UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/057
Judgment No.: UNDT/2021/004
Date: 2 February 2021
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BRANGLIDOR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Miryoung An, AAS/ALD/OHR
Romy Batrouni, AAS/ALD/OHR

INTRODUCTION AND PROCEDURAL HISTORY

1. The Applicant is a former staff member of the United Nations Multidimensional Integrated Stabilization Mission in Mali ("MINUSMA"). He filed applications on 4 June 2019 and 8 August 2019 challenging the decision to impose on him the disciplinary measure of separation from service (Case No. UNDT/NBI/2019/057) and a decision he characterizes as the "failure in entitlements" disbursements after separation from service" (Case No. UNDT/NBI/2019/117). By Order No. 142 (NBI/2019), the Tribunal consolidated the two cases for adjudication in one judgment. Subsequently, upon a finding that gathering information relevant only to Case No. UNDT/NBI/2019/117 would delay the issuance of the present judgment, the case was severed by way of Order No. 027 (NBI/2021). Case No. UNDT/NBI/2019/117 remains under consideration.

2. The Respondent filed a reply to Case No. UNDT/NBI/2019/057 on 11 July 2019.

3. The Tribunal held a case management discussion ("CMD") with the parties on 5 November 2019.

4. In response to Order No. 001 (NBI/2020), dated 3 January 2020, the Applicant requested an oral hearing and proposed his spouse, SB, as a witness. The Respondent filed a response on 24 January 2020 in which he submitted that an oral hearing was not necessary and objected to SB being called as a witness. The Respondent also submitted that one of the two persons directly implicated, the Director of Administration at the Institute for American Universities ("DoA/IAU"), had previously expressed her unwillingness to testify, and that no further contacts were made with the other person, the Applicant's daughter, KB, after she told Respondent's Counsel that she had not talked to her parents at all and was not aware of the Applicant's separation. Counsel assumed from her response that she did not wish to be involved in this matter any further.

5. The Tribunal informed the parties on 1 September 2020 that it would hear oral evidence from the Applicant and SB on 15 September 2020.[1] By email dated 9 September 2020 addressed to the Nairobi Registry, SB declined to appear as a witness.

6. On 15 September 2020, the Tribunal heard oral evidence from the Applicant. The Applicant and Respondent filed their closing submissions on 17 September 2020 and 12 October 2020, respectively.

7. After a review of the closing submissions on 13 October 2020, the Tribunal considered it necessary for the Respondent to undertake efforts to have KB and the DoA/IAU provide oral evidence. The Tribunal, therefore, ordered the Respondent to contact the two potential witnesses regarding their availability to appear before the Tribunal in either late October or early November.[2]

8. The Respondent informed the Tribunal on 26 October 2020 that: (i) on 21 October 2020, the DoA/IAU indicated she was unable to appear before the Tribunal in either late October or early November; and (ii) although KB had indicated on 21 October 2020 her availability to appear, she did not respond to Counsel's request for specific dates in late October or early November. Further, KB did not join or respond to Counsel's invitation on 23 October 2020 for a video conference by MS Teams or any other platform.

9. In light of the Respondent's futile efforts to have KB and the DoA/IAU, who are not United Nations staff members and therefore not obliged to testify before UNDT, appear, and SB's refusal, the Tribunal limited the hearing to the testimony of the Applicant.

[1] Order No. 164 (NBI/2020).
[2] Order No. 201 (NBI/2020).

FACTUAL BACKGROUND

10. On 3 June 2015, the Applicant submitted a signed P.45 form to MINUSMA Human Resources Management ("HRMS")[3], dated 2 June 2015, requesting an education grant advance for the 2015-2016 academic year for KB.[4] The P.45 form was received by the Regional Service Center Entebbe ("RSCE") on 11 June 2015.[5]

11. On 28 July 2015, the Applicant created a request for an education grant advance for the 2015-2016 academic year for KB in the Field Support Suite ("FSS")[6] and attached another signed P.45 form, dated 20 July 2015[7]. The Applicant did not, however, submit the request for processing thus it was automatically cancelled by FSS on 12 April 2016. The advance was subsequently processed in Umoja based on a *pro forma* invoice that the Applicant submitted to the RSCE on 5 November 2015.[8] The invoice, dated 8 September 2015, bore the letterhead of IAU, and indicated that the total charge for the fall and spring semesters for the 2015-2016 academic year for KB was USD27,045.14.[9] On 14 December 2015, the Applicant received an education grant advance payment of EUR8,662.75.[10]

