent to do the paperwork to correct an illegal situation created by Mr. P., and alleged that it was that agent who forged Mr. M.’s and her own signature without her knowledge.

47. While the Tribunal finds this new line of argumentation hardly credible, it also noted that even if it were true, the actions of the agent, who had been contracted by the Applicant to regularize the irregular situation of the ownership of the car, are necessarily imputable to the Applicant. Therefore, the forgery of Mr. M.'s signature on the Bill of Sale, if it was not undertaken by the Applicant herself, has to be attributed to her. Hence, there is clear and convincing evidence establishing that charge against the Applicant.

Acting improperly when purchasing air tickets for personal use

48. Finally, the Tribunal notes that the Applicant admits to have failed to settle the outstanding amounts for the air tickets purchased for personal use from a UN-contracted travel agency in a timely manner; hence, the facts on the basis of which this charge was made were not contested and are likewise established.

Whether the established facts legally amount to misconduct

49. The illegal use of the passbooks of two international staff members, the failure to transfer the ownership of the car and to pay taxes thereon, and the driving of the car with diplomatic plates constitute a clear breach of the obligation to comply with local laws, as per staff regulation 1.1(f) and the Standards of Conduct for the International Civil Service quoted above. The Tribunal notes that the respect of the privileges and immunities granted to and by staff members is an essential element to ensure the fulfilment of the Organization's mandate, and the latter has to make sure that any violation of such privileges and immunities be immediately uncovered and rigorously disciplined.

50. With respect to the Applicant's argument that she only followed a commonly accepted practice at UNHCR Bangladesh Office with respect to the use of passbooks, the Tribunal notes that if indeed such practice existed, it would be convictable in the strongest terms. However, even such practice would not lessen or exempt the Applicant's individual accountability taking into account that she was in charge, *inter alia*, of establishing documentation on Government regulations, including timely processing of duty free passbooks and vehicle registration.

51. Further, there is no element on file allowing to conclude that the Applicant acted under any kind of coercion—e.g. that she had been menaced with the non-renewal of her contract if she refused to use the passbooks—which would possibly have influenced the Tribunal’s assessment of her actions. Therefore, such practice, if existing, would not legitimise the Applicant’s “adhering” thereto or in any other way justify her behaviour.

52. With respect to the charge of having forged the signature of Mr. M., the Tribunal notes that forgery committed by a staff member in connection with her or his status as an international civil servant goes to the core values of integrity, is a clear violation of staff regulation 1.2(b) and the above referenced principle 2 of UNHCR Code of Conduct, and constitutes misconduct.

53. The Tribunal finds that the last charge, namely the failure to settle the outstanding amounts for personal air tickets over a lengthy period—while inappropriate and neglectful—hardly amounts to misconduct, since the Applicant had clearly indicated from the outset that the tickets were for private use and had no intention to commit fraud or otherwise take advantage of the Organization.

54. Therefore, the Tribunal concludes that the Applicant’s behaviour with respect to three out of the four charges amounts to misconduct for the purpose of the United Nations Staff Rules and Regulations.

Proportionality

55. According to staff rule 10.3(b), any disciplinary measure imposed on a staff member must be proportionate to the nature and gravity of the misconduct.

56. The Appeals Tribunal has consistently ruled that the Secretary-General has broad discretion with respect to the determination of the appropriate disciplinary sanction, and that it is not for the Tribunal to decide what sanction would have been fair or, in its view, more appropriate (*Samwidi* 2010-UNAT-084; *Cabrera* 2010-UNAT-089).

57. The Appeals Tribunal clarified in *Aqel* 2010-UNAT-040 that when misconduct and the seriousness of the incident are established, the level of sanction imposed can only be reviewed by the Tribunal in cases of obvious absurdity or flagrant arbitrariness. As such, it has found that while the decision maker enjoys broad discretionary power, a termination decision may be disproportionate where it “[was] more drastic than necessary” since “it [was] like taking a sledgehammer to crack a nut” (*Doleh* 2010-UNAT-025).

