



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

KENGUEMBAT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Marcos Zunino, OSLA

Counsel for Respondent:

Marisa Maclellan, UNHCR

Francisco Navarro, UNHCR

Introduction

1. By application filed on 4 September 2018, the Applicant, a former staff member of the Office of the United Nations High Commissioner for Refugees (“UNHCR”), contests the decision to dismiss him from service following a disciplinary proceeding in which he was accused of corruption.
2. The above-mentioned application was filed in the Nairobi Registry of the Tribunal where it was registered under Case No. UNDT/NBI/2018/092.
3. The Respondent filed his reply on 5 October 2018.
4. On 19 March 2019, Case No. UNDT/NBI/2018/092 was transferred to the Geneva Registry and registered under Case No. UNDT/GVA/2019/019.
5. A case management discussion (“CMD”) took place on 25 November 2020 and a hearing on the merits followed from 18 to 20 January 2021.
6. The parties filed their respective closing submission on 3 February 2021.
7. By Order No. 60 (GVA/2021) dated 1 March 2021, the Tribunal informed the parties that the Tribunal will issue its judgment in English and a French translation of it will be made available to the parties at a later stage. The parties were also informed that the time limit for appeal will start to run from the issuance of the English version of the judgment.

Facts

8. The Applicant joined UNHCR on 8 May 2014, as a Senior Programme Assistant (G-5 level) in Bangui, Central African Republic (“CAR”), a position that he held until his dismissal.
9. The head of the Applicant’s Unit was the Senior Programme Officer, who was also dismissed for his involvement in the same allegations.

10. In March 2017, UNHCR entrusted a local Non-Governmental Organization (“NGO”) with the renovation of shelters for refugees in the Yaloke district, approximately 220 kms away from Bangui. Said NGO had to build roofs for 26 houses and, where necessary, repair the walls of those 26 houses. The total value of the project was XAF8,139,300 (approximately USD14,386).

11. The project was executed under the modality of direct implementation on the basis of a field operational advance. This entails that a UNHCR staff member is personally responsible for the funds used in the project.

12. The Senior Reintegration Officer (P-4), UNHCR, was the staff member responsible for the field operational advance. He made the request for the advance on 20 March 2017 and received a UNHCR cheque for the total project value on 21 March 2017.

13. Also on 21 March 2017, the Senior Reintegration Officer gave the NGO Coordinator a first instalment of XAF5,500,000 (approximately USD9,722) in cash that was deemed sufficient to cover material and transportation costs. A receipt was issued to document this advance payment.

14. Later that day, the NGO Coordinator received a call from the Applicant requesting him to return XAF2,00,000 of the money he had received for the project. They met about two kilometres away from UNHCR premises and the NGO Coordinator handed the requested amount in an envelope. The Applicant took the money without providing a receipt to the NGO Coordinator.

15. The Applicant then brought the envelope to the Senior Programme Officer who, without counting the money, kept it in a drawer in his office.

16. In late March 2017, the NGO Coordinator requested additional funds. In support of his request, he submitted a report on the progress of the construction site indicating that he had renovated 20 houses. On 28 March 2017, the Senior Reintegration Officer disbursed another XAF1,000,000 to the NGO.

17. On 25 April 2017, the Senior Reintegration Officer and a Field Associate (Shelter Cluster), visited the site of the project and discovered that, contrary to the NGO's report, only 10 houses had been renovated.

18. On that same day, the NGO Coordinator sent an email to the Applicant informing him that UNCHR had visited the project, and noting that without the money requested by the Applicant the works were not going well. The NGO Coordinator requested the Applicant to tell his "boss" to return him the money unconditionally, otherwise he would denounce the matter as he could no longer keep the secret. The NGO Coordinator forwarded this email to the Field Associate (Shelter Cluster).

19. On 26 April 2017, the Applicant forwarded the NGO Coordinator's email to the Senior Programme Officer who then instructed him to return the money to the NGO Coordinator. On that same day, the NGO Coordinator received XAF2,000,000 from the Applicant on UNHCR premises and issued a receipt to document the payment.

20. On 19 May 2017, the Inspector General's Office ("IGO"), UNHCR, received an allegation that the Applicant had obtained a bribe from the NGO Coordinator. Concretely, it was alleged that around 23 March 2017, the Applicant had requested and received a bribe of XAF2,000,000 (around USD3,400) from the NGO Coordinator.

21. The IGO opened an investigation and interviewed five witnesses, including the Applicant who was interviewed on 11 July 2017.

22. On 17 July 2017, the IGO shared the interview transcript with the Applicant and gave him the opportunity to review it. The Applicant sent his comments and additional information on 19 July 2017.

23. On 20 July 2017, the IGO shared the draft investigation findings with the Applicant and invited him to comment, which he did on 27 July 2017. The Applicant denied that he had extorted money from the NGO Coordinator.

24. On 5 September 2017, the IGO sent the final version of the investigation report to the Division of Human Resources and Management (“DHRM”), UNHCR.

25. By letter dated 14 November 2017, the Director, DHRM, UNHCR, transmitted the final version of the investigation report to the Applicant and informed him of the decision to initiate a disciplinary process against him. The Applicant was invited to provide his comments on the allegations of misconduct within two weeks.