12. On 16 and 22 July 2016 and 15 August 2016, the Education Grant Service Line ("EGSL") at the RSCE received emails from an icloud address, which appeared to be KB's, stating that she had not attended IAU during the 2015-2016 school year as indicated on the "education grant forms" but had attended a public university instead.[11] Although KB denied having sent the emails from that address, she confirmed the contents to be correct.[12] She also expressed the strong view that her mother, SB, had

[3]The form is filled out by the staff member (see reply, annex 2, page 36, para. 6(iii)). Staff members who are entitled to education grant and who are required to pay all or a portion of the full-time school attendance expenses at the beginning of the school year may apply for an advance against their entitlement (ST/AI/2011/4, para. 6.1). The request must be accompanied by invoices or other official documentation from the educational institution (ST/IC/2014/12/Rev.1, para. 4).
[4] Reply, annex R/2, page 53.
[5] Ibid., page 49.
[6] Ibid., page 110 – 113.
[7] Reply, annex R/3, pages 13 - 14.
[8] Reply, annex R/2, page 110 – 113; see also application, annex titled "supporting emails", page 3.
[9] Ibid., page 66.
[10] Ibid., page 136.
[11] Ibid., pages 82, 83 and 89.
[12] Ibid., pages 212 and 215; page 406, line 92, Respondent's hearing bundle, p 251 lines 256-267.

sent the emails to the EGSL/RSCE because she had spoken frequently of "exposing" the Applicant, had previously tried unsuccessfully to get KB to do it and had previously used her children's email addresses in order to conceal her authorship.[13]

13. On 29 December 2016, the Office of Internal Oversight Services ("OIOS") received a report alleging that the Applicant had submitted false information in support of education grant claims. The allegations concerned education grant claims submitted between September 2014 and April 2017 for the Applicant's dependent children, DB, GB, KB and GRB.[14] OIOS initiated an investigation into the allegations.

14. According to the DoA/IAU, sometime in April 2017, the Applicant visited her unexpectedly at IAU in Aix-en-Provence, France, and asked her to sign two P.41 forms for his daughters KB and GB for him to be reimbursed by the United Nations. She signed and stamped the forms as requested and emailed copies to him on 10 April 2017.[15]

15. By email dated 11 April 2017, the EGSL/RSCE directed the Applicant to submit his education grant claim for KB via FSS to allow them to proceed with processing.[16] On 12 April 2017, the EGSL/RSCE notified the Applicant that if he did not create the claim and submit the supporting documents by close of business, the advance paid to him on 14 December 2015 would be recovered.[17] He responded the same day that he did not have access to FSS because he was away from his duty station and that he was "stuck in bed at home" due to a severe medical condition that was hampering his movement. He was therefore willing to accept a recovery "should it take place".[18] The Applicant failed to submit the P.41 form for KB in FSS by the education grant claim deadline of 12 April 2017, thus there was a recovery of the 14 December 2015 advance.[19]

[13] Ibid., pages 212 and 215.
[14] Ibid., page 5 (OIOS Investigation Report).
[15] Ibid., page 386 (DoA/IAU interview of 25 July 2017 with OIOS, lines 279-280 and 288).
[16] Reply, annex 5, page 139.
[17] Ibid., page 98.
[18] Ibid., page 138.
[19] Ibid., pages 98 and 138-139.

16. On 28 April 2017, the Applicant submitted the education grant claim for KB's attendance at IAU for 2015-2016.[20] This submission contained a P.41 form signed by the DoA/IAU and the P.45 form signed by himself. Both documents were dated 24 April 2017. The P.41 stated that KB attended IAU from 14 September 2015 to 20 May 2016 at a cost of USD27,230.[21] This claim was rejected, and no payment was made to the Applicant.[22]

17. OIOS issued its report on 30 April 2018[23] and on 26 December 2018, the Assistant Secretary-General for Field Support referred the matter to the Office of Human Resources Management ("OHRM") for appropriate action.[24]

18. On 30 January 2019, formal charges of misconduct ("allegations memorandum") and relevant supporting documentation were emailed to the Applicant.[25] The allegations memorandum alleged that the Applicant had engaged in misconduct by submitting to the Organization, between September 2014 and April 2017, one or more education grant claims and/or documentation for KB and DB that contained false information. He acknowledged receipt of the email and was given two weeks to respond to the allegations.[26] He submitted his response to the allegations on 10 February 2019.[27]

