UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/054
Judgment No.: UNDT/2016/221
Date: 22 December 2016
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

RAJAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Daniel Trup, OSLA

Counsel for Respondent:
Ms. Susan Maddox, ALS/OHRM, UN Secretariat
Ms. Miryoung An, ALS/OHRM, UN Secretariat

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Introduction

1. The Applicant, former Chief of Finance at the P-5 level with the Office for the Coordination of Humanitarian Affairs ("OCHA"), contests the decision to impose on him the disciplinary measure of separation from service with termination indemnity and compensation in lieu of notice. At the time of the contested decision, the Applicant held a permanent appointment. The disciplinary sanction was based on the finding that he had made a material misrepresentation on a personal history form known as "P.11" and several personal history profile ("PHP") forms. (It appears that the P.11 forms were replaced by PHP forms sometime after 2001. These forms will be collectively referred to as "personal history forms").

2. The Tribunal would have preferred to render this decision earlier, however, the filing of the parties' closing submissions in June 2016 coincided with the finalization of several complicated matters, including seven abolition/termination cases that required careful consideration. The finalization of this judgment was further affected by, amongst other matters, staff mobility and movement, as well as fifteen applications for suspension of action filed in New York in the period of June to December 2016, eight of which were disposed of by the undersigned Judge.

3. Due to the extensive detail of facts and issues, the pertinent facts dating as far back as 2001, this Judgment contains a table of contents as an *aide mémoire*.

Procedural background

4. The application was filed with the Dispute Tribunal on 14 September 2015. The Respondent's reply was submitted on 9 October 2015.

5. On 29 April 2016, the case was assigned to the undersigned Judge.

6. By Order No. 105 (NY/2016) dated 4 May 2016, the Tribunal noted that art. 16.2 of the Dispute Tribunal's Rules of Procedure states: "A hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure". The Tribunal informed the parties that it has, in a number of appropriate instances, decided cases concerning the imposition of a disciplinary measure on the papers filed before it, without a hearing, where the parties agree to such a determination. The Tribunal ordered the parties to file a jointly signed statement indicating whether they agreed to have this case decided on the papers or whether one or both parties requested a hearing on the merits.

7. In a jointly signed statement dated 20 May 2016, the parties informed the Tribunal that, "having engaged in a thorough review of the case and good-faith discussions, the parties agree to have this case decided on the papers". The parties requested the opportunity to file closing submissions. The Tribunal granted the request.

8. On 1 June 2016, the Applicant filed his closing submission and on 23 June 2016, the Respondent filed his closing submission.

Facts

April 1976 to December 2008—employment of the Applicant's brother

9. It is common cause that the Applicant's brother was employed by the United Nations Office in Geneva ("UNOG") at the time of the Applicant's initial appointment in 2001. More specifically, the Applicant's brother was employed at UNOG from 5 April 1976 until 8 December 2008, when he retired.

August 2001—exchange leading up to the Applicant's appointment

10. In August 2001, the Applicant was selected for the position of a P-3 level Transport Officer with the Department of Peacekeeping Operations. He received an email on 15 August 2001 from a human resources officer regarding a P.11 form that the Organization apparently held on file, stating: "Upon review of our records, we note that your P.11 [form,] while indicating that you had a BA [Bachelor of Arts degree] in English History in 1985, does not include the Masters in Cost Accounting from the University of Bombay". One day later, on 16 August 2001, an internal email was circulated among the persons dealing with the Applicant's recruitment confirming that he should be sent an offer of appointment.

11. On the same day, 16 August 2001, the Applicant sent a facsimile transmission with copies of his education certificates, stating, "I had applied for the post via email and hence have not completed any P.11 document of the U.N. Please let me know if you need any further information, and will try and provide it as soon as possible". The Applicant also sent an email referring to the facsimile and stating that he "had applied for the job via the internet, and hence have not personally completed a P.11". He also

provided a clarification regarding his qualifications, stating: "My bachelor degree was a B.Com in Accounting and not B.A. in English History as mentioned by you".

12. By email the same day, the human resources officer handling his recruitment requested that the Applicant complete an attached P.11 form. One day later, on 17 August 2001, the Applicant was again asked to complete and return a P.11 form. The Applicant replied that he would try to send the P.11 form as soon as possible. On the same day, a series of emails were also exchanged between the Applicant and the human resources officer regarding the Applicant's nationality for the purposes of employment with the Organization.

August–September 2001—preparation of the initial P.11 form

13. On 22 August 2001, the Applicant sent an email stating that it was his understanding that the human resources officer would be making changes to the Applicant's P.11 form. Specifically, the Applicant stated: "Based on the exchange of emails, I assume you have made the necessary changes to the P.11 document with you, and are not expecting me to forward another document".

14. By internal email, dated 4 September 2001, circulated among the persons dealing with the Applicant's recruitment, it was again confirmed that the Applicant should be sent an offer of appointment.

15. By email to the Applicant dated 5 September 2001, the human resources officer handling his case stated, "I have received all the information except the P.11 which you will complete upon your arrival at [Headquarters]". She noted that an offer of appointment was forthcoming.