58. With this in mind when assessing the proportionality of the sanction, the Tribunal has also to consider whether any attenuating circumstances existed and, in the affirmative, whether they have been duly taken into account.

59. In this respect, the Tribunal is concerned that Mr. P., the Applicant’s former supervisor, when buying the car from Mr. M. and subsequently selling it to the Applicant, failed to provide the necessary paperwork. The Tribunal is aware of the difficulties for the Applicant to transfer the ownership of the car to her. It acknowledges that the Applicant’s actions, once she did not get the necessary papers from Mr. P., were made in an attempt to regularize a situation that she did not create. While this is not an excuse, the Tribunal finds it comprehensible that the Applicant tried to find a solution, so as to allow her to drive the car which she had in fact paid for and which she could trust she would be able to use as her property.

60. The Tribunal is further concerned that by note dated 16 June 2009 and signed by Mr. P., the latter “authorized” the Applicant to drive his “personal vehicle” in his absence, which was also a more than inappropriate thing for him to do and which might have misled the Applicant.

61. The Tribunal considers that the foregoing constitute mitigating circumstances to be taken into account in the Applicant’s favour.

62. The Tribunal recalls, however, that the sanction imposed on the Applicant, that is, separation from service with compensation in lieu of notice and with termination indemnities, was not the most severe sanction available. It is therefore

satisfied that the mitigating factors described above were duly taken into account in the determination of the appropriate sanction.

63. Therefore, in view of the seriousness of the totality of the three charges which the Tribunal found to constitute misconduct, and taking into account the above mitigating circumstances, the Tribunal considers that the sanction of separation with compensation in lieu of notice and with termination indemnity was not disproportionate to the seriousness of the offences.

Due process requirements

64. With respect to possible procedural irregularities, the Tribunal has to assess whether the Representative, in conducting the “fact finding” described above (para. 14 to 18 above) exceeded his mandate as per the terms of the applicable legal framework.

65. The Tribunal recalls that ST/AI/371/Amend.1 (*Revised disciplinary measures and procedures*), provides in sec. 2:

Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake an investigation.

66. Former UNHCR IOM/FOM/54/2005 expressly provided that IGO/UNHCR is the responsible officer as per the terms of para. 2 of ST/AI/371. While the terms of current IOM/009/FOM/010/2012 (*The role, functions and modus operandi of the IGO*), applicable to the case at hand are not as explicit, it results from that document and the *Guidelines on conducting investigations and preparing investigation* of 28 September 2012 (“the Guidelines”) that IGO/UNHCR remains the sole authority within UNHCR to conduct investigations into alleged misconduct.

67. Paragraph 2.6 of the Guidelines provides that:

Investigations conducted by the IGO are administrative in nature and are essentially a fact finding exercise undertaken to determine if it is likely or probably that misconduct has occurred. The IGO is the sole entity responsible for conducting investigations of alleged staff misconduct in UNHCR (footnote omitted).

68. The Guidelines further state:

5. Reporting possible misconduct

...

5.2 ... Staff members who receive information suggesting misconduct by a UNHCR staff member ... have the obligation to provide this information without delay to the IGO.

...

5.5.2 When alerting the IGO to situations involving possible staff misconduct, staff members and others are encouraged to provide as much detail as possible, including any supporting documents and/or other relevant facts already available to them. However, steps should not be taken by staff (including managers) or others to investigate the alleged misconduct without first consulting with the IGO on the appropriate procedures and due process considerations.

69. Under para. 4.1, "Rights" the Guidelines provide:

4.1.1. During an investigation, UNHCR staff members and other personnel have a right to:

- A presumption of innocence throughout the investigation;
- A professional, impartial and thorough investigation without undue delay; and
- Confidentiality in the conduct of the investigation.

4.1.2 In addition, in order to ensure an effective investigation process, the Subject of the investigation may expect to:

- Be given an explanation of the investigation process;

...

- Have the interview(s) schedules at a reasonable place and time and to be provided with the name and role of the individual(s) conducting the investigation interview;
- Be given an opportunity to be accompanied at the interview;
- ...
- Be given the opportunity to review the record of interview for correction before signing;
- ...