19. By a letter dated 18 March 2019 ("sanction letter"), the Assistant Secretary-General for Human Resources informed the Applicant that the allegations in respect of education grant claimed for DB were dropped. This was notwithstanding a finding that the Applicant had submitted claims for non-existing schooling expenses for DB and one of them had resulted in a payment which would be subject to recovery. In respect of KB, there was clear and convincing evidence that his conduct amounted to misconduct because he had submitted one or more education grant claims and/or

[20] Ibid., page 97.
[21] Ibid., page 114.
[22] Reply, para. 19.
[23] Reply, annex 5, page 8.
[24] Ibid., page 4.
[25] Reply, annex R/4.
[26] Reply, annex R/7.
[27] Reply, annex R/8.

documentation that contained false information for the period September 2015 through April 2017. She further informed him that his conduct had violated staff regulation 1.2(b) and section 9.1 of ST/AI/2011/4 (Education grant and special education grant for children). Accordingly, the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity in accordance with staff rule 10.2(a)(viii) was imposed on him.[28]

20. The Applicant was separated from service on 2 April 2019.

Scope and standard of review in disciplinary matters

21. In the context of disciplinary cases, the UNDT is to examine:[29]

a. Whether the facts on which the sanction is based have been established;

b. Whether the established facts qualify as misconduct under the Staff Regulations and Rules;

c. Whether the sanction is proportionate to the offence; and

d. Whether due process rights were observed.

22. The Tribunal recalls that as per the United Nations Appeals Tribunal ("UNAT/Appeals Tribunal") full bench holding in *Applicant*, "[j]udicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration."[30] In its jurisprudence since *Applicant*, the UNAT has maintained that it is not the role of the UNDT to conduct a *de novo* review of the evidence and place itself "in the shoes of the decision-maker"[31], as well as the definition of "judicial review" articulated in *Sanwidi*

[28] Reply, annex R/9.
[29] *Mahdi* 2010-UNAT-018; *Haniya* 2010-UNAT-024; *Sanwidi* 2010-UNAT-084; *Masri* 2010-UNAT-098; *Mbaigolmem* 2018-UNAT-819.
[30] *Applicant* 2013-UNAT-302 at para 29, citing to *Messinger* 2011-UNAT-123, presumably in that "it was not the task of the UNDT to conduct a fresh investigation into the harassment complaint; rather its task in this case was to determine if there was a proper investigation into the allegations", and confirmed since in *e.g.*, *Nyambuza* 2013-UNAT-364, *Diabagate* 2014-UNAT-403, *Toukolon* 2014-UNAT-407, *Jahnsen Lecca* 2014-UNAT-408, *Khan* 2014-UNAT-486, *Mayut* 2018-UNAT-862 para 48.
[31] *Wishah* 2015-UNAT-537, paras. 21 and 23.

retains actuality:

> During [its] process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.[32]

Considerations

Whether the facts on which the sanction is based have been established

23. The Respondent's case is that the facts have been established by clear and convincing evidence because:

a. Between September 2015 and April 2017, the Applicant submitted one or more education grant claims and/or related documentation that contained false information with respect to KB's attendance at IAU College for the school year 2015-2016 to the RSCE. These documents include: the 8 September 2015 invoice from IAU College for the 2015-2016 school year, which he submitted to the RSCE on 5 November 2015; the Applicant's signed P.45 form of 24 April 2017 for the 2015-2016 school year; and the P.41 form for KB for the 2015-2016 school year, signed by the DoA/IAU.

b. The evidence provided by KB to the OIOS investigator, specifically the email chain of 27 September 2015, establishes that the Applicant knew that she

[32] See *Ouriques* 2017-UNAT-745 para 14 and 15, citing to *Sanwidi* 2010-UNAT-084. Conducting a judicial review, as opposed to making all relevant findings afresh, is a norm in disciplinary proceedings before international administrative tribunals, see the recent ILOAT Judgment 4361 "The role of the Tribunal […] is not to assess the evidence itself and determine whether the charge of misconduct has been established [to the ILOAT standard] but rather to assess whether there was evidence available to the relevant decision-maker to reach that conclusion (see, for example, Judgment 3863, consideration 11). Part of the Tribunal's role is to assess whether the decision-maker properly applied the standard when evaluating the evidence (see Judgment 3863, consideration 8)." The applied standard of proof being different between ILOAT and the other tribunals, the standard of review remains the same, and recognises the legal and practical impossibility to ensure cognisance over all the evidence directly - as the present case shows.

had not attended IAU during the 2015-2016 school year.

c. The DoA/IAU's statement that the Applicant visited her office around 10 April 2017 is corroborated by the Applicant's leave record showing that he had travelled to Marseille, France, between 8 and 17 April 2017. Further, the DoA/IAU's statement that the Applicant had brought with him a P.45 form that he had signed and dated 24 April 2017 and the two P.41 forms for his daughters KB and GB that he had already completed is consistent with her e-mail of 10 April 2017, by which she forwarded to the Applicant scanned copies of the documents. The DoA/IAU's statement that the Applicant visited her "around April 30th or shortly after" was in relation to KB's attendance for the 2014-2015 school year, which is not relevant to the Applicant's April 2017 visit.[33]

d. The Applicant's contention that he had submitted a payment plan to IAU for KB for the 2015-2016 school year does not change the fact that KB had not attended IAU for that school year and that no payment was made to IAU College.

