



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

MASSART

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Monika Ona Bileris, Esq.

Counsel for Respondent:
Michael Appiateng, UNDP

Introduction

1. On 11 May 2017, the Applicant, a former staff member with the United Nations Development Programme (“UNDP”), filed the application in which he contests his summary dismissal. The case was registered with the Dispute Tribunal’s Registry in Nairobi under Case No. UNDT/NBI/2017/044 and assigned to Judge Agnieszka Klonowiecka-Milart.

2. On 15 June 2017, the Respondent filed his reply in which he submits that the decision to dismiss the Applicant was “a lawful exercise of administrative discretion” and that the application is therefore without merit.

3. On 19 October 2019, the case was reassigned to Judge Margaret Tibulya.

4. By Order No. 207 (NBI/2019) dated 5 December 2019, Judge Tibulya transferred the case to the New York Registry with immediate effect. Judge Tibulya further indicated that Counsel for the parties attended a case management discussion on 3 December 2019 at which:

Counsel for the Respondent told the Tribunal that he was not open to this matter being resolved *inter partes* and that the Respondent is ready for this matter to proceed to trial. Counsel for the Applicant, although prepared to engage in settlement discussions, likewise indicated that they are trial ready.

5. On 9 December 2019, the case was assigned to the undersigned Judge.

6. On 10 January 2020, the parties filed a joint submission in which, with reference to Order No. 207 (NBI/2019), they stated, “The Parties wish to take this opportunity to respectfully submit to the Tribunal that neither Party is trial ready and/or wishes for the matter to proceed to a trial or a hearing”.

7. By Order No. 11 (NY/2020) dated 17 January 2020, the Tribunal outlined the issues of the case on a preliminary basis. It was further found that with reference to

art. 16.2 of the Dispute Tribunal's Rules of Procedure, no hearing was necessary, because, among other things, the parties had explicitly stated that they do not want it (or a "trial"). As none of the parties had requested the production of any additional documentation, the Tribunal therefore found that the case appeared ready for adjudication and instructed the parties to file their written closing statements.

8. The parties duly filed their closing statements in the following sequence: the Applicant (24 January 2020), the Respondent (6 February 2020), and the Applicant (13 February 2020).

Facts

9. By judgment from a District Court in Belgium ("Tribunal de Premiere Instance Verviers") dated 7 December 2009, the Applicant got divorced from Ms. CR (name redacted). The Applicant was represented at the proceedings by an attorney recognized by the bar of Liege.

10. On 22 April 2011, the Applicant got married to Ms. KC (name redacted) (see the certified translation dated 23 May 2011 of the marriage certificate).

11. By email of 6 May 2011, the Applicant wrote a UNDP Human Resource Associate that, "I just wish to advi[s]e you that as of 16 of April 2011, I am divorced from [Ms. CR] ... Please kindly advi[s]e on actions expected from my end ... I think that her Van Breda Medical Insurance as my dependant must be canceled also?"

12. After an email exchange, on 9 May 2011, the Applicant emailed the Human Resource Associate that, "Here are the document that have been requested. However for the Official notification of Divorce I will have to wait it from Belgium".

13. In a UNDP form titled, "Questionnaire on dependency status" (presumably this is the so-called "P84" form to which reference is made in other documentation cited below) apparently dated the same date, namely 9 May 2011 (the handwriting is very illegible), the Applicant indicated that there had been "a change in [his] marital

status during 2011” (emphasis omitted) in that he got divorced on “16 of April”. The form was signed by the Applicant under the heading, “I hereby certify that the information provided in this questionnaire is true to the best of my knowledge and belief” (capitalization omitted).

14. In response, by email of 10 May 2011, the Human Resource Associate wrote the Applicant that “I will be waiting for your divorce decree for processing the PA [assumedly personnel action] but I have already terminated dependency allowance”.

15. On 15 June 2011, the Applicant responded the Human Resource Associate, that, “At least I get the divorce notification from the ‘greffier’ [in English, the Registrar] of the court”.

16. After another email exchange, on 22 July 2011, the Applicant emailed the Human Resource Associate that, “For my birthday, or almost, I did get the scan copy of the long awaited divorce decree” (from the copy of the email, however, cannot be seen what was actually attached to the email).