70. The Tribunal notes that the Representative, in his memorandum of 20 December 2012 to the Inspector General, stressed that he had informed the Senior Inspection Coordinator already on 16 October 2012, while the latter was conducting a standard inspection in Dhaka, that there was a possible case of misconduct “but that [the Representative] wished to better establish the facts before referral to [headquarters]”. Thereafter, and although he already had documentary evidence with respect to both the use of the passbooks and the Bill of Sale, he held a meeting with the Applicant on 29 November 2012 at which he asked her questions with respect to the various allegations that had come to light since September/October 2012.

71. The Tribunal notes that nothing on file shows that the Representative, who took “steps ... to investigate the alleged misconduct” had prior thereto consulted with the IGO on the appropriate procedures and due process considerations, as per the terms of sec. 5.5.2 of the Guidelines. However, his memorandum of 20 December 2012 clearly shows his intention to better establish the facts before referring the case to headquarters. In this respect, the Tribunal notes that the above referenced provisions of the Guidelines are drafted almost contradictory: while it encourages staff when reporting possible misconduct to the IGO/UNHCR “to provide as much detail as possible, including any supporting documentation and/or other relevant facts already available to them”, it stresses, at the same time, that staff, including managers, “should not take steps ... to investigate the alleged misconduct without first consulting with the IGO/UNHCR on the appropriate

procedures and due process considerations” and that they shall report possible misconduct “without delay” to the IGO/UNHCR.

72. The foregoing notwithstanding, the Tribunal finds that by failing to consult with the IGO/UNHCR on the appropriate procedures and due process considerations, and by gathering “testimonial” and documentary evidence, by means of writing to witnesses, and holding meetings with the Applicant—particularly the meeting of 29 November 2012—the Representative went too far and exceeded his mandate/authority under the above-referenced rules. As such, the due process requirements contained in sec. 4 of the Guidelines, were not respected at the stage of the “fact finding” by the Representative, and the Applicant was, for instance, not given the opportunity to review the record of her meeting/interview with the Representative.

73. Nevertheless, the Tribunal is satisfied that in its investigation IGO/UNHCR strictly followed the rules governing the investigative procedures at UNHCR, and that the Applicant was given ample opportunities to contest the allegations made against her: she was provided with the interview record by IGO/UNHCR, which she signed on 7 April 2013; she was subsequently provided with the draft investigation report for comments though she did not make any. Also, UNHCR strictly followed the procedure under ST/AI/371/Amend.1 when it informed the Applicant of her right to counsel and her right to file comments on the charge letter and the final investigation report.

74. The Applicant did not avail herself of the various opportunities to file comments to refute the charges. Her argument that she was advised by her FRO not to comment on the charge letter is not credible: her FRO was on leave at the time the Applicant received the charge letter and resumed duty two weeks after the deadline for filing comments had elapsed. It was the Applicant’s own responsibility to file comments and seek counsel, if this was her wish, once she was asked to file such comments and informed of her right to seek assistance. Finally, the Tribunal observes that while the Applicant was asked whether she wanted to be accompanied by another staff member/person at IGO/UNHCR interview, she did not avail herself of that opportunity.

75. The Tribunal recalls that the Appeals Tribunal held in *Leal* 2013-UNAT-337 that when the key elements of due process were met, and a staff member “was informed of the charges against him and was given the opportunity to contest them, it is satisfied that the interests of justice were served”. Similarly, the Tribunal is satisfied that for the reasons outlined above, due process requirements were satisfied and the interests of justice were equally served in the case at hand.

76. Since the Tribunal, in its ruling, did not make use of the additional documents filed by the Respondent on an *ex parte* basis, it did not consider it necessary to share them with the Applicant.

Conclusion

77. In view of the foregoing, the Tribunal DECIDES:

The application is dismissed.

(Signed)

Judge Thomas Laker

Dated this 19th day of January 2015

Entered in the Register on this 19th day of January 2015

(Signed)

René M. Vargas M., Registrar, Geneva