24. The Applicant's case is that the facts were not proven by clear and convincing evidence. Inchoate arguments have been advanced by him; namely, initially his averment was that no irregularity occurred, and the claims corresponded to payments actually made. Subsequent averments are centred on his unawareness of the fallacy of the claim. Specifically:

a. KB denied authorship of the emails sent to the RSCE;

b. When submitting the claim, he did not know that KB had dropped out of IAU College. Among others, he had submitted a payment plan to IAU for KB's 2015-2016 attendance and the DoA/IAU confirmed such attendance on the education grant form;

c. It has not been established that he went to meet the DoA/IAU. She

[33] Reply, para. 23.

indicated that he had come to her office on 30 April although she had emailed the signed education grant forms to him on 10 April 2017; moreover, his email of 12 April 2017 to the RSCE proves that he was too ill to have visited the DoA/IAU's office personally;

d. It has not been established that he in any manner assisted KB in the formalities related to her entry at Aix-Marseille Université ("AMU").

25. Regarding the Applicant's initial position that there was no irregularity concerning the claims, the Tribunal recalls that he told the investigator that KB had attended IAU during the 2015-2016 school year.[34] He also stated that he had made the USD3,845 payment to IAU[35] and the payments listed on the credit card authorization form[36] which he had sent to IAU for processing of KB's school fees. He confirmed that the dates on the credit card authorization form and the P.41 form were a reflection of the payments that he had made to IAU.[37] The Applicant undertook to provide documentation reflecting these payments[38] but he did not provide them to either the OIOS investigator[39] or the Tribunal.

26. KB provided written responses to queries from the OIOS investigator in August 2017 and was interviewed by the investigator on 5 September 2017. KB confirmed that she attended IAU until about June or July 2015 and started attending AMU in September 2015 for the 2015-2016 academic year.[40]

27. The DoA/IAU provided written responses to queries from the OIOS investigator in May 2017 and was interviewed by the investigator on 25 July 2017. According to the DoA/IAU, KB was a student at IAU during the 2014-2015 school year (September 2014 to May 2015) but withdrew her registration for the Summer 2015

[34] Reply, annex R/2, pages 244 – 245, 271; see also Applicant's oral evidence of 15 September 2020.
[35] Ibid., page 271, lines 944-953.
[36] Reply, annex R/5, page 116 and pages 228-229, lines 1321-1355.
[37] Reply, annex R/2, page 300, lines 1600-1608.
[38] Ibid., pages 300-301, lines 1600-1620 and pages 357-358, lines 2887-2902.
[39] Reply, annex R/5, page 17 (OIOS Investigation Report, para. 37).
[40] Reply, annex R/2, pages 212-215 (KB emails to OIOS investigator); and page 406 (KB interview of 5 September 2017 with OIOS, lines 98, 103-104 and 110-114).

session in June 2015 and did not attend IAU during the 2015-2016 academic year.[41] The DoA/IAU told the OIOS investigator that: (i) she had no record of the 8 September 2015 invoice in the IAU database;[42] (ii) the invoice "looks a little strange" because the font used for KB's name and address was different and the payment of USD3845 was entered in a format that she did not use;[43] and (iii) there was no record in the IAU database of the payments listed[44] on the P.41 form[45] for KB.

28. The Tribunal concludes that the Applicant has not offered any evidence which would contradict the fundamental findings on the objective element of the impugned conduct, that is, that he had made requests based upon untrue information, to which he attested.