17. By email of 22 July 2011, the Human Resource Associate responded the Applicant that, “Thank you for your email. I believe this is what we need in order to close the case. I will send you soon processed PA for your personal records”.

18. By letter dated 4 April 2013, the Deputy Director of the Office of Audit and Investigations in UNDP (“OAI”) informed the Applicant that OAI was “conducting an investigation of ... [s]ubmitting fraudulent documents: divorce certificate and correspondence from the Clerk: Tribunal de Premiere Instance Verviers, to the Office of Human Resources UNDP in relation to your dependency status”. It was further stated that the Applicant was “considered subject of this investigation”.

19. On 13 April 2015, UNDP shared a draft investigation report from OAI with the Applicant requesting his comments, which the Applicant provided on 14 June 2015.

20. By the final investigation report dated 24 July 2015, OAI indicated that on 4 April 2012, Mr. WH (name redacted) had reported 15 allegations against the Applicant, including that he “allegedly ordered [the United Nations Department of Safety and Security (“UNDSS”)] radio room staff to change the date on an official document which has allegedly been utilized to support a claim for dependency allowance from [the United Nations] for a 15 month period which possibly he was not entitled to receive”. OAI also stated that Mr. WH had “supplied OAI” with “copies of a divorce decree belonging to [the Applicant] in various states of alteration” and that it “found sufficient evidence to proceed with the investigation” in respect to the quoted allegation.

21. Based on its investigation, involving a proper review of numerous relevant documents and interviews with various witnesses, including the Applicant, OAI made the following findings in the investigation report:

- a. “Based on the investigation, OAI finds that [the Applicant] knowingly and deliberately misrepresented the date of his divorce to OHR as 16 April 2011, while being completely and fully aware that he was divorced from [Ms. CR] on 7 December 2009”.
- b. “[The Applicant] deceived [the Human Resources Assistant] in his email correspondence in respect to the date of his divorce from [Ms. CR]. [The Applicant] never reported his divorce from [Ms. CR] as occurring on 7 December 2009. Rather, he reported to her that his divorce from [Ms. CR] occurred on 16 April 2011”.
- c. “[The Applicant] attempted to use his influence as [Field Security Coordination Officer with UNDSS] to have [Ms. DL] alter his divorce decree and, when this effort failed, successfully used his influence to make [Mr. IR] alter his divorce decree, dated 7 December 2009, so that it would appear that he was divorced on 16 April 2011”.

d. “[The Applicant] took these steps to mislead [the Office of Human Resources] about his divorce date to avoid having to repay to UNDP dependency allowances wrongly paid to him from 7 December 2009 until 16 April 2011”.

e. “As a result of these actions, [the Applicant] successfully defrauded UNDP of approximately \$10,862.45”.

f. “[The Applicant] neither accepted that he had acted wrongly or had in any way harmed UNDP or UNDSS, nor has [the Applicant] demonstrated any remorse for his conduct”.

g. “[The Applicant] sought to deliberately mislead and deceive OAI during the investigation, claiming that his former colleagues from UNDSS Philippines had conspired against him to commit the fraud, without his knowledge. [The Applicant] also sought to mislead and deceive OAI in regard to the alleged misuse of his UNDSS laptop by other UNDSS staff and personnel. Furthermore, [the Applicant] sought to deceive OAI in regard to statements he falsely attributed to [Mr. WH]”.

22. By letter dated 3 June 2016 from the UNDP Assistant Administrator and Director, Bureau for Management Services, the Applicant was informed with reference to the OAI investigation report that “there is sufficient evidence to bring charges of misconduct against [him]” and that the charges were the following:

a. “*You misrepresented the date of your divorce to UNDP in the context of official records*” (bold omitted). It was, *inter alia*, indicated that, “The above facts show that your divorce judgment was issued in December 2009. However, you did not inform the Organization of your divorce until 6 May 2011. At that time, you stated in an email to the [Human Resources] Associate that the date of your divorce was 16 April 2011. Thereafter, on 9 May 2011, you again stated the date of your divorce as 16 April 2011 in your P84