26. On 5 December 2017, the Applicant provided his comments on the allegations of misconduct against him. He asserted that he only executed a written instruction from the Senior Programme Officer. In support of his contention, the Applicant submitted a copy of the operational advance form together with a handwritten note by the Senior Programme Officer and addressed to him suggesting payment of XAF6,000,000 to the NGO, with the rest to be paid following a report by colleagues in the Shelter Cluster, UNHCR. The authenticity of the handwritten note is disputed by the Respondent.

27. On 19 January 2018, the Applicant made an additional submission to the Director, DHRM, UNHCR.

28. By letter dated 2 May 2018, the Director, DHRM, UNHCR, informed the Applicant of the High Commissioner’s decision to dismiss him from service.

29. On 6 June 2018, the Applicant was notified of the contested decision and he was separated from service on the same day.

Parties’ submissions

30. The Applicant’s principal contentions are:

- a. The contested decision was not properly motivated despite the gravity of the alleged facts against the Applicant;
- b. The Administration failed to consider relevant exculpatory factors;

- c. The facts underlying the sanction were not established to the requisite standard of “clear and convincing evidence”;
- d. The established facts did not amount to misconduct;
- e. The rights of the Applicant were not respected during the investigation and disciplinary process; and
- f. The sanction imposed was disproportionate.

31. The Respondent’s principal contentions are:

- a. The facts of the case, which involved dismissal for misconduct, were established through “clear and convincing” evidence according to the Appeals Tribunal’s jurisprudence;
- b. The High Commissioner correctly concluded that the evidence supported a finding that the allegations had been established to the required standard of clear and convincing evidence;
- c. The High Commissioner correctly determined that the Applicant’s conduct constituted corruption as he requested a kickback from a UN contractor, and this conduct was inconsistent with his basic obligations under the Staff Regulations and Rules;
- d. In determining the proportionality of the disciplinary sanction, the High Commissioner considered aggravating and mitigating circumstances as well as the parity principle. He correctly determined that dismissal was a proportionate disciplinary measure; and
- e. The Applicant’s due process rights were respected.

Consideration

Preliminary issue

32. The Tribunal recalls that the NGO Coordinator was one of the witnesses initially called to provide testimony at the hearing as per Order No. 3 (GVA/2021). However, since the NGO Coordinator informed the Tribunal that he was under medical treatment in a hospital in Bangui, the Tribunal decided, by Order No. 6 (GVA/2021), that his testimony was no longer required as the case record already contained relevant evidence in relation to the facts in which he had been involved.

33. The NGO Coordinator was informed of the Tribunal's decision by email of 19 January 2021. However, on 20 January 2021, the last day of the hearing, the NGO Coordinator sent a letter to the Tribunal, which he qualified as his testimony.

34. Given that the Tribunal had already decided that the NGO Coordinator's testimony was no longer required, his 20 January 2021 letter was not admitted into evidence in the case record and was therefore not considered by the Tribunal.

The scope of judicial review in disciplinary cases

35. The Appeals Tribunal has held that judicial review is focused on how the decision-maker reached the impugned decision, and not on the merits of the decision (see *Sanwidi* 2010-UNAT-084 and *Santos* 2014-UNAT-415).

36. The Appeals Tribunal has also determined what the role of this Tribunal is when reviewing disciplinary cases (see *Mahdi* 2010-UNAT-018 and *Haniya* 2010-UNAT-024). In the case at hand, this Tribunal considers that the issues to be examined are:

- a. Whether the facts on which the disciplinary measure was based have been established according to the applicable standard;
- b. Whether the established facts legally amount to misconduct under the Staff Regulations and Rules;

c. Whether the disciplinary measure applied is proportionate to the offence, and

d. Whether the Applicant's due process rights were respected during the investigation and the disciplinary process.

Have the facts on which the disciplinary measure was based been established?

37. According to the jurisprudence of the Appeals Tribunal, when the disciplinary sanction results in separation from service, the alleged misconduct must be established by clear and convincing evidence. This standard of proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. In other words, it means that the truth of the facts asserted is highly probable (see *Molari* 2011-UNAT-164).

38. The Tribunal will now assess whether the evidence collected by the Administration to establish the facts meets the applicable standard of proof.

39. Between 18 and 20 January 2021, the Tribunal held a hearing on the merits in the Applicant's case. It examined and cross examined the Applicant and other relevant witnesses, namely, the Senior Programme Officer, the Senior Reintegration Officer, and the IGO Investigator. It was not possible, however, to have the NGO Coordinator's testimony in Court due to his medical condition as noted above.

40. The Tribunal found both the Senior Reintegration Officer's and the IGO Investigator's testimony very clear, consistent and reliable. On the contrary, the Tribunal found the Applicant's and the Senior Programme Officer's version of the facts unreliable, implausible, and inconsistent.

41. The Applicant was dismissed for requesting and receiving a bribe of XAF2,000,000 from the NGO Coordinator in the context of the implementation of a UNHCR project in Yaloke.

42. It is the role of the first instance Judge to critically assess the evidence, review how it was collected and under which circumstances and whether it rationally supports the allegations made against the Applicant. For this purpose, the Tribunal refers below to the sequence of the most relevant facts which are undisputed:

- a. The Yaloke project