29. As concerns the subjective element, that is, knowledge and intent on the Applicant's part, in his evidence before the Tribunal on 15 September 2020 the Applicant stated that he had learned for the first time that KB had not attended IAU in 2015-2016 from the OIOS investigator during his 9 August 2017 interview. Before, he was unaware of it because he had not signed a parental discharge form required for KB who had then been a minor, to change schools. Additionally, he had last seen KB in August or September 2015 and she did not mention any arrangements to attend AMU to him. He had not communicated with her since May 2016.[46] Further, he was unaware because the DoA/IAU had failed to inform him of KB's withdrawal from IAU and had signed the P.41 form confirming her attendance.[47]

30. The DoA/IAU told the OIOS investigator that the Applicant had visited her unexpectedly at IAU in Aix-en-Provence, France, and asked her to sign documents for

[41] Reply, annex R/2, pages 67 – 81 (DoA/IAU emails to OIOS investigator); page 384 (DoA/IAU intervew of 25 July 2017 with OIOS, line 231); and page 399, lines 572-575.
[42] Ibid., page 383 (DoA/IAU interview of 25 July 2017 with OIOS, lines 207-208).
[43] Ibid., pages 381-382, lines 168-170; 174-175; 193-197.
[44] Ibid., page 387 (DoA/IAU interview of 25 July 2017 with OIOS, line 313).
[45] Ibid., page 174. The P.41 form or the certificate of attendance and costs and receipt for payments is submitted by a staff member when there is an education grant claim for the previous school year. Part A of the P.41 form is filled out by the staff member while part B is filled out by the educational institution. See pages 14 and 15 of ST/IC/2014/12/Rev.1.
[46] Applicant's oral evidence of 15 September 2020. See also reply, annex R/2, page 239, lines 207-212 and page 245, lines 342-345 and 354-358.
[47] Applicant's oral evidence of 15 September 2020.

him to be reimbursed by the United Nations.[48] She signed and stamped two P.41 forms, which had all the information, including the date, 24 April 2017, typed in. She did not fill in any of the information.[49] One form was for KB for the school year 2015-2016 and the other was for his other daughter, GB, for the school year 2016-2017.[50] The DoA/IAU was unsure of the date of the Applicant's visit but told the OIOS investigator during her 25 July 2017 interview that it was in April 2017.[51] She explained that the Applicant presented her with many documents that he wanted her to sign immediately[52] so it is possible that she had not read them carefully before signing and mistook the forms as relating to the 2014-2015 school year.[53]

31. As to the Applicant's contention about the dates of his visits to IAU, the Tribunal recalls that the DoA/IAU told the OIOS investigator of two such visits – one having been on 30 April 2015 and the other one in April 2017. It is the April 2017 visit that is at issue. Whereas the visit on 30 April is connected to attesting the P.41 form for the school year 2014-2015, which had been signed on 30 April 2015, and which is not disputed.[54] The Applicant's argument in the application that he could never have visited IAU on 30 April is thus mixing up the 2015 and 2017 visits and does not undermine the DoA/IAU's version of events.

32. The Tribunal, moreover, accepts the Respondent's argument at paragraph 23(c) above that the Applicant's home leave posed an opportunity for him to visit the DoA/IAU. At the hearing, the Applicant acknowledged that he was at home in Marseille on rest & recuperation ("R&R") and annual leave from 8 – 24 April 2017[55]. However, he refuted the DoA/IAU's claim that he had visited her office in April 2017. His evidence during the hearing was that he had emailed the P.45 and P.41 forms to the DoA/IAU and she emailed the forms back to him on 10 April 2017.[56] The Applicant

[48] Reply, annex R/2, page 386 (DoA/IAU interview of 25 July 2017 with OIOS), lines 279-280 & 288).
[49] Ibid., page 385, lines 263-266; page 386, line 282; page 388, line 328 & 330.
[50] Ibid., page 385, lines 270-272; page 391, lines 391-396.
[51] Ibid., page 393, line 453.
[52] Ibid., page 393, lines 441-443.
[53] Ibid., page 385, lines 261-262; page 386, lines 275-276 and 284 – 285.
[54] Ibid., p.132.
[55] See also reply, annex R/3, page 58.
[56] Ibid., pages 62 – 66; reply, annex R/2, pages 325-326, lines 2166-2197.

did not provide a copy of his email to the DoA/IAU to the Tribunal. His evidence was also that he could not have gone to IAU in April 2017 because he was sick and was under the care of a doctor.[57] He told the OIOS investigator that his wife had subsequently picked the signed originals from the DoA's office and given them to him [58] but then told the Tribunal that his other daughter, GB, had picked the forms from the DoA's office and given them to him and then he had forwarded copies of the signed forms to the RSCE on 28 April 2017 for processing of his education grant claim/settlement.[59] The Tribunal also recalls that the Applicant told the OIOS investigator that he had only filled out his personal details in the yellow portion of the P.41 form and that the DoA/IAU had filled out the rest of the form upon receipt of his email.[60] On the same issue, the Applicant's evidence before the Tribunal was that prior to emailing the P.45 and P.41 forms to the DoA/IAU, he had filled in all the information on the forms and dated them 24 April 2017 as this was the date of his scheduled return to Mali.