October 2001—initial appointment

16. By email dated 3 October 2001, the Applicant was informed of the details of his arrival and induction process. He replied by email on 14 October 2001, attaching his "completed P.11 form, to mirror [his] application sent in January 2001". He was appointed with the effective date of 17 October 2001.

October 2001—unsigned P.11 form

17. An unsigned P.11 form was submitted as evidence by the parties. Although it is dated "January 2001", it appears from the surrounding circumstances that this form was in fact submitted in or around October 2001. The form records the Applicant's personal details, educational qualifications, and work history. Section 18 of the form asks, "Are any of your relatives employed by a public international organization?" The form is marked, "No". A follow-up subsection, which reads—"If answer is 'yes', give the following information [name, relationship, name of international organization]"—has been left blank. Question 33 of the form states: "I certify that the statements made by me in answer to the foregoing questions are true, complete and correct to the best of my knowledge and belief. I understand that any misrepresentation or material omission made on a Personal History form or other document requested by the United Nations renders a staff member of the United Nations liable to termination or dismissal". This section is marked with the typed date referred to above ("January 2001") but is not signed.

March 2005 and February 2007—job applications through Galaxy

18. On 25 March 2005 and 21 February 2007, the Applicant submitted two job applications using Galaxy, the Organization's online recruitment

system used at the time. The Applicant was selected for these positions. In his personal history forms, he answered "No" to the question, "Are any of your relatives employed by a public international organization? If you answered Yes to #1, list any relatives employed by the United Nations or its Specialized Agencies Below". (The Tribunal notes that some of the documents and submissions also refer to the Applicant's job application submitted on 11 December 2008, however, as that application post-dated the Applicant's brother's departure from the Organization, it was not pursued by the Administration as part of the disciplinary case and is to be disregarded.)

8 December 2008—retirement of the Applicant's brother

19. On 8 December 2008, the Applicant's brother retired from the Organization.

August 2010—introduction of Inspira

20. In or around August 2010, a new online recruitment system known as "Inspira" replaced Galaxy.

August 2010—job applications through Inspira

21. On 10 August 2010, the Applicant submitted a personal history form in Inspira for the position of Chief of Finance, P-5 level, Administrative Services Branch, Executive Office, OCHA. In response to the question "Are any of your relatives employed by the United Nations Secretariat", the Applicant answered "Yes" and listed his spouse. The Applicant was selected for the position and was promoted effective 29 June 2011.

May 2013—fact-finding investigation

22. On 10 May 2013, almost two years after his promotion in 2011 and 12 years after his entry into service, Mr. Michael Stefanovic, the then Director, Investigations Division, Office of Internal Oversight Services ("OIOS"), wrote to Ms. Valerie Amos, the then Under-Secretary-General, OCHA ("USG/OCHA"), concerning the Applicant. He stated that the Applicant's brother had been employed by the Organization from 1976 until the brother's retirement in 2008. He further stated that OIOS had received information that the Applicant had falsely stated in his 2001 application for employment that he did not have any relatives working for the Organization. The Director of the Investigations Division referred the matter to the USG/OCHA for appropriate action.

23. On 19 June 2013, the Executive Officer, Administrative Services Branch, OCHA, wrote to the Applicant to inform him of the information received from OIOS. The Applicant was asked to state whether he had a brother working at the United Nations in 2001 and, if he did, why he indicated in his Personal History form that he did not have any relatives employed by a public international organization.

24. On 24 June 2013, the Applicant submitted a response stating that his brother was working at UNOG in 2001. He further stated that his initial application for a position in the Department of Peacekeeping Operations did not require him to submit a Personal History form. Rather, he submitted an application through an online recruitment system. However, after receiving an appointment letter, he was asked to fill out a Personal History form. He noted that he was an external candidate and not familiar with United Nations rules, regulations and procedures. He further stated that he did not

intend to misrepresent himself or to omit any material and relevant information.

25. On 28 June 2013, the USG/OCHA forwarded the Applicant's response to Ms. Catherine Pollard, the then Assistant Secretary-General for Human Resources Management, for appropriate action.

26. On 19 July 2013, the then Officer-in-Charge of the Office of Human Resources Management ("OHRM") informed the USG/OCHA that, in accordance with ST/AI/371 (Revised Disciplinary Measures and Procedures), there was a sufficient basis for OCHA to consider whether to undertake an investigation into the Applicant's conduct.

27. On 24 April 2014, a fact-finding investigation panel interviewed the Applicant. On the same day, immediately following the interview with the Applicant, the panel interviewed the Applicant's brother via telephone.

28. On 26 May 2014, the Applicant signed a summary of the interview he participated in with the fact-finding panel on 24 April 2014, certifying that the text was an accurate description of what was said.

29. On 5 June 2014, the Applicant's brother signed a similar certification with respect to an interview which also took place on 24 April 2014.

November 2014—investigation report

30. By interoffice memorandum dated 28 November 2014, the Head of the Capacity Development Office, Department of Economic and Social Affairs, and the Acting Executive Officer, Office of Legal Affairs,

forwarded a copy of a fact-finding investigation on possible misconduct to the USG/OCHA.

