



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/021

Judgment No.: UNDT/2021/002

Date: 13 January 2021

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

LEKOETJE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
George Irving

Counsel for the Respondent:
Angela Arroyo, UNDP

Introduction

1. This is an application filed by the Applicant contesting the United Nations Development Programme (“UNDP”) Administrator’s decision to separate her from service with compensation *in lieu* of notice for serious misconduct. The Respondent argues that the application should be dismissed. The application succeeds.

Facts and Procedural history

2. The Tribunal received oral evidence from the Applicant and from Ms. Izumi Morota-Alakija – Former Deputy Resident Representative (“DRR”), UNDP/Gambia. Mr. Essa Coker – Procurement and Administration Associate, UNDP/Gambia, testified for the Respondent.

3. At the time of the contested decision, the Applicant held the position of United Nations Resident Coordinator and UNDP Resident Representative (“RC/RR”) for the UNDP Gambia Country Office at the D-1 level.

4. The facts of this application arose in 2013 when the Applicant leased a residential property from UNDP that had been loaned to it by the Gambian Government since 2004. The allegations against her related to terms of that lease concerning monthly rent, administrative services, repairs, remodelling and renovations and settlement of disputes (clauses 1, 2, 3 and 6 of the agreement), allegations involving misappropriation of UNDP funds and using staff to carry out her personal errands.

5. It was the Respondent’s contention that the Applicant was conflicted and used undue influence to determine a lower rent for the property and that she misappropriated UNDP funds. The Applicant vehemently denied all the allegations. She argued that there was a misunderstanding on certain aspects of the utility payments. These were resolved administratively after they were clarified. The Applicant reimbursed UNDP any money that was incorrectly paid by it for utilities on the property meant to be paid by her, and immediately assumed the responsibility of paying for those services.

6. On 2 July 2020, the Applicant filed an amended application¹ contesting her separation from service pursuant to staff rule 10.2(a)(viii) for misconduct for the following acts:

- a. misappropriating funds and misusing resources by using UNDP staff and funds to pay for her personal expenses;
- b. engaging in an abuse of authority and a conflict of interest by unilaterally determining the rent she would pay UNDP for her personal residence, allowing petty cash to be used for personal expenses and instructing UNDP personnel to pay her personal bills; and
- c. failing to uphold the highest standards of efficiency, competence and integrity.

7. The Respondent filed an amended reply on 7 July 2020 urging the Tribunal to dismiss the application in its entirety.²

8. The Applicant joined UNDP/Gambia as RC/RR in September 2013. She was dismissed from service on 12 September 2018. According to the sanction letter³, the decision was arrived at after the Applicant was informed through a letter, dated 3 July 2018, from the UNDP Bureau for Management Services (“BMS”), setting out charges of misconduct against her.⁴ She was also asked to provide, within 10 working days of her receipt of the letter containing the charges, a written response to the charges and to submit exculpatory evidence. She was advised that she could request, at the earliest time possible, for any extension of time to submit her response which request could be granted on an exceptional basis.

9. After a thorough review of the entire dossier, including her comments, the

¹ Pursuant to Order No.: 121 (NBI/2020) which required the Applicant to submit the application in the appropriate form and to limit it to 10 pages. The original application was filed on 19 February 2019.

² The original reply was filed on 28 March 2019.

³ Amended application, annex 2.

⁴ Amended application, annex 6.

UNDP Administrator determined that the evidence supported the charges against her and separated her from service of the Organization.

Submissions

The Applicant

10. The charges were not proven by clear and convincing evidence. For the most part, the charges are vague and generalised. On the one hand, the Applicant is being criticised for interfering with the process of managing the property, and on the other hand she is being criticised for not interfering enough, for a lack of consultation and for a lack of decision-making on her part.

11. These kinds of issues are raised in routine country management financial audits and are done all the time to see whether or not there are adequate records, whether there are adequate justifications for financial decisions, how to tighten up decision-making and how to clarify roles. These are not matters of serious misconduct. At most, they are performance issues, and, in this case, there is room to criticise more than just the Applicant for the kinds of decision-making that took place. Clearer policy and guidelines were obviously needed.

12. The Office of Audit and Investigations (“OAI”) drew conclusions from very selective information. It never asked the essential questions; such as: what the prior practice was, what the appropriate policy for managing a government-owned property was and how authority was delegated for the decisions that were taken.