33. The Tribunal considers that the Applicant's 12 April 2017 email alleging that he was ill on that date does not create an alibi for him on 10 April 2017. Neither does the *ex post facto* doctor's note dated 26 April 2017. On the other hand, the Applicant's shifting story about the circumstances of filling out and obtaining signatures on the forms, is of low credibility. Obviously, the DoA/IAU had no interest in filling out the forms to unduly benefit the Applicant.

34. According to KB's statement to the OIOS investigator, the Applicant was aware that she was not attending IAU because: he had paid "inscription [registration]" fees for her attendance at AMU for the 2015-2016 school year; in August and September 2015 he had sent her the documents needed to complete her registration for AMU; and he had helped her fill out the forms in October 2015.[61] When she started AMU in

[57] Applicant's oral evidence of 15 September 2020. See also application, annexes 2 and 6; reply, annex 5, page 138.
[58] Reply, annex R/2, pages 284-286, lines 1266-1284, page 292-294, lines 1432-1457, page 295, lines 1454-1457, page 296, lines 1518-1520, page 317, lines 1972-1988 and page 321, line 2076.
[59] Ibid., pages 321-322, lines 2082-2102; reply, annex R/3, pages 39, 59; reply, annex R/5, page 97.
[60] Ibid., page 287, lines 1298-1317 and page 319, lines 2030-2036.
[61] Ibid., pages 214, 217-220; pages 408-409, lines 138-161; and pages 410-411, lines 191-213.

September 2015, she lived at home, and the Applicant saw her at the bus stop when she was departing for AMU.[62] Admittedly, she and the Applicant had been in touch through February 2016.[63] KB moved out on her own in May 2016 and had very little contact with her parents afterwards.[64] The Applicant did not provide any financial support for her attendance at AMU during 2015-2016 since it is free.[65]

35. The Applicant denied making fees payments to AMU for KB. He explained that he always left his credit card at home with his family for their use because his children needed it for school, and he did not need it in Kidal. To his recollection, KB never used his card to make fees payments to AMU. He pointed out that there is no documentation to confirm any such payments. In this regard, the Tribunal notes that the investigation confirmed that the Applicant's credit card had been charged on account of payment to AMU in August 2015 and KB, while she confirmed that the Applicant's credit card had been left at home to be used for the children's schooling expenses, stated that she had informed the Applicant of the registration payment and forwarded to him a confirmation issued by AMU.[66] KB moreover supplied OIOS with emails correspondence on 27 September 2015 involving the Applicant, his wife and herself in the matter of provision of documents required to obtain KB's student ID, and demonstrating that these documents, including the Applicant's French ID card and United Nations Laissez-Passer, his United Nations insurance and ID card, had been forwarded to AMU.[67] Whereas the Applicant asserts that there is nothing in the 27 September 2015 email thread between KB, SB and himself to suggest KB was changing schools or why she needed his documents,[68] the Tribunal notes that the Applicant has not, however, provided any alternative explanation for this correspondence. Noting further that the Applicant submitted in his closing submission that KB had reportedly paid EUR419 as the inscription/registration fee but the fee listed on the AMU website for 2020-2021 is only EUR170, the Tribunal does not find that

[62] Ibid., page 409, lines 168-170
[63] Ibid., page 417, lines 341-343, also Applicant's oral testimony of 15 September 2020.
[64] Ibid., page 407, lines 115-123 and 132-135.
[65] Ibid., page 411, lines 217-221.
[66] Respondent's hearing bundle, pages 62 and 252-253.
[67] Respondent's hearing bundle pages 65-68.
[68] Applicant's oral evidence of 15 September 2020.

this assertion, even if true, would undermine the fact that money had been transferred from the Applicant's credit card to AMU, or, for that matter, the veracity of the statement that he had been informed of the purpose of the payment by KB.