Questionnaire form. Finally, on 22 July 2011, you provided a purported divorce judgement reflecting your divorce date as 16 April 2011”.

b. *“You failed to inform UNDP of your divorce and you claimed a later date of divorce to retain dependency benefits”* (bold omitted). Among various reasons was stated that “The evidence identified by OAI indicates that you sought and obtained a dependency benefit on behalf of [Ms. CR] between 7 December 2009 and 6 May 2011, a dependency benefit to which you knew you were not entitled as you were no longer married to her. As noted, the evidence indicates that you misrepresented the date of your divorce on communications and documents to do so”.

c. *“You forged documents in support of your misrepresentation regarding the date of your divorce”* (bold omitted). In this regard, the reasons included that “The ... facts show that on 22 July 2011, you submitted a forged version of the divorce judgment to UNDP which falsely reported your divorce date as 16 April 2011”.

23. On 18 August 2016, the Applicant provided his comments to UNDP’s 3 June 2016 letter in which he objected to all the allegations and concluded that he “did not engage in the alleged misconduct, and the allegations should be dropped and the case immediately closed for the reasons laid out herein”.

24. By letter dated 21 February 2017, the Associate Administrator of UNDP dismissed the Applicant in accordance with staff rule 10.2(a)(ix) and with reference to the letter dated 3 June 2016 from the UNDP Assistant Administrator and Director, Bureau for Management Services. This decision was based on “evidence establishing that [the Applicant] (i) misrepresented the date of [his] divorce to UNDP in the context of official records; (ii) forged documents in support of [his] misrepresentation regarding the date of your divorce; and (iii) intentionally claimed a later date of divorce to retain dependency benefits to which [he was] not entitled for about 17 months, equivalent to \$10,862.45”.

Consideration

Scope of the case and case management

25. Under the consistent jurisprudence of the Appeals Tribunal, “the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review” (see para. 20 of *Fasanella* 2017-UNAT-765).

26. With reference to the submissions of the parties and Order No. 11 (NY/2020), the Tribunal defines the issues of the present case as follows:

- a. Whether the decision to summarily dismiss the Applicant was unlawful?
- b. If the decision is found unlawful, what remedies is the Applicant entitled to?

Standard of review in disciplinary cases

27. The general standard of judicial review in disciplinary cases requires the Dispute Tribunal to ascertain: (a) whether the facts on which the disciplinary measure was based have been established; (b) whether the established facts legally amount to misconduct; and (c) whether the disciplinary measure applied was proportionate to the offence (see, for example, *Abu Hamda* 2010-UNAT-022, *Haniya* 2010-UNAT-024, *Portillo Moya* 2015-UNAT-523, *Wishah* 2015-UNAT-537). When termination is a possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable (see, for instance, *Molari* 2011-UNAT-164, para. 30, and *Ibrahim* 2017-UNAT-776, para. 44).

Were the facts on which the disciplinary measure was based properly established?

28. The Applicant submits that UNDP “ignored certain facts and came to erroneous conclusions, and otherwise committed procedural errors, which should render the impugned decision null and void”. Specifically, the Applicant’s interview with OAI “was not impartial and objective” as the interviewers expressly accused the Applicant of engaging in the alleged misconduct. The resulting interview transcript was of “such poor quality, making it impossible to rely upon, and the Applicant provided exonerating evidence which OAI did not weigh equally with other witness testimony”. The investigators relied on “questionable witness testimony, including testimony in which the two key witnesses cited different dates and details of the alleged incident, and which at the very least casts doubts on the evidence, making it impossible to make a finding of clear and convincing evidence”. The Organization “admits to discrepancies in its witness testimony in the impugned dismissal letter” and made “unfair and untrue assertions regarding the Applicant’s credibility, and failed to interview four third party witnesses specifically requested by the Applicant, who could have testified to his version of the facts”.

29. The Applicant contends that he had a “contentious relationship” with [Mr. WH], who had reported him for misconduct. A witness, Ms. CH, stated, “I believe the issues between [them] fall more on [Mr. WH], than [the Applicant]. I say this because [Mr. WH] had tense relationships with everybody at [UNDSS]”. The Applicant sought “transfer to another duty station as a direct result of said relationship”. He was “transferred to Iraq, where he continued to perform his duties without incident”. Mr. WH “pressed [Ms. DL and Mr. IR] to file charges against the Applicant, which he can only have done in order to cause the Applicant harm”.