31. The key findings of the fact-finding investigation report were as follows:

> (iv) In job application forms in 2001 and 2003, Mr. A. Rajan did not indicate that he had any relatives employed in the UN system, although his brother … was employed at UNOG at that time.
>
> (v) In job application forms in 2005, 2007, and 2008, Mr. A. Rajan did not indicate that he had any relatives employed in the UN system, although in addition to his brother … who was employed at UNOG, his wife … was also employed in the UN.
>
> (vi) In job application forms in 2010, 2013, and 2014, Mr. A. Rajan indicated that his spouse … was employed in the UN, by which time, his brother … had retired from UN service.

32. By interoffice memorandum to Ms. Carole Wainaina, Assistant Secretary-General, OHRM ("ASG/OHRM"), dated 26 December 2014, the USG/OCHA summarized the fact-finding investigation report and concluded that there may be cause to consider potential misconduct. She stated that she was referring the case to OHRM for possible disciplinary action.

February 2015—formal charges of misconduct

33. By interoffice memorandum dated 18 February 2015 and titled "Allegations of misconduct", Ms. Ruth di Miranda, Chief of the Human Resources Policy Service, OHRM, informed the Applicant that the ASG/OHRM had decided to issue formal allegations of misconduct against him. In particular, it was alleged that he engaged in misconduct by, between

2001 and 2008, making a material misrepresentation on personal history forms by falsely stating that he did not have a relative employed by a public international organization. The Applicant was asked to provide a written statement in response to the allegations.

34. On 22 April 2015, the Office of Staff Legal Assistance submitted a written response to the allegations on behalf of the Applicant.

15 July 2015—disciplinary sanction letter

35. On 15 July 2015, Ms. Wainaina wrote to the Applicant to convey the outcome of the disciplinary process. Ms. Wainaina summarized the Applicant's submissions dated 22 April 2015. She stated that having reviewed the dossier, she had decided to drop the allegations against the Applicant relating to his failure to disclose his spouse's employment with the Organization.

36. However, she informed the Applicant that it had been established by clear and convincing evidence that, knowing that his brother was employed by the Organization, the Applicant had falsely stated that he did not have a relative employed by a public international organization. In relation to the Applicant's comments on the allegations, the letter stated:

> With respect to your comments on the allegations of misconduct, the Under-Secretary-General for Management, on behalf of the Secretary-General, considered, among other things, the following:
>
> (a) There is no ambiguity in the question regarding employment of relatives since the United Nations is clearly a "public international organization". You also indicated that, without due enquiry, you decided that the purpose of the question was directed at detecting possible conflicts of

interest. This contention, however, provides no justification for your not providing a truthful answer to the question and certifying the truthfulness of the false information you submitted.

(b) In 2003, you created your PHP anew in the newly-introduced online platform (Galaxy), as the automatic electronic transfer of information previously submitted on P.11s was not possible in Galaxy. Further, at the time you completed your PHP in Galaxy, you had already served the Organization for almost two years at the P-3 level, and it is not credible that you still did not understand that your brother worked for a public international organization, as you knew he was working for the United Nations at that time.

(c) With respect to making false statements in PHPs, the Appeals Tribunal held that the Organization is under no obligation to prove *mens rea*, and that the applicant is obliged to ensure that his candidacy is premised on accurate information.

(d) As your dishonesty is at the heart of the case, the question of whether you benefited from the non-disclosure is not relevant. In any event, given the narrow exceptional circumstances where fraternal employment was allowed under the applicable Staff Rules, disclosure of your brother's employment may have led to additional scrutiny being given to your job applications.

The letter concluded as follows:

> In determining the appropriate sanction, the Under-Secretary-General for Management, on behalf of the Secretary-General, took into account the past practice of the Organization in similar cases, which showed that making false statements on application forms normally resulted in

> disciplinary measures at the stricter end of the spectrum (e.g., separation or dismissal).
>
> With respect to aggravating factors, the Under-Secretary-General for Management, on behalf of the Secretary-General, considered that you had a number of opportunities to submit truthful information over a period of time.
>
> With respect to mitigating circumstances, the Under-Secretary-General for Management, on behalf of the Secretary-General, considered that you showed remorse and apologized for your conduct, and that you have a record of long service with positive performance evaluations.
>
> In light of the above, the Under-Secretary-General for Management, on behalf of the Secretary-General, has decided to impose on you the disciplinary measure of separation from service with compensation in lieu of notice, and with termination indemnity in accordance with staff rule 10.2(a)(viii), effective upon your receipt of this letter.

16 July 2015—separation from service

37. On 16 July 2015, the Applicant received the letter of 15 July 2015. He was separated effective 16 July 2015, with three months' compensation in lieu of notice and termination indemnity.