13. UNDP recognises that there was no UNDP policy on the use of government-owned property. The principle of self-financing or self-sufficiency was used to determine the rent in these situations. This is derived from the agreement with the Gambian Government on the use of the property. Therefore, it is not market value that determines the rent of the property, but rather the cost of maintaining that property and ultimately returning it to the government at some point in good condition. Setting the rent at market level for profit was therefore a contradiction. UNDP Headquarters’

advice was to use commercial rent comparisons only when the property was owned and managed by UNDP. This was set out in an email dated 7 September 2013, from Mr. Tahsin Haque, Premises and Facilities Lead, UNDP/Headquarters, to Ms. Binta Sanneh, UNDP/Gambia's Operations Manager.

14. There was lack of clarity over the allocation of expenses because the property was used not only as an official residence but also as a venue for official functions.

15. The question of internet service was abandoned in the decision letter, presumably based on the security-based practice identified in other UNDP Africa offices (Nigeria and Liberia). The Country Office agreed to provide home based internet connectivity to the RR, the DRR and Senior Economist as a matter of business necessity.

16. With respect to the revision of the lease agreement, OAI found insufficient documentation. There was a *lacuna* in terms of record-keeping. There was no indication of a prior lease for the Applicant's predecessor. In her testimony, Ms. Morota-Alakija stated that there was no income and expense record prior to 2013. This was not the Applicant's fault. Management was delegated to the UNDP/Gambia Country Office, including what the term "maintenance" entailed.

17. There were prior practices, and those practices had never been questioned before. OAI ignored all of this. It was a reasonable decision for the Applicant to continue existing practices pending a fuller review at the end of the first year. There was no legal impediment to renegotiating the lease based on the facts as long as the two parties agreed to that revision. This was not abuse of authority nor a unilateral act. There was a new rental contract entered into following an examination of the principles behind the setting of the rent. There is no evidence of any undue influence. No one was dictated to or threatened. Ms. Morota-Alakija and Mr. Coker both testified there was no pressure placed on them by the Applicant.

18. As a tenant, the Applicant had a right to raise issues relating to the tenancy. The suggestion that she took the decision to lower her rent is entirely misplaced. That is not

what occurred. There were issues over the metering and the billing of the water accounts. There were issues over improper keeping of the water bills and why the bills had to be looked into and that was the responsibility of the UNDP/Gambia Country Office and not the responsibility of the Applicant as a tenant. Landscaping, gardening and irrigation of the property, including security issues, were outside of the house. They had been paid previously by UNDP/Gambia without any question. It was reasonable for the Applicant to continue to follow these past practices.

19. Mr. Coker was concerned that some personal expenses were being assumed by the UNDP/Gambia Country Office, and in particular, the misuse of petty cash. He cited water bills. The Applicant submits that there was a problem in sorting out what her responsibility was as a tenant. In the bills cited in the OAI report, there were 14 bills but only five of them pertained to the correct account, that is, to the correct source of the water to the Applicant's house. This issue was only sorted out in 2017 when repairs were made. As these were multiple and excessively high water bills, it was the responsibility of the UNDP/Gambia country office to adjust and to correct.

20. The Applicant did not have direct oversight over the petty cash account. The Program and Operations Policies and Procedures ("POPP") provides for the Resident Representative to "Request Petty Cash Fund" not to administer it, which was done by the Procurement Officer and Operations Specialist. The Applicant reported repairs and maintenance as it arose, which she was required to do under the lease. The Applicant recused herself from the handling of these expenditures. She neither authorised them nor interfered.

21. The expenses for other buildings, like exterior property maintenance, were all proved to have been paid out of the rent that was collected before. In reference to the question of light bulbs, the Applicant submits that the type of light bulbs paid for by the UNDP Gambia country office were not those used in the house at all but used on the exterior property. Gardening and trash collection were specifically part of the UNDP contract with the service provider. Bills were addressed directly to the office for collection in most cases.

22. The charge of improper use of staff resources is a generalisation with no specific identification of negligence or what personal expenses are at issue. Past practice was that services for cleaning and gardening, some electricity and lighting, disposal of garbage and other services had been routinely covered by UNDP. It was the job of the Operations Specialist, Finance Office and Deputy Resident Representative to sort this out. None of these individuals claimed that any undue influence was exerted on them by the Applicant. From April 2014, it was advised to cover some expenses under rent and the Applicant voluntarily agreed to pay the providers for garbage, water charges and internet. No audit before or during her tenure had raised this.