30. The Applicant submits that the lead investigator in the case, Mr. CW (name redacted), “denied the Applicant the presumption of innocence”. He had apparently “predetermined that the Applicant was guilty, as seen in his 17 April 2014 Skype interview”. Mr. CW stated: “... I find it implausible, that statement that you make,

that you didn't check the document such that you could determine that it was a forgery"; "So, can you explain to me why you lied in your email ..."; and "... I just wanted to bring [the amount of benefits the Applicant allegedly improperly received] to your attention ... such that you understand the amount of monies you have defrauded the [United Nations] system ..."

31. The Applicant contends that it is "impossible to see how [Mr. CW] was neutral and unbiased, having already determined the Applicant's guilt". The investigation report was "borne out of this bias and slanted viewpoint and as such should be nullified". Further proof of bias is "evidenced by the fact that OAI included witness testimony that was adverse to the Applicant, and excluded the testimony of the Applicant's witness [Mr. JT (name redacted)], who was with him on the date of the alleged incident". It also "excluded witness testimony from [Security Information Analyst, Ms. TM (name redacted), and Security Coordination Officer, Ms. CH (name redacted)], who had only positive things to say about the Applicant, which were relevant to his management style and commitment to rules". Testimony from these witnesses could have "supported the Applicant's assertions regarding his character, breaches of confidentiality at the UNDSS Manila Office, which might have explained how the alleged forgery occurred, the attitudes of staff toward the Applicant, and the harassment they suffered at the hands of [Mr. WH], which might have explained his motivation for having brought the allegations against the Applicant". Further, OAI failed "to address the inconsistencies in OAI's key witnesses' statements".

32. The Applicant submits that the Organization "failed to prove its case through clear and convincing evidence". The 17 April 2014 interview statement conducted over Skype was "unclear, having been marked as such seventeen times throughout the transcript". The connection was "cut repeatedly, and language barriers made for an unreliable account of the facts". Further, the witness testimonies of Ms. DL (name redacted) and Mr. IR (name redacted) were "equally unreliable". Ms. DL was "unable to produce the email wherein she claims the Applicant sent her the allegedly forged document for printing, or the email where she allegedly sent the Applicant the

scanned forged document, and OAI failed to perform a forensic search of her computer or the Applicant's in order to produce same". Ms. DL gave "an incorrect date for the incident, which was off by a month". Mr. IR was "unable to corroborate the information provided by [Ms. DL]". Both Ms. DL and Mr. IR each claimed that the Applicant "asked them to scan the document, and could not remember who actually did it". Finally, it was "common knowledge that [Mr. WH] and the Applicant had a contentious relationship, and it was [Mr. WH] who brought the charge of forgery, not [Ms. DL or Mr. IR], who were actually involved in the incident". This gives "rise to questions about the motivations for making the allegations, which do not appear to have been explored at all by OAI. Especially in the aggregate, the facts do not result in a finding of guilt by clear and convincing evidence".

33. The Applicant contends that Ms. DL and Mr. IR's testimonies were "contradictory" and each "cited different dates of the subject incident and differing details of what the Applicant allegedly asked them do so, and neither was able to produce the email in which he allegedly asked them to print the subject document". Both were "motivated to curry favour with Mr. WH, who encouraged them to make complaints against the Applicant". Eleven of their twelve claims against the Applicant "were disproven, which casts shadows on the credibility of the remaining complaint". They only "brought their complaints against the Applicant a year after he had already transferred duty stations, which also calls into question their motivations for complaining in the first place". If they were "so concerned about this alleged forgery, why did they engage with the Applicant on the matter and why did they not complain immediately?".

34. The Applicant submits that "fact remains that the Organization did not prove its case through clear and convincing evidence" because OAI, "tasked with investigating the allegations against the Applicant in a neutral and fair manner, failed to produce the document that the Applicant allegedly asked [Ms. DL and Mr. IR] to forge". It also failed to "produce the emails with the allegedly forged document that they supposedly sent to the Applicant", to "perform a forensic examination of the

Applicant's, [Ms. DL' and Mr. IR's] computers for evidence, and to "interview several witnesses proposed by the Applicant, who could have further corroborated his claims, or diminished their testimony about [Mr. WH's] antipathy toward the Applicant".