36. As previously indicated, it proved impossible to secure KB's and the DoA/IAU's appearance before the Tribunal. The Tribunal finds, nevertheless, that their written responses to questions posed by OIOS and, subsequently, their recorded statements to the OIOS investigator, are exhaustive, voluntary, apparently sincere, do not disclose any tendency to unduly incriminate the Applicant, are coherent internally and with each other, and confirmed by documents. They are altogether credible. Issues flagged out by the Applicant as unclear (the date of the Applicant's visit; the amount of the registration fee at AMU), are peripheral details. The Tribunal finds, in any event, that the main evidence against the Applicant consists in facts attested to by documents, that is; that KB was not registered as an IAU student during the school year 2015-2016; that she instead signed up for and attended AMU; that the Applicant did not pay for IAU; that he instead paid a far lesser registration fee at AMU; and that the Applicant applied for and received the education grant advance, and subsequently, submitted a claim for the regular disbursement of the education grant indicating IAU as the educational institution. Considering, moreover, that for an average employee of the Organization making a payment of USD27,045.14 is a fact unlikely to be overlooked or forgotten and that the impulse for this investigation was not an audit but rather an email informing of fraud which came from a person close to the Applicant and well informed, these facts add up to form a very high probability of an act committed with knowledge and intent. In these circumstances, the import of the witness statements lies mainly in the express confirmation of what has already transpired from the remaining evidence.

37. In conclusion, the Tribunal finds that the relevant facts have been established to the requisite standard of clear and convincing evidence.

Whether the established facts qualify as misconduct under the Staff Regulations and Rules.

38. The Respondent submits that: the Applicant's conduct amounted to misconduct because he violated staff regulation 1.2(b) (by failing to uphold the highest standards of integrity), and section 9.1 of ST/AI/2011/4 (by failing to ensure the accuracy and completeness of the information being provided to the Organization).

39. Staff regulation 1.2(b) states that:

> 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.

40. Section 9.1 of ST/AI/2011/4 states that:

> When submitting a request for education grant advance or for payment of the education grant, staff members shall ensure the accuracy and completeness of the information being provided to the United Nations, and promptly correct any erroneous information or estimates that they may have previously submitted. Documentation provided by an educational institution may not be altered by the staff member. Incorrect, untrue or falsified information, as well as misrepresentation or partial disclosure, may result not only in the rejection of a claim and/or recovery of overpayments but also in disciplinary measures under the Staff Rules and Regulations (see ST/SGB/2011/1).

41. The Tribunal observes that for staff applying for education grant, section 9.1 of ST/AI/2011/4 establishes a duty to act with a particular diligence. Among others, an unambiguous obligation to verify the accuracy and completeness of the information provided in the education grant request rests upon the staff member irrespective of the corresponding duties of various officials involved in certifying, processing and disbursement. In the present instance, the error on the part of the DoA/IAU who wrongly attested to the eligibility for the education grant, was, at a minimum, used in an opportune fashion by the Applicant in order to enrich himself if not induced by him. The Tribunal, therefore, agrees with the Respondent's qualification of the Applicant's acts on both counts.

Whether the sanction is proportionate to the offence.

42. The Applicant submits that the sanction was not proportionate to the offence because the Respondent failed to take the following mitigating matters into consideration: the OIOS investigator's failure to report his cooperation in providing contact details for KB and SB; his long service in volatile duty stations that had adverse impacts on his family life, psychological and physical being; his responsibility for the care of his ailing father who passed away in March 2016; his exemplary personal and professional performance; and OSLA's refusal to provide him with legal representation.

43. The Respondent submits that the sanction imposed was proportionate because it was in line with the Secretary-General's past practice in comparable disciplinary cases. There is no obligation for the Administration to consider his service in field missions or positive performance as mitigation in the case of gross dishonesty such as submitting a false education grant claim. The Applicant's claim that he had been taking care of his ill father was not raised during the disciplinary process and has no relevance to this case. Similarly, the Applicant's purported illness and medical treatment were not raised by him and in any event have no relevance to his conduct at issue.

44. The Tribunal recalls that a long record of unblemished service has been traditionally recognized by the Respondent as a mitigating circumstance. This said, it also, however, observes that the measure applied in this instance was not the most severe and was consistent with the established practice in similar matters.[69] The Tribunal does not consider it disproportionate.

Whether due process rights were observed.

45. The Applicant submits that the following procedural errors during the investigation tainted the outcome: the OIOS investigator's failure to contact SB although he had provided her contact information and his failure to disclose emails

[69] *See* e.g. *Aghadiuno* 2018-UNAT-811; ST/IC/2016/26, ST/IC/2015/22, ST/IC/2008/41, ST/IC/2005/51 and ST/IC/2002/25 (Practice of the Secretary-General in disciplinary matters and cases of criminal behavior).

between the DoA/IAU and the RSCE, which he had submitted; the investigator's consolidated materials were "biased and contradictory"; the investigator exploited the vulnerability of interviewees, seemed to coach interviewees for his desired outcomes and failed to assess the veracity of the statements provided by KB and the DoA/IAU; the investigator giggled during interviews; and there are key facts in the separation memorandum of 16 March 2019 and the investigation report which differ. The Applicant also submits that the Respondent's failure to produce KB and the DoA/IAU for cross examination during the UNDT hearing was a violation of his due process rights.