23. In respect to the issue of replacement of counter tops with which Mr. Coker expressed concern, these were done for the benefit of future occupants of the property and were not cosmetic improvements. They were part of the maintenance obligations of the Organisation because the counter tops had deteriorated. The Applicant brought this to the attention of the DRR as required under the lease. The DRR gave her tentative approval and asked the Operation's Manager to secure proposals which was done. If there had been serious reservations, there should have been a call for negotiations between the parties or advice from UNDP headquarters. It was not up to the Applicant to negotiate against herself.

24. Mr. Coker informed the Tribunal that he had raised the matter of the counter tops with the DRR at that time, Mr. Fernando Edjang. There is no record of any conversation or of any note that he made to the Applicant. There was also no follow-up; yet he submitted that complaint to OAI.

25. With respect to the charge that she failed to uphold the highest standards of efficiency, competence and integrity, the Applicant submits that she did not stand to gain in any of these transactions. She was advised that she was expected to occupy the residence, and that the rent would be agreed upon. All the money went to keeping the premises in good, habitable, condition for the future. Payments were processed in accordance with UNDP procedures. All payments were certified, approved and

processed by the responsible officials. The record demonstrates that when concerns were brought to her attention, she tried to address them and resolve them. OAI arbitrarily determined what was justified or unjustified but did not give reasons for their opinions or ask for explanations, such as, issues over water or expenses for the Business Continuity Plan (“BCP”) site. As a result of all of this, the property was maintained and enhanced. The surplus grew and the office meanwhile achieved great success.

26. The Applicant requests rescission of the contested decision, three months compensation *in lieu* of notice and compensation for material and moral damages. The Applicant submits that she has suffered significant financial and moral damages because of the Respondent’s actions, including the loss of her employment and unfair actions for recovery. Her career has been cut short three years before her expected retirement with significant reputational damage. In addition, the Applicant has been receiving medical treatment for the significant work-related stress this case has caused.

The Respondent

27. There is clear and convincing evidence that the Applicant engaged in serious misconduct of misappropriating UNDP resources, engaging in a conflict of interest, and, as a consequence, failing to uphold the conduct expected of her as a UNDP staff member.

28. The Applicant as head of the office in The Gambia had responsibility to handle UNDP’s resources properly and to avoid conflict of interest or even the perception of such conflict.

29. There is no dispute that UNDP funds were used to pay for expenses for the Applicant’s residence. The dispute lies in whether those expenses were her responsibility or whether they were UNDP’s.

30. It is the Respondent’s position that the expenses at issue were the Applicant’s responsibility under her lease agreement. The Applicant claims that she acted at all

times consistent with the terms of the lease but has also provided many justifications for why she didn't follow the lease terms.

31. If the Applicant was unclear about her responsibility or did not know if certain utilities were covered by the lease, she did not take any action to clarify the lease terms before using UNDP funds even though she stood to gain personally by using UNDP funds instead of her own funds to pay for those expenses.

32. The evidence reflects that payments for the expenses at issue were made using UNDP funds and using staff time. UNDP also paid for assorted food items for the Applicant's residence. The payment invoices reflect that these were processed by various UNDP personnel. The Respondent submits that, in doing so, the Applicant obligated the time and effort of UNDP personnel to process, account for and pay her personal expenses amounted to a misuse of the time of that personnel.

33. In respect to the cleaning, repairs and remodelling expenses, the payments were for a range of different type of expenses, including the installation of new kitchen countertops to the replacement of light bulbs, a toilet set and shower head. The Respondent submits that replacement of light bulbs, one of the expenses the Applicant charged to UNDP, was a repair specifically indicated as the Tenant's responsibility under the Leases. The Respondent further submits that all of the cleaning and repair expenses were incurred subsequent to the Applicant moving into the Residence, and in some cases years after she had lived in the Residence, and, accordingly, could not be considered to be "initial" repairs, remodelling or renovation.

34. Further, the Respondent notes that, in accordance with the leases, the Applicant was responsible for informing UNDP of any need for repairs, in order to allow to determine whether they were justified or not. While the Applicant claims for the first time in her application that she reported needed repairs and maintenance, there is no evidence to support that she did so before deciding to use UNDP funds to pay for those various expenses.