Applicant's submissions

38. The Applicant's primary contentions can be summarized as follows:

a. He had not completed his P.11 form at the time he was offered the initial appointment in 2001. He was offered, and accepted, an initial appointment with the Organization before any representation as to his brother's employment had been made. It would not, therefore, have been possible for his non-disclosure to have advanced his chance of recruitment;

b. Having been previously employed in the private sector, the Applicant was not familiar with the Organization's structure. He did not make any connection between the United Nations offices in Geneva and the Department of Peacekeeping Operations in New York. He understood the question to be related to whether there were any possible conflicts of interest (to which the answer was, he believed, "no"). He maintains that the question was not clear to him at the time of his application to the Organization. The Tribunal has previously found that the phrase "Public International Organization" is "not as self-evident as the Respondent submits that it is" (*Nourain* UNDT/2012/142);

c. His submissions in subsequent job applications were attributable to misunderstanding and inattention rather than deliberate deception;

d. When the Organization transitioned to the Galaxy recruitment system, he transferred the information from his previous records into this new system automatically. The mistaken non-disclosure as to his brother's employment was therefore transferred without him noticing;

e. The reason his disclosure changed in 2010 was not because of his brother's retirement in 2008, but rather because in 2010 the Organization transferred its online recruitment process to the new Inspira system, which did not allow for the transfer of all previous information wholesale and automatically. As a result, he was required to input his details manually into Inspira;

f. The Administration ignored relevant matters and considered irrelevant matters in reaching its decision to separate the Applicant, which is wholly disproportionate to his conduct;

g. Former staff rule 104.10 did not include the blanket prohibition on employment of close family members, which is now in place. The primary concerns at the time were to ensure both that the selected candidate was the best qualified for the position (former staff rule 104.10(a)) and that there was not potential for a conflict of interest (former staff rule 104.10(c));

h. The Administration failed to consider mitigating factors, such as his admission of error; his unblemished disciplinary record; his cooperation with the investigation; that the Applicant had no intention of deriving personal benefit from his representations, nor did the Organization suffer harm; and the length of time taken by the Administration to resolve the case.

Respondent's submissions

39. The Respondent's primary contentions can be summarized as follows:

a. The Applicant's submission that he misunderstood the question is irrelevant. It is sufficient to establish that the Applicant made false statements contrary to his knowledge;

b. The Applicant's culpability lies not in the fact that he had a brother working for the United Nations at the time of his application but rather the lack of disclosure of the material fact,

which was crucial to the Organization to ensure the conditions stipulated in the staff rule were adhered;

c. If the Applicant believed no conflict of interest arose from his brother's employment and that giving the truthful answer would therefore not create a problem for him, then the reasonable course of action would have been to simply disclose the fact that his brother worked for the Organization in Geneva;

d. Former staff rule 104.10 permitted fraternal employment only in very limited circumstances. The disclosure of the Applicant's fraternal relationship with a staff member would have led to additional scrutiny of his applications, and possibly impacted the selection decisions. That former staff rule 104.10 include circumstances in which fraternal employment was permitted does not alleviate the gravity of the Applicant's offence;

e. The Applicant's contention that he accepted his initial offer of appointment before making a misrepresentation is not a mitigating factor. It does not address that nature of the misconduct involving dishonesty;

f. The Applicant's contention regarding the automatic transfer of data from the P.11 form to the Galaxy recruitment system is not supported by the evidence. The record shows that he did not simply copy his previous application, but reviewed and made changes to his previous employment details, such as job title, field of work, number of employees supervised by him, kind of employees supervised by him, and name of supervisor;

g. The disciplinary measure imposed on the Applicant was proportionate to the Applicant's misconduct. The Applicant has failed to show "obvious absurdity or flagrant arbitrariness". The Applicant's separation from service was consistent with the past practice of the Respondent in cases involving misrepresentation on a PHP form. Normally, making a material misrepresentation on a PHP form renders a staff member unfit for service, and mandates the imposition of a disciplinary measure at the stricter end of the spectrum;

h. The sanction imposed on the Applicant was not the most severe available because the Respondent properly considered mitigating factors, including the Applicant's remorse, apology, and long service with positive performance evaluations. Other mitigating factors claimed by the Applicant were not supported the facts.

Applicable law

40. Staff regulation 1.2(b), which was in effect at the time of the Applicant's initial appointment (ST/SGB/1999/5), and which has since remained in effect and unchanged (ST/SGB/2014/1), states:

> **Regulation 1.2**
>
> **Basic rights and obligations of staff**
>
> …
>
> (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;

41. Former staff rule 104.4, in effect at the time of the Applicant's initial appointment in 2001, stated:

> **Rule 104.4**
>
> **Notification by staff members and obligation to supply information**
>
> (a) Staff members shall be responsible on appointment for supplying the Secretary-General with whatever information may be required for the purpose of determining their status under the Staff Regulations and Staff Rules or of completing administrative arrangements in connection with their appointments.
>
> (b) Staff members shall also be responsible for promptly notifying the Secretary-General, in writing, of any subsequent changes affecting their status under the Staff Regulations or Staff Rules.

42. Former staff rule 104.10 stated:

> **Rule 104.10**
>
> **Family relationships**
>
> (a) Except where another person equally well qualified cannot be recruited, appointment shall not be granted to a person who bears any of the following relationships to a staff member: father, mother, son, daughter, brother or sister.
>
> (b) The husband or wife of a staff member may be appointed provided that he or she is fully qualified for the post for which he or she is being considered and that the spouse is not given any preference by virtue of the relationship to the staff member.
>
> (c) A staff member who bears to another staff member any of the relationships specified in (a) and (b) above:
>
> (i) Shall not be assigned to serve in a post which is superior or subordinate in the line of authority to the staff member to whom he or she is related;
>
> (ii) Shall disqualify himself or herself from participating in the process of reaching or reviewing

> an administrative decision affecting the status or entitlements of the staff member to whom he or she is related.

43. In 2009, new provisional Staff Rules were introduced (ST/SGB/2009/7), including staff rules 1.5 and 4.7(a), which stated:

> **Rule 1.5**
>
> **Notification by staff members and obligation to supply information**
>
> (a) Staff members shall be responsible for supplying the Secretary-General with relevant information, as required, both during the application process and on subsequent employment, for the purpose of determining their status under the Staff Regulations and Staff Rules as well as for the purpose of completing administrative arrangements in connection with their employment. Staff members shall be held personally accountable for the accuracy and completeness of the information they provide.
>
> (b) Staff members shall also be responsible for promptly notifying the Secretary-General, in writing, of any subsequent changes affecting their status under the Staff Regulations or Staff Rules.
>
> …
>
> **Rule 4.7**
>
> **Family relationships**
>
> (a) An appointment shall not be granted to a person who is the father, mother, son, daughter, brother or sister of a staff member, unless another person equally well qualified cannot be recruited.
>
> (b) The spouse of a staff member may be appointed provided that he or she is fully qualified for the post for which he or she is being considered and that the spouse is not given any preference by virtue of the relationship to the staff member.
>
> (c) A staff member who bears to another staff member any of the relationships specified in paragraphs (a) and (b) above:

(i) Shall not be assigned to serve in a post which is superior or subordinate in the line of authority to the staff member to whom he or she is related;

(ii) Shall not participate in the process of reaching or reviewing an administrative decision affecting the status or entitlements of the staff member to whom he or she is related.

44. With effect from 2 September 2010, staff rule 4.7 was amended to remove from para. (a) the phrase "unless another person equally well qualified cannot be recruited" (see ST/SGB/2010/6). Staff rule 4.7 has since remained in force, stating:

Rule 4.7

Family relationships

(a) An appointment shall not be granted to a person who is the father, mother, son, daughter, brother or sister of a staff member.

(b) The spouse of a staff member may be appointed provided that he or she is fully qualified for the post for which he or she is being considered and that the spouse is not given any preference by virtue of the relationship to the staff member.

(c) A staff member who bears to another staff member any of the relationships specified in paragraphs (a) and (b) above:

(i) Shall not be assigned to serve in a post which is superior or subordinate in the line of authority to the staff member to whom he or she is related;

(ii) Shall not participate in the process of reaching or reviewing an administrative decision affecting the status or entitlements of the staff member to whom he or she is related.

45. Staff rules 10.1, 10.2, and 10.3 (ST/SGB/2014/1), provide, insofar as relevant:

Rule 10.1

Misconduct

(a) 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.

Rule 10.2

Disciplinary measures

(a) Disciplinary measures may take one or more of the following forms only:

(i) Written censure;

(ii) Loss of one or more steps in grade;

(iii) Deferment, for a specified period, of eligibility for salary increment;

(iv) Suspension without pay for a specified period;

(v) Fine;

(vi) Deferment, for a specified period, of eligibility for consideration for promotion;

(vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;

(viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;

(ix) Dismissal.

…

Rule 10.3

Due process in the disciplinary process

…

> (b) Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct.

Consideration

Scope of judicial review

46. When considering appeals against the imposition of disciplinary measures for misconduct, the Tribunal must examine whether the procedure followed is regular, whether the facts in question have been established, whether these facts constitute misconduct, and whether the sanction imposed is proportionate to the misconduct committed (see *Mahdi* 2010-UNAT-018; *Sanwidi* 2010-UNAT-084; *Masri* 2010-UNAT-098). The Appeals Tribunal has reiterated in a number of judgments that due deference is to be afforded to the decision of the decision-maker and that it is not the role of the Dispute Tribunal to substitute a decision that it may have otherwise made, had it been in the shoes of the decision-maker (*Doleh* 2010-UNAT-025; *Said* 2015-UNAT-500; *Hepworth* 2015-UNAT-503; *Portillo Maya* 2015-UNAT-523; *Ogorodnikov* 2015-UNAT-549).

Whether the facts were established

47. As the Appeals Tribunal stated at para. 17 of *Liyanarachchige* 2010-UNAT-087,

> In a system of administration of justice governed by law, the presumption of innocence should be respected. Consequently, the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.

48. When termination is a possible outcome, there should be sufficient proof, and misconduct must be established by clear and convincing evidence, which 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 (*Molari* 2011-UNAT-164).

49. In this case, the established facts are that on three occasions—sometime in or around October 2011, on 25 March 2005 and on 21 February 2007—the Applicant's personal history forms incorrectly indicated he did not have "relatives employed by a public international organization", whereas his brother was in fact employed by the United Nations until 8 December 2008.

Whether the facts amount to misconduct

50. The disciplinary sanction was based on the finding that the Applicant made material misrepresentation in his personal history forms. A significant component of the Administration's case was that the Applicant acted with intent and that, as stated in the letter of 15 July 2015, his "dishonesty [was] at the heart of the case".

51. In view of the Applicant's explanations, the Tribunal does not find that it has been established that the Applicant's actions amounted to misconduct, including that he acted dishonestly and with the intent to mislead the Organization.

52. Firstly, the timing and the manner in which the data was initially entered in 2001 suggests in all likelihood, an oversight and misunderstanding on the Applicant's part and a lack of thoroughness on the part of the Administration in securing all necessary documentation timeously. The P.11 form dated "January 2001" was, in any event, not

signed by the Applicant. It appears that this form may have been completed with guidance or input from OHRM (see the Applicant's email exchange with the human resources officer on 22 August and 5 September 2001). The P.11 form was also prepared after the letter of appointment had already been signed and after the Applicant had entered on duty in or around October 2001. (As mentioned above, the date "January 2001" on the P.11 form appears to be a misnomer, as the unsigned form was in all likelihood backdated.)

53. Secondly, the Applicant submitted that, having come from private practice, he was confused by and misunderstood the question. He did not make any connection between the United Nations offices in Geneva and the Department of Peacekeeping Operations in New York. At the same time, the Applicant understood the question to concern whether there were any possible conflicts of interest. Indeed, a plain reading of the applicable law (former staff rule 104.10(c)(i) and (ii)) illustrates that its primary purpose was to avoid a situation of a conflict of interest, particularly between family members serving in posts where there is a common line of authority or where a staff member may be involved in an administrative decision involving his or her relative. Notably, and furthermore in *Nourain* UNDT/2012/142, the Dispute Tribunal also considered whether a staff member ought to know that reference to a "Public International Organization" in the Personal History form includes any organization in the United Nations Common System. The Dispute Tribunal noted that "[i]f the term is intended to mean the United Nations Common System, it is not clear why, for the purposes of specificity and clarity the Organization would not use this term directly; perhaps with a reference to the website specifying all the relevant organizations as opposed to an ambiguous and more complex term". The Dispute Tribunal concluded that the meaning of the term is not

self-evident, as suggested by the Respondent in that case, and recommended framing the question in a clearer manner.

54. Indeed, the wording of the question ("Are any of your relatives employed by a public international organization") raises some issues. There are a number of international organizations that are separate and distinct from the UN Secretariat. There are some entities whose relationship to the UN Secretariat and UN family may be somewhat unclear to an ordinary person, such as the United Nations Development Programme, International Labour Organization, etc. One could be reasonably confused by whether the question meant to establish whether the persons are working in the same office, same location, or under the same chain of command. Furthermore, the Tribunal is concerned that the implications of the question and the consequences of an incorrect response were not articulated anywhere in the personal history forms. No candidate could reasonably foresee that an incorrect response would result in the findings of misconduct and separation from service.

55. Thirdly, it is unclear whether the information regarding the Applicant's brother's employment, had it been disclosed at the time, would actually have had a negative effect on the Applicant's recruitment. Based on staff rule 104.10(a), which applied at the material times, had the Applicant's brother's employment been disclosed, it would not have necessarily meant that the Applicant could not and would not have been employed. When considering whether an omission or misrepresentation was material and whether there was an element of dishonesty, it is necessary to look at the surrounding circumstances, the type of information in question, how the non-disclosure or incorrect information affected the Organization, and what effect it had on the Applicant's status.

56. Fourthly, regarding the subsequent personal history forms, the Applicant provided a plausible explanation that he automatically duplicated some fields based on the initial form created in 2001. He says that, after the initial personal history form was put together, he duplicated many of its fields by using the initial personal history profile form as the basis for other forms. The mistaken non-disclosure of his brother's employment was automatically copied from the earlier forms, which the Galaxy system permitted its users to do.

57. Fifthly, when Inspira was introduced in 2010, the Applicant had to re-create his personal history form. Under Inspira, the new question—"Are any of your relatives employed by the United Nations Secretariat?"—was clearly unambiguous and related solely to those currently employed. At the same time, the Applicant could not simply transfer the data to the new system and therefore had to input all the details anew. It was only at that stage that he recognized and understood the meaning of the question, which was unambiguous as compared with the initial question contained in the P.11 form, which was completed back in 2001.

58. The Tribunal finds that the Applicant provided plausible explanations that were not given sufficient weight by the Administration. His explanations were, in fact, reasonable and consistent with the documents on record and with the chronology of events.

59. Both parties have referred to the case of *Nourain* UNDT/2012/142. In *Nourain*, a staff member (Ms. S. Nourain) submitted personal history forms in 2008 and 2009, in which she answered "No" to the question "Are any of your relatives employed by a Public International Organization?" In 2009, the Organization discovered that Ms. S. Nourain had a sister, Ms. A. Nourain, who worked for the same field mission, the African Union–United

Nations Hybrid Operation in Darfur. The two sisters were initially given 14 days to decide and advise management as to which of them would resign. When no response was provided to management, the matter was referred for an investigation, and, in 2011, Ms. A. Nourain was separated from service with compensation in lieu of notice but without termination indemnity, and Ms. S. Nourain was dismissed without compensation. Ms. S. Nourain appealed the decision before the Dispute Tribunal. The Tribunal concluded that she deliberately made a false material misrepresentation and therefore the sanction of summary dismissal was proportionate to the conduct and dismissed her application. Subsequently, both sisters appealed the Dispute Tribunal's judgment. The Appeals Tribunal upheld the decision of the Dispute Tribunal in *S. Nourain & A. Nourain* 2013-UNAT-362, dismissing Ms. S. Nourain's appeal on the merits and Ms. A. Nourain on receivability as she was not a party to the proceedings to the Dispute Tribunal.

60. In *Nourain*, both family members worked for the exact same field mission and the Organization initially presented an option for one of them to resign within 14 days, thus initially, in effect, condoning the misconduct. It is only because no response was received during the stipulated time that an investigation was conducted, resulting in the separation of both staff members. There is a stark contrast and apparent inconsistency in the treatment of the applicant in that case and in the instant case, in breach of the parity principle. The Tribunal finds that there are several features present in the matter of *Nourain* that distinguish it from the present case. On the particular facts in *Nourain*, the Dispute Tribunal found that the applicant deliberately made a false representation. Indeed, given that the *Nourain* case resulted in separation, and that both family members worked for the exact same mission, one would expect to see clear evidence of dishonesty and intent to mislead the Organization, and the presence of a potential conflict

of interest. However, the circumstances of the Applicant's case and the elements of his conduct do not point to a lack of integrity or dishonesty. The facts in the present case, in view of the Applicant's explanations, do not support the same conclusion as was reached in *Nourain*. Rather, this is a case of an oversight and perhaps a certain degree of carelessness, but certainly not a matter that falls under the category of misconduct warranting a disciplinary sanction. Nor was there any potential or perceived conflict of interest in the employment of both family members, working in two totally separate locations and unrelated units, in terms of the applicable law at the time. Further, this does not appear to be the type of situation where it can be said that the employment relationship broke down irretrievably.

61. The Tribunal finds that the established facts do not amount to misconduct.

Proportionality

62. The jurisprudence on proportionality of disciplinary measures is well-settled. The Tribunal will give due deference to the Secretary-General unless the decision is manifestly unreasonable, unnecessarily harsh, obviously absurd or flagrantly arbitrary. Should the Dispute Tribunal establish that the disciplinary measure was disproportionate, it may order imposition of a lesser measure. However, it is not the role of the Dispute Tribunal to second-guess the correctness of the choice made by the Secretary-General among the various reasonable courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General. (See *Doleh* 2010-UNAT-025; *Aqel* 2010-UNAT-040; *Sanwidi* 2010-UNAT-084; *Said* 2015-UNAT-500; *Hepworth* 2015-UNAT-503; *Portillo Maya* 2015-UNAT-523; *Ogorodnikov* 2015-UNAT-549.)

63. As was noted in *Yisma* UNDT/2011/061, disciplinary cases tend to be very fact-specific and the Tribunal must exercise caution in extracting general principles concerning proportionality of disciplinary measures from the types of measures imposed in other cases, as each case has its own unique facts and features.

64. The Tribunal finds that, given that the established facts do not amount to misconduct, it follows that no disciplinary measures should have been applied to the Applicant.

Relief

65. The Applicant seeks, *inter alia*, rescission of the decision to terminate his permanent appointment; reinstatement in service to his former post of Chief of Finance or, alternatively, "adequate compensation for actual damages"; and compensation for "moral injury, stress, reputational and career damage".

General principles

66. By resolution 69/203, adopted on 18 December 2014 and published on 21 January 2015, the General Assembly amended art. 10.5 of the Tribunal's Statute to read as follows: "As part of its judgement, the Dispute Tribunal may *only* order one or both of the following … (a) [r]escission … [or] (b) [c]ompensation for harm, *supported by evidence*" (emphasis added). (See also *Antaki* 2010-UNAT-095, stating that "compensation may only be awarded if it has been established that the staff member actually suffered damage.")

67. The fundamental purpose of a judicial remedy is to attempt, to the extent possible, to place the aggrieved party in the position she or he would

have been in but for the breach (*Warren* 2010-UNAT-059, *Castelli* 2010-UNAT-082 and *Iannelli* 2010-UNAT-093).

Specific performance

68. In *Klein* UNDT/2011/169, the Tribunal stated:

> … The remedy of rescission of an administrative decision generally entails the undoing of the decision. However, in some situations rescission as a remedy may be unavailable, for example, where third party rights are affected, or where a restoration of the *status quo ante* is impossible. Further, in some instances, the Tribunal may find that, although rescission is available, other types of relief, such as specific performance or compensation, may be more appropriate.
>
> … While the power to rescind relates to "the contested administrative decision", the power relating to specific performance is put in general terms as various types of specific performance may be ordered depending on the circumstances of each case. The Dispute Tribunal has ordered the following types of corrective action: access to a full performance rebuttal process for staff on contracts with duration of less than one year (*Miyazaki* UNDT/2010/078); quashing of a contested investigation report and conditional referral of the matter for a fresh investigation (*Messinger* UNDT/2010/116, affirmed in *Messinger* 2011-UNAT-123 (note that the referral was made not under arts. 10.4 or 10.8 of the Dispute Tribunal's Statute, but as specific performance under art. 10.5(a)); removal of improper or adverse material from personnel records (*Zerezghi* UNDT/2010/122, *Grigoryan* UNDT/2011/057, Garcia UNDT/2011/068); imposition of an alternative disciplinary measure (see *Zerezghi* UNDT/2010/122 and *Bridgeman* UNDT/2011/145, and, also, the United Nations Appeals Tribunal's judgments in *Abu Hamda* 2010-UNAT-022 and *Doleh* 2010-UNAT-025); referral of the matter to a classification appeals committee (*Aly et al.* UNDT/2010/195) (note that the referral was made not under arts. 10.4 or 10.8 of the Dispute Tribunal's Statute, but as specific

> performance under art. 10.5(a)); convening of a medical board for consideration of outstanding medical claims (*Meron* UNDT/2011/004); and return of personal material improperly seized from the concerned staff member (*Bridgeman* UNDT/2011/145).
>
> … As the examples of corrective action ordered above demonstrate—and as confirmed by the Appeals Tribunal in *Fröhler* 2011-UNAT-141, *Appellant* 2011-UNAT-143 and *Kaddoura* 2011-UNAT-151—the Tribunal is vested with the statutory power to determine, in the circumstances of each case, the remedy it deems appropriate to rectify the wrong suffered by the staff member whose rights have been breached.

69. The Tribunal finds it appropriate, in order to place the Applicant in the position he would have been in but for the unlawful decision, to direct the Organization to remove the record of investigation and disciplinary sanction, as well as any adverse material pertaining hereto, from the Applicant's official personnel records.

Pecuniary loss

70. In view of the findings above, the Tribunal will order rescission of the contested decision and retroactive reinstatement in service, with alternative compensation pursuant to art. 10.5(a) of the Tribunal's Statute.

71. Both the Dispute Tribunal and the Appeals Tribunal have said that there is a duty to mitigate losses and the Tribunal should take into account the staff member's earnings, if any, during the relevant period of time for the purpose of calculating compensation (see, e.g., *Tolstopiatov* UNDT/2011/012; *Mmata* 2010-UNAT-092). The point of mitigation of pecuniary loss was not pressed by the Respondent and there is no submission or evidence before the Tribunal that the Applicant had any earnings following his separation.

72. However, upon his separation from service the Applicant was paid termination indemnity and three months' salary in lieu of notice. As the Appeals Tribunal stated in *Bowen* 2011-UNAT-183, the Applicant's termination indemnity should be taken into account when awarding compensation. This is consistent with the Appeals Tribunal's pronouncement in *Warren* 2010-UNAT-059 that "the very purpose of compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations". As both the termination indemnity and the payment in lieu of notice stemmed from the unlawful decision to separate the Applicant from service, these sums shall be deducted from the final amount of compensation to be paid as an alternative to rescission (see also *Koh* UNDT/2010/040; *Tolstopiatov* UNDT/2011/012; *Cohen* 2011-UNAT-131).

73. In all the circumstances of the present case, the Tribunal finds it appropriate to order, under art. 10.5 of its Statute, rescission of the decision to terminate the Applicant's permanent contract or, alternatively, compensation in the amount of two years' net base salary, minus any termination indemnity and payment in lieu of notice paid to him upon his separation.

74. In view of the above, the Tribunal sets the amount of compensation to be paid as an alternative to the rescission of the contested decision and reinstatement at two years' net base salary.

Non-pecuniary loss

75. The Appeals Tribunal has consistently held that, as a general principle of compensation, moral damages may not be awarded without

specific evidence supporting the claim for such relief (*Kozlov and Romadanov* 2012-UNAT-228; *Hasan* 2015-UNAT-541).

76. Having considered the evidence in this case and the jurisprudence of the Appeals Tribunal on issues of relief, the Tribunal does not find that the present case satisfies the requirements for an award for moral injury. No evidence has been brought forward by the Applicant to substantiate his claim for compensation for moral injury, nor does the Tribunal consider that the breach of his rights was of such a fundamental nature that it should give rise, in and of itself, to an award of compensation in addition to compensation for his pecuniary loss (see also art. 10.7 of the Tribunal's Statute, precluding awards of exemplary or punitive damages). Accordingly, the claim for an award for moral injury is dismissed.

Observations

77. The Tribunal commends both parties for preparing thorough, composite and helpful submissions in a rather complex matter. Clear and concise pleadings and joint submissions on agreed and disputed facts and legal issues, as well as the preparedness of Counsel, go a long way in expediting proceedings and assisting the Tribunal.

Orders

78. The decision to separate the Applicant is rescinded and he shall be reinstated in service retroactively from the date of dismissal. Alternatively, the Respondent may elect to pay the Applicant compensation in the amount of two years' net base salary, minus the termination indemnity and payment in lieu of notice paid to the Applicant upon his separation.

79. The record of investigation and disciplinary sanction, as well as any adverse material pertaining hereto, shall be removed from the Applicant's personnel files.

80. The aforementioned amount shall bear interest at the U.S. Prime Rate with effect from the date this Judgment becomes executable until payment of said award. An additional five per cent shall be applied to the U.S. Prime Rate 60 days from the date this Judgment becomes executable.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 22nd day of December 2016

Entered in the Register on this 22nd day of December 2016

(*Signed*)

Hafida Lahiouel, Registrar, New York