35. The Applicant contends that "OAI failed to follow its own procedures". The "UNDP Legal Framework for Addressing Non-Compliance with UN Standards of Conduct", Chapter III, section 1.4 states that the staff member should be either exonerated or charged within six months. In this case, the process "inexplicably took four years". The "undue delay was never addressed by UNDP" and "no reason was ever offered for such undue delay".

36. The Respondent, in essence, submits that the facts were properly established for the disciplinary measure of dismissal.

37. The Tribunal notes that the crux of the present case is whether the Applicant misrepresented the date of his divorce in various written communications to UNDP, leading him to unduly receiving a spouse dependency allowance with respect to his ex-wife (according to the OAI investigation report, he unlawfully received this allowance from 7 December 2009 until 16 April 2011 and thereby unjustifiably received approximately USD10,862.45).

38. From the written documentation on the case record, the Tribunal observes that it explicitly follows that the Applicant incorrectly indicated 16 April 2011 as the date of his divorce from Ms. CK, even though it was correctly 7 December 2009, in two separate communications to UNDP, namely in (a) his email of 6 May 2011 to the Human Resources Associate and (b) his "P84" questionnaire form dated 9 May 2011 regarding change in his marital status in 2011. When signing this questionnaire form, the Applicant even did so certifying that the provided information was the information "true to the best of [his] knowledge and belief".

39. In this regard, the Tribunal notes that the Applicant nowhere denies that he knew that the actual date of the divorce was 7 December 2009 and not 16 April 2011. On the contrary, the Tribunal finds that the case file shows that when the Applicant provided the incorrect information to UNDP, he was fully aware of the actual date of his divorce. For instance, at the relevant time, the Applicant was in possession of the original judgment from the District Court in Belgium (at which proceedings he was represented by a licensed attorney), which he, although in an altered form, forwarded to UNDP—his only claim is that he did not make those alterations by which the date of divorce was, *inter alia*, changed in handwriting from 7 December 2009 to 16 April 2011.

40. The Tribunal finds that the fact that the Applicant stated the same erroneous date in the two separate communications, including in an official form with the specific purpose of indicating a change to marital status in 2011 (and not 2009), clearly and convincingly shows that the Applicant did so deliberately—it was not just a simple typographical mistake.

41. Accordingly, the Tribunal finds that the Respondent has clearly and convincingly demonstrated that the Applicant intentionally misrepresented the date of his divorce as 16 April 2011 in two communications, including in an official form. The Tribunal notes that the Applicant does not deny this. Neither does he deny that the incorrect date resulted in him unlawfully receiving a spouse dependency allowance from 7 December 2009 until 16 April 2011 (worth an estimated USD10,862.45 according to the OAI investigation report). Rather, in the Applicant's closing statement, he states as a mitigating factor that "he volunteered to repay the amounts in error in full on numerous occasions" and thereby appears to admit his mistakes.

42. In the Applicant's submissions, he instead challenges how the disciplinary process was conducted, in particular the OAI investigation. However, as it has already been clearly and convincingly established that the Applicant deliberately

misrepresented the divorce date and was unduly enriched thereby, all the circumstances to which the Applicant refers are, in principle, not important for the present Judgment (see the Tribunal's additional findings below, in particular para. 56). The Tribunal, in any event, finds that the UNDP Associate Administrator's conclusion that the Applicant had also committed forgery and intentional unjust enrichment was appropriately based on the findings of the OAI investigation report and that it would appear that the OAI had appropriately established the facts for these offenses, although the parties disagree thereon. However, since the misrepresentations have already been properly established with clear and convincing evidence, in the interest of justice, expeditiousness and judicial economy, no further factfinding is necessary in this Judgment (see the Tribunal's conclusion below).

Did the established facts legally amount to misconduct and was the disciplinary measure proportionate to the offence?

43. The Applicant submits that he did not commit "misconduct". He was charged on "only one of the allegations—the other eleven allegations against him having been dismissed as unfounded, which itself serves as an indication that he was not likely to commit misconduct—and he had no other marks on his record". UNDP instead "meted out a severe penalty that arbitrarily held him up to a higher standard than other staff members" as it stated in the impugned dismissal letter that "as a profession-level staff member and one concerned with Security, you hold a position of heightened trust and authority". Nothing in the staff rules "permits the Organization to punish a staff member more harshly based on their position or level, yet UNDP appears to have done exactly that".

44. The Applicant contends that UNDP "did not consider the mitigating circumstances of this case", namely that (a) the Applicant worked "without incident before and after the alleged misconduct took place", (b) he "cooperated with the investigation", and (c) he "volunteered to repay the amounts in error in full on numerous occasions". Further, the Applicant did not pose an imminent threat to the

safety and security of the Organization or its staff, therefore the disciplinary sanction of summary dismissal was excessive and unnecessary. Finally, the Respondent did “not consider his years of flawless service all completed in hardship duty stations (indeed, in war zones) where he was exposed to bombs and gunfire constantly, including two deadly roadside bombings and three suicide attacks in the Canal Hotel Baghdad where, despite being wounded, he stayed on the ground and assumed all of his duties, acting as first responder during the building’s collapse”. The Applicant “has been diagnosed with [a certain condition] due to his work”, is now “left with no support from the same Organization he helped defend”, and not the “malicious figure the Respondent characterizes him to be”.

45. The Applicant submits that he had “no motive to commit fraud or forgery as he stood to earn more without his ex-wife as his dependent, but he did not have the divorce decree to show the Organization until around the date he actually sent it”. Meanwhile, he was “paying benefits for his new wife and stepchild from his own pocket, even though he could have named them as dependents under his UNDP policy”. The Applicant has “already shown that the divorce decree was not signed and registered before the end of January 2011, at which point he had to retrieve it from abroad in order to produce it to Human Resources—a fact which OAI’s investigation revealed”. The Applicant has “likewise illustrated that his bank account statements clearly show that he was supporting his new wife and stepchildren from early 2011”. If he could have “proven his divorce occurred in December 2009, he would have been happy to support them earlier”. In other words, “if he had a financial motivation, it was to prove his divorce as early as possible so that he could carry his new family on his benefits because, as it was, he was paying for them out of pocket, which was financially detrimental to him”. This much was “recognized by OAI investigator [Ms. RF (name redacted)] during the Applicant’s OAI interview”. Any attempts “to say that the Applicant intended to capitalize on amounts not owed to him are simply not true, and Respondent’s attempts to paint the Applicant as a wilful wrongdoer [are] incorrect”.

46. The Respondent essentially submits that the Applicant committed misconduct and that the disciplinary sanction of dismissal was proportionated to his wrongdoings.

47. The Tribunal notes that the Applicant was dismissed pursuant to staff rule 10.2(a)(ix), which ranks dismissal as the severest disciplinary measure for misconduct. In this regard, staff rule 10.2(a) defines misconduct as follows:

... Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and 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.

48. As relevant to the present case, staff regulation 1.2 (concerning the basic rights and obligations of staff) highlights under “core values” that staff members “shall uphold the highest standards of ... integrity”, which “includes, but is not limited to ... honesty and truthfulness in all matters affecting their work and status”.

49. In implementing staff regulation 1.2, staff rule 1.2(d) underscores that “[d]isciplinary procedures set out in article X of the Staff Regulations and chapter X of the Staff Rules may be instituted against a staff member who fails to comply with his or her obligations and the standards of conduct”. Whether to institute such a disciplinary process and impose a disciplinary measure “shall be within the discretionary authority of the Secretary-General or officials with delegated authority” in accordance with staff rule 10.1(c).

50. Regarding the Administration’s discretionary authority in general, the Tribunal notes that the Appeals Tribunal has consistently held that its judicial review is limited as it is not to replace the decisionmaker’s sense of judgment but rather to assess how s/he reached her/his decision (see, for instance, *Sanwidi* 2010-UNAT-084, para. 40):

... When judging the validity of the Secretary-General’s exercise of discretion in administrative matters, the Dispute Tribunal

determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various 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.

51. Based on the above, after having appropriately found that the Applicant had intentionally misrepresented the divorce date in two separate communications, including an official form, resulting in his unjust enrichment, the Tribunal finds that it clearly fell within the Administration's latitude of discretion to conclude that the Applicant had committed misconduct. Under staff regulation 1.2, such behaviour evidently does not uphold the highest standard of integrity, and pursuant to staff rule 10.2(a), the Applicant therefore failed to comply with his obligations as a United Nations staff member.

52. Concerning the proportionality of the sanction, namely dismissal, the Appeals Tribunal has affirmed that when a staff member misrepresents a fact in communications with the administration, which results in an unjust enrichment of her/him, this can lead to a dismissal (see *Bastet* 2015-UNAT-511). In this case, which concerned a staff member who had incorrectly received rental subsidy due to his failure to disclose his ownership of an apartment, the Appeals Tribunal endorsed the Dispute Tribunal's finding that this constituted misconduct even if the Dispute Tribunal had not affirmed his "actual" ownership. This was because "the misconduct arose from the fact that [the staff member] could not ignore that he was officially the legal owner of the apartment and submitted a lease agreement to obtain rental subsidy without disclosing that fact" (see para 56). The Appeals Tribunal further found that "[t]he fact that the staff member did not disclose the situation at the time of claiming a monetary benefit was enough to constitute the misconduct" (see para. 57). The Appeals Tribunal therefore affirmed the Dispute Tribunal's judgment by which as a matter of fact, but not procedure, the Administration's decision to dismiss the staff member was upheld (see paras. 14, 58 and 59).

53. The Tribunal finds that, similar to *Bastet*, the Applicant could not “ignore” that the date of his divorce was 7 December 2009 and not 6 April 2011 when he informed UNDP about the divorce. Also, the Applicant clearly obtained “a monetary benefit” from his misrepresentation, namely the unwarranted spouse dependency allowances of approximately USD10,862.45.

54. In line herewith, the Appeals Tribunal found in another case concerning misrepresentation (although in a Personal History Profile) that “termination of [the applicant’s] employment was within the reasonable range of responses” even if the applicant “had more than 10 years’ service, a clean employment record and no evident harm was caused to the Organization by the misconduct” (see para. 49 of *Rajan* 2017-UNAT-781). The Appeals Tribunal further held that, “Although a graduated system of progressive discipline is normally to be preferred, a single incident of dishonesty or material non-disclosure in some circumstances may justify separation from service. In this case, the conduct was repeated. The Secretary-General must be afforded an appropriate margin of appreciation in setting a high standard of probity”.

55. The Tribunal find that, like in *Rajan*, the Applicant also repeated the misrepresentation in the present case as he stipulated the same incorrect date in two separate written communications. The Applicant’s misconduct was, however, significantly more severe in the present case in that his misrepresentations actually caused the Organization harm because, in consequence, the Applicant was erroneously paid spouse dependency allowances of an estimated USD10,862.45.

56. Considering the gravity of the Applicant’s misrepresentations, including the intentional character and his resulting enrichment, with reference to *Bastet* and *Rajan*, the Tribunal therefore finds that UNDP did not overstep its margin of discretion when imposing the disciplinary measure of dismissal for misconduct against the Applicant (see also *Sanwidi*, as quoted above). The Applicant refers to various circumstances that he believes should have a mitigating effect on his sanction. While the Tribunal

recognizes the Applicant's many years of dedicated service to the Organization, the seriousness of his offense means that this does not change the Tribunal's conclusion (in line herewith, see the Appeals Tribunal in *Ibrahim* 2017-UNAT-776, para. 21, in which it was stated that "however spotless and noble a professional's past may be, a staff member can still be sanctioned in the case of misconduct").

57. The well-established factual findings on misrepresentation therefore fully justify the Applicant's dismissal. It is therefore not necessary for the Tribunal to examine any of UNDP's other findings regarding forgery and intentional unjust enrichment (in line herewith see, *Islam* 2011-UNAT-115, paras. 28-33).

Conclusion

58. The application is rejected.

(Signed)

Judge Joelle Adda

Dated this 21st day of February 2020

Entered in the Register on this 21st day of February 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York