35. The Applicant did finally seek authorization from the Regional Bureau but did so only after three years of using UNDP funds and after the investigation into her conduct had commenced. Seeking such clarification before using UNDP funds was, at a bare minimum, expected of someone at the Applicant's level and someone who UNDP otherwise trusted to manage and handle its resources and who stood to gain personally by these decisions.

36. The Applicant testified that between 2015 and 2017, she did not know how the water bill was being paid. It is not credible that as a tenant the Applicant would not know how her utilities were being paid. In addition, this claim was rebutted by Ms. Mahfouze-Aidara's statement given during the investigation. The Operation Specialist told the investigators that in 2015, she raised concerns with the Applicant that UNDP should not be paying water bills for her residence. Ms. Mahfouze-Aidara stated to the investigators that the outcome of that discussion with the Applicant was a decision by the Applicant that UNDP should cover that expense.

37. It was not one or two water bills that the Applicant had UNDP pay, it was a significant amount of the expenses incurred by her as a tenant in the UNDP residence. There were 14 payments for water between April 2014 and February 2017. The Applicant explained that this was due to an issue with the water bill but according to her own statement, that issue did not arise until 2015 so there is no explanation for the bills paid by UNDP prior to that date. Nor does it explain why she never followed up on who or how the bill is being paid since she knew that it was her responsibility.

38. There were nine payments for garbage between October 2013 and December 2016 and 70 bills for cleaning and repairs to the UNDP residence between October 2013 and December 2016. The expenses included light bulbs and plumbing materials, normal materials that any resident or tenant may incur and would cover themselves. The Applicant explained that the charges for light bulbs were for the BCP site but there is no evidence for that in the record. The expense as linked by the petty cash is even labelled as, "For the RR's residence".

39. The lease that the Applicant entered into upon her arrival into The Gambia was valid until her departure. There was no need for the Country Office to review or renegotiate its terms while the Applicant was head of that office, a circumstance that would create a conflict of interest. Notwithstanding that fact, the Applicant requested that the lease be reviewed and that the amount of rent she paid for a month be reduced by USD300. She negotiated the lower rent as a tenant, but also took the decision to reduce that rent as head of the office, along with her subordinate, the DRR. She did not recuse herself, nor did she recuse her subordinate from that decision knowing that she stood to gain financially. UNDP's rules make it clear that conflicts of interest must be avoided at all costs and include even the perception that one is engaging in a conflict of interest. This is particularly true for someone in the Applicant's former position.

40. The Applicant explained that the reason for making this request was reliance on the principle that the rental should be self-sustaining. However, neither the Applicant nor her subordinates conducted any assessment of the amount needed to allow the property to be self-sustaining moving forward. Nor does she document any basis for how she or her subordinates arrived at a USD700 figure.

41. Instead of being the guardian of UNDP resources that she should have been, the Applicant used her position to obtain an incredibly advantageous situation for herself in which she was paying rent that was far below market rate and far below even what staff members in lesser-ranking positions were paying.

42. The Applicant also charged UNDP/Gambia other expenses and utilities incurred by that property making her living expenses very low for the circumstance. The Applicant could not have thought that her arrangement was fair or that it would not lead other staff to think that this was an incredibly unfair position that she held. The UNDP expected more of her and was fully justified in concluding that this serious behaviour, committed directly in the scope of her responsibilities and functions as RR, was so serious as to warrant her separation from UNDP.

43. The imposition of separation from service was not disproportionate. The Applicant's conduct is aggravated by the fact that she held the most senior level position in UNDP Gambia and, in fact, used that position to carry out the conduct at issue. The Respondent also submits that, in accordance with the United Nations Staff Regulations and Rules, it was proper for it to seek reimbursement from the Applicant of funds that UNDP established were lost as a result of the Applicant's conduct.

44. The investigation and disciplinary process respected the Applicant's due process rights.

45. In view of the foregoing, the Respondent requests the Tribunal to uphold the disciplinary decision and the imposition of the measure of separation from service on the Applicant.

Considerations

Preliminary Motion to adduce further evidence

46. On 30 July 2020, the Applicant filed a motion to admit the following additional evidence:

- a. Email exchanges between UNDP/Gambia staff members dated 9 May 2006 on the issue of the budget for the RC/RR residence;
- b. RC/RR residence rental documentation for the period 2006-2008;
- c. Expenditure statements for the period 2013-2014 for the RC/RR residence;
- d. Email exchanges dated 17 December 2018 between the Applicant and Ms. Mahfouze-Aidara;
- e. A list of expenses and remarks dated 2016-2017;
- f. A list of expenditures and bills from 2009;

- g. Petty cash record for 2008;
- h. Photos of the RC/RR residence's kitchen counters;
- i. A statement dated 23 August 2018 from an Atlantic Cleaning Services employee;
- j. An addendum to the contract between UNDP and Atlantic Cleaning Services dated 23 September 2014;
- k. Records of the BCP from 2014 to 2017; and
- l. Records and correspondence dated 24 and 25 April 2008 on the subject of rehabilitating the RC/RR residence.

47. The Respondent opposed the motion arguing, among others, that he was deprived an opportunity to verify the veracity or consider relevance of the additional evidence, that the evidence was extraneous to the facts at issue and that in any event the additional evidence would not alter the finding that the Respondent had proved the case by clear and convincing evidence.

48. The Tribunal holds that the Respondent had ample time or else could have applied for more time to verify the veracity of the issues raised in the motion. The Tribunal has not considered any extraneous evidence that was not before the Respondent in arriving at the impugned decision at the time it was made; and considering the evidence that was on record before the additional material, the Tribunal finds that the Applicant has made her case. The motion is therefore granted, there being no evidence that any of the additional material submitted by the Applicant is prejudicial to the Respondent's case. Further, in accordance with art. 19 of the Tribunal's Rules of Procedure, the Applicant's submissions are relevant for a fair and expeditious disposal of this case and to do justice to the parties.

Merits

49. In disciplinary cases, this Tribunal is called upon to examine the following; (i) whether the facts on which the disciplinary measure is based have been established (ii) whether the established facts amount to misconduct; (iii) whether the staff member's due process rights were respected and (iv) whether the sanction is proportionate to the offence⁵.

50. The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred. When termination is the outcome, as is the case in this application, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable⁶.

51. The Tribunal further reminds itself that its role in this application is to examine how the Administration reached the impugned decision and not its merits.⁷

52. In this regard, it is necessary to determine whether the decision was vitiated by bias or bad faith, that is, if it was taken for an improper purpose. A decision taken for an improper purpose is an abuse of authority. It follows that when a complainant challenges a discretionary decision, he or she by necessary implication also challenges the validity of the reasons underpinning that decision⁸. In this respect, the Tribunal may examine the surrounding circumstances to determine whether the impugned decision was tainted by abuse of authority⁹.

53. Therefore, an administrative decision, which adversely impacts on a staff member's status, must be supported by sufficiently clear, precise and intelligible

⁵ *Suleiman* 2020-UNAT-1006, para. 10, citing *Nadasan* 2019-UNAT-918, para.38; *Siddiqi* 2019-UNAT-913, para. 28.

⁶ *Bagot* 2017-UNAT-718 at para. 46 citing *Mizyed* 2015-UNAT-550, para. 18; *Applicant* 2013- UNAT-302, para. 29; see also *Diabagate* 2014-UNAT-403, paras. 29 and 30; *Molari* 2011-UNAT-164, paras. 29 and 30.

⁷ *Jafari* 2019-UNAT-927, para. 33.

⁸ *Jafari*, para. 34 citing *Toure* 2016-UNAT-660, para. 30.

⁹ *Jafari*, para. 34.

reasons. Generic reasoning befitting every case is not enough and renders the decision unlawful¹⁰.

The charges and whether they were proved by clear and convincing evidence.

54. The Applicant argues that the charges were not proven by clear and convincing evidence. For the most part, the charges were vague and generalised. She says, on the one hand, she was criticised for interfering with the process of managing the property, and on the other hand she was criticised for not interfering enough, for a lack of consultation and for a lack of decision-making on her part¹¹.

55. For his part, the Respondent argues that there is clear and convincing evidence that the Applicant engaged in serious misconduct of misappropriating UNDP resources, engaging in a conflict of interest, and, as a consequence, failing to uphold the conduct expected of her as a UNDP staff member.

56. The particulars of the charges levelled against the Applicant are as follows:

- a. Misappropriating funds and misusing resources by using UNDP staff and funds to pay for her personal expenses:
 - i. By instructing staff to make payments of expenses related to her personal residence using UNDP funds;
 - ii. Misusing staff resources by utilizing staff time to process, account for and pay her personal bills well beyond that which may have been justified.
- b. Engaging in abuse of authority and a conflict of interest by unilaterally determining the rent she would pay UNDP for her personal residence, allowing petty cash to be use for personal expenses and instructing UNDP personnel to pay her personal bills:

¹⁰ *Jafari*, para. 36.

¹¹ Applicant's submissions.

- i. By unilaterally reducing the rent payment for the RC/RR residence from USD1,000 to USD700.
 - ii. Misusing petty cash.
 - iii. Improper use of staff resources for her benefit and to serve her needs.
- c. Failing to uphold the highest standards of efficiency, competence and integrity.

Unilateral Adjustment of monthly rent

57. The Respondent produced a 2013 document purported to have been endorsed by the Applicant requesting that the rent payable be reduced from USD1,000 to USD700 which was below the market value, and argued that this was engaging in conflict of interest because as the tenant and most senior officer at the Office, she ought not to have determined the rent in that manner.

58. In response, the Applicant denied that she was conflicted in negotiating for a monthly rent because as a tenant she was entitled to negotiate for fair terms of the agreement, and that the reason given by the Respondent as posing conflict of interest was an irrelevant consideration under the circumstances of this case.

59. The Tribunal agrees with the Applicant. The tenancy agreement between the Applicant and the UNDP was a private arrangement and not part and parcel of the Applicant's terms of employment. The agreement had a clause for resolving disputes and if there was any dispute as to the determination of rent, the parties were at liberty to resolve that dispute privately and where necessary, either party was entitled to seek clarification or advice from Headquarters.

60. Taking the tenancy agreement disputes as disciplinary issues without first exhausting the mechanisms set for resolving them privately, and opting for disciplinary action, was abuse of authority and therefore unlawful exercise of discretion on the part of UNDP.

61. Secondly, there was no evidence that the Applicant personally benefitted from the determined rent since the rent payable was more than sufficient to maintain the property thereby complying with the objective of the rent scheme under the principle of no gain, no loss.

62. Thirdly, the Tribunal heard, and this was not contradicted, that adjustments in rent in subsequent years after 2013 were based on an objective criterion after a careful assessment of previous expenses and balances in the account using an income and expenditure spread sheet. The rent was set at an amount that ensured both current and future sustainable maintenance of the property, in other words that the property should be self-financed. The spreadsheets disclosed that after monthly maintenance expenses, there was a credit balance carried over to the following month.

63. Fourthly, there was no evidence whatsoever what the so-called rental “market value” of the property entailed if the objective of the rent was not for profit generation (commercial purposes). Market value was an irrelevant factor under the circumstances of this case. Relying on it was therefore abuse of authority and unlawful; more especially, because this house was given for the use of UNDP gratuitously by the Gambian Government.

64. Finally, and above all, the one witness who acted as the ‘estate agent’ for the Respondent in the lease agreement, Ms. Morota-Alakija, was emphatic in her testimony that as the official representative of UNDP in management of the lease agreement between the Applicant and UNDP, she was never at any time coerced or unduly influenced or pressured by the Applicant to manipulate any term of the agreement for the benefit of the Applicant. The decisions relating to the agreement were mutually discussed and agreement upon and not unilaterally imposed as alleged.

Repairs, remodelling and renovations

65. It was alleged that the Applicant unilaterally renovated the kitchen counter in the house she rented using UNDP funds. That the renovation was uncalled for. The Applicant explained that the old kitchen counter top was worn out. At the material time,

it had not been maintained for over 12 years. The Respondent did not adduce any evidence to contradict the Applicant who at the time of the renovation had occupied the house for two years, that the countertop did not require replacement. Any maintenance to any permanent fixture of the house was for the long-term benefit of the landlord and future tenants. The Respondent did not dispute these justifiable, reasonable and plausible assertions. He did not produce any evidence to show that any clause of the lease agreement was breached. As a matter of fact, clause 1 of the agreement placed the responsibility of carrying out structural maintenance and repairs on UNDP.

Procurement of light bulbs and other items using UNDP funds

66. The Respondent alleged that the Applicant used UNDP resources to procure light bulbs for her house and other items. This allegation was proved malicious by the Respondent's witness, Mr. Coker, who asked the Tribunal during hearing to strike it out from the list of misused resources. The rest of the items were too general and not canvassed with specificity during trial. The Respondent failed to meet the required standard of proving the allegations.

67. It is this Tribunal's finding, therefore, that the Respondent has failed to prove the allegations relating to the tenancy agreement and any ancillary matters connected thereto with clear and convincing evidence. The facts on which the disciplinary measure was taken are not established.

Misuse of Petty Cash and other matters

68. In support of this allegation, the Respondent called one witness, Mr. Coker, who after much probing from the Tribunal during his oral testimony was only able to cite one incident where he thought a request for use of petty cash was irregular. He in that regard consulted his immediate supervisor, Mr. Edjang, who undertook to investigate the matter but as at the time of the hearing the witness had not had any response from his supervisor on the matter. He also stated that he did not discuss the matter with the Applicant. The Tribunal agrees with the Applicant that this incident

was a purely managerial audit matter that ought to have been resolved internally as an irregular or abnormal request and rejected by the petty cash authorisation officer as per petty cash guidelines.

69. Further, there is no evidence from Mr. Coker, that the Applicant interfered with his work by exerting pressure on him concerning petty cash authorisation and payment or that she breached any petty cash management guidelines.

Garbage collection services

70. The Respondent did not adduce any bill in the name of the Applicant for garbage collection which the Applicant refused to pay. The Tribunal heard that the garbage collection was incorporated into an outsourced contract for grounds maintenance between the UNDP and the service provider. The Applicant inherited this practice and was not a party to the contract. It was only after a query that she realised she was responsible to pay for the garbage collection separately and she paid retrospectively by way of reimbursing the Respondent and immediately commenced paying for subsequent bills. In the Tribunal's view, the Applicant's confusion should have been taken as a relevant factor when considering the allegations during investigation.

71. Additionally, the Respondent did not dispute that the funds used for garbage collection came from the house rental which were not UNDP funds.

Water bills and staff resources

72. The same pattern happened in relation to water bills. When an anomaly was discovered in some bills, the Applicant paid the controversial bills retrospectively. The matter should have been resolved at that level. Especially because the bills (multiple meters) were all in the Country Office's name and UNDP address. The Tribunal was not presented with a single bill in the Applicant's name, which she omitted to pay for. Her explanation on the misunderstanding was relevant for consideration by UNDP.

Misusing staff resources

73. The Respondent alleged that the Applicant used staff to process and pay water bills on her behalf. The Applicant responded that the water bills were in UNDP's name as landlord and hence the misunderstanding. No other incident of misuse of staff for personal errands was proved with specificity and no staff member was called to testify on the matter. This was a largely generic allegation that carries no weight as per UNAT jurisprudence cited above. Musing aloud, the UNDP was paying for water bills used at BCP site which was within the Applicant's compound and for the office, it makes absolute sense that instead of the countenance of the United Nations RC/UNDP RR queuing at a water utility company (most probably during working time), a member of her staff responsible for paying UNDP water bills could take the Applicant's bill along for payment. The Tribunal is at pains to discern the motivation behind this allegation.

Process to arrive at impugned decision

74. Why the Respondent decided to treat these as disciplinary matters is beyond comprehension. The investigation report recommended one of two options, either to institute disciplinary process or administrative action. UNAT jurisprudence instructs this Tribunal to examine the process that the Respondent followed to arrive at an impugned decision. This is because the Respondent exercises discretionary power to decide whether to institute disciplinary proceedings into allegations¹².

75. The Tribunal agrees with the Applicant that OAI "drew conclusions from very selective information. It never asked the essential questions such as what the prior practice was, what the appropriate policy for managing a government-owned property was and how authority was delegated for the decisions that were taken"¹³.

76. It is indeed fair to conclude from the circumstances of this case that these kinds of issues are raised in routine country management financial audits done all the time to see whether or not there are adequate records, whether there are adequate justifications

¹² See generally, *Applicant* 2020-UNAT-1001.

¹³ Applicant's submissions.

for financial decisions, how to tighten up decision-making and how to clarify roles. These are not matters of serious misconduct. At the most, they are performance issues, and, in this case, there is room to criticise more than just the Applicant for the kinds of decision-making that took place. Clearer policy and guidelines were obviously needed¹⁴.

77. There is no proof of misappropriation of funds that belonged to UNDP or staff resources. The Tribunal finds that had the investigation been conducted in good faith and a fair report produced, it is highly improbable that the Respondent or any reasonable decision-maker would have instituted disciplinary proceedings into the allegations against the Applicant.

Failure to uphold the highest standards of efficiency, competence and integrity

78. It is also reasonable to concur with the Applicant that with respect to the charge that she failed to uphold the highest standards of efficiency, competence and integrity, the Applicant did not stand to gain. All the money went to keeping the premises in good, habitable condition for the future. Payments were processed in accordance with UNDP procedures. All payments were certified, approved and processed by the responsible officials. The record demonstrates that when concerns were brought to her attention, she did try to address them and resolve them¹⁵.

79. The Tribunal also notes that when anomalies in the payments were brought to her attention by the Operations Manager, the Applicant acted professionally, with due diligence and integrity to resolve them. She was cooperative and showed remorse for her minor oversight in relation to the water and garbage bills which were controversial due to the fact that the compound was also used for office functions (BCP) and layover for staff.

80. There was no justification for Mr. Edjang, being the official agent of UNDP in management of the lease to report allegations of potential wrongdoing to OAI relating

¹⁴ Applicant's submissions.

¹⁵ Applicant's submissions.

to the lease agreement or staff resources without first declaring a dispute and invoking the dispute settlement mechanism under clause 6 of the lease agreement.

Conclusion

81. Consequent upon the above findings, the applicable law and jurisprudence, the Tribunal finds the impugned decision illegal as the Respondent abused its authority in exercise of its discretion to institute disciplinary proceedings in a matter where it could have, and it indeed did, institute managerial action by clarifying the lease terms with the Applicant and mutually agreeing with her to reimburse the organisation whatever had erroneously been paid on her behalf.

82. The Tribunal finds that the facts on which the disciplinary measure was based have not been established. It is not necessary to address the other three requirements of whether the established facts amount to misconduct; whether the staff member's due process rights were respected and whether the sanction is proportionate.

83. In arriving at this decision, the Tribunal has considered and in relevant parts applied the jurisprudence cited by both the Applicant and the Respondent in furtherance of their respective positions. For instance, the issue in *Portillo- Moya* 2015-UNAT-523, was whether the sanction imposed on Ms. Portillo-Moya was proportionate to the proven misconduct. It is distinguishable from the instant application. In *Akello* 2013-UNAT-336, UNAT found that the facts established misconduct (conflict of interest) and that the disciplinary measure of separation was proportionate. In the case at bar, the Respondent has failed to establish that the Applicant engaged in conflict of interest therefore *Akello* does not apply in this application.

Judgment

84. The application is allowed.

Remedies

85. The Applicant requests rescission of the contested decision, three months' net base salary as compensation *in lieu* of notice, and compensation for material and moral damages. The Applicant submits that she has suffered significant financial and moral damages as a result of the Respondent's actions, including the loss of employment and unfair actions for recovery. Her career has been cut short three years before she was due to retire, which has in turn caused significant reputational damage. In addition, the Applicant has been receiving medical treatment for the significant work-related stress this case has caused.

86. The decision is rescinded in accordance with art. 10(5)(a) of this Tribunal's Statute. The Respondent may opt to pay compensation *in lieu* of rescission comprising her salary from the date of termination to the date when the Applicant would have retired from service. This compensation takes care of the three months' salary *in lieu* of notice requested by the Applicant and all other relevant factors when determining an award of compensation are taken into consideration¹⁶, including that had it not been for the illegal separation, the Applicant's chances of reaching her mandatory retirement age are almost 100 per cent, her impeccable employment record of 24 years is relevant and because of her fairly advanced age (63.7 at date of judgment), the likelihood of her securing another job with similar terms for the remainder of her active employment life is rather slim.

Moral Damages

87. The Applicant has proved that she suffered moral damages due to the unfair treatment at the hands of the Respondent. Annex 20 of the application proves the Applicant's deteriorating medical condition attributed to occupational stress during the relevant period described in the application. She is awarded equivalent of two years' net base salary as damages for moral harm.

¹⁶ *Krioutchkov* 2017-UNAT-712.

Reimbursement

88. The Applicant has also proved that she was over deducted by USD20, 987.91 causing her financial loss¹⁷. The Tribunal orders that this amount be reimbursed to the Applicant with interest at the US Prime Rate applicable from the date of deduction to date of payment.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 13th day of January 2021

Entered in the Register on this 13th day of January 2021

(Signed)

Shamila Unnikrishnan, Legal Officer, for

Abena Kwakye-Berko, Registrar, Nairobi

¹⁷ Paragraph IX(1) of the amended application and the second paragraph at page 5 of the sanction letter (annex 2 to the amended application).