46. The Respondent submits that the Applicant's due process rights were respected throughout the investigative and disciplinary processes. The OIOS investigator informed the Applicant in advance of the allegations against him and provided him with a subject pre-interview sheet that the Applicant signed. The Applicant was interviewed by OIOS on 9 August 2017 and was asked about the material aspects of the matter. He was informed that he was a subject of an investigation concerning false statements "in respects of requests and clams for education grant, advances and payments submitted by" him to the EGSL. The Applicant was subsequently provided with a copy of the audio-recording of his interview and he was given 10 working days to submit any written statement about the matters discussed during the interview. The Applicant did not specify the basis for his accusations that the OIOS investigator was "biased and contradictory" and "exploit[ed] the vulnerability of interviewees". The OIOS interviews were audio-recorded and transcribed thus, there was no room for the OIOS investigator to "distort" interviewees' statements. Contrary to the Applicant's contention, the transcriber's note of "giggling" in interview transcripts is not evidence of coaching or exploitation of an interviewee.

47. For the reasons stated by the Respondent[70], the Tribunal agrees that no violation of due process rights has been substantiated. As for the interviewing of the Applicant's wife, SB, by OIOS, it was the Applicant's suggestion that she would not be available

[70] See also the investigation report (reply, annex 2, pages 6-7, 130 and 230-231 for the OIOS investigator's methodology) and reply, annex 10.

for an interview.[71] Upon the Applicant's motion, however, the Tribunal undertook to hear SB but she declined.

48. As concerns the Applicant's complaint that he had no opportunity to cross-examine KB and the DoA/IAU, the Tribunal concedes that hearing the witnesses directly before the Tribunal would have been preferred. It notes, however, that it is inherent in judicial review that it must be able to rely on the material gathered by the decision-maker. The Appeals Tribunal, the former United Nations Administrative Tribunal and ILOAT, all accepted that a right to cross-examine witnesses is not absolute.[72] This Tribunal has also earlier noted practical difficulties in having the hearing as the principal tool of fact-finding, including the unfortunate but inescapable reality of a lag between the incidents and the time when the cases reach the Tribunal and the fact that the UNDT has neither subpoena nor sanctioning power over non-employees. When non-employees appear before the UNDT, they do it on their own volition and veracity of their testimony is secured only by a declaration on "honour and conscience" but not under any institutional sanction. Employees are obligated to appear by internal rules but also under the sanction of disciplinary liability only. As such, the Tribunal hearing the evidence certainly has the practical advantage of direct and adversarial examination but is not inherently superior in the legal sense as would be a proper testimony before a national court. As such, this Tribunal takes it that it has authorisation and not the obligation to carry out a re-determination and to seek direct cognisance of evidence under certain circumstances. The exercise of this authority is to be guided by what is necessary to determine the disputed and doubtful material facts in view of readily available evidence, without, however, placing the UNDT "in the shoes" of the entity responsible for discharging the burden of proof. The function of the Respondent in properly conducting the investigation and litigation rests at the crux of the matter.[73] As a corollary to the judicial review model, witness statements obtained

[71] Reply, annex 2, pages 358-359, lines 2915-2917 and 2923-2924F. For the OIOS investigator's explanation re this issue see reply, annex R/3, page 2 and para. 6 of the Respondent's 24 January 2020 submission, annex R/15.
[72] See *Applicant* 2013-UNAT-302 paras. 36-39 and references cited therein; *Majut* 2018-UNAT-862 para. 88.
[73] See *Ricks* UNDT/2018/090, at para. 62.

in the investigation must be accorded a special status. They are not hearsay and are more than ordinary documentary evidence as they are given under assurances of speaking the truth, drawn up by an authorised official according to a formalised procedure and are either signed by the interviewee or recorded.

49. Since it was not possible to have KB and the DoA/IAU testify before it, the Tribunal was entitled to rely on the written record. The Tribunal evaluated the quality of these statements for their credibility and considered the Applicant's critique. The Tribunal found, moreover, that interviews in the investigation were neither the only evidence relied upon nor, in viewing the evidence as a whole, had a decisive bearing on the question of the Applicant's responsibility.

Conclusion

50. As the impugned decision conformed to the established requirements and standards, the Tribunal finds no grounds for it to intervene.

JUDGMENT

51. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 2nd day of February 2021

Entered in the Register on this 2nd day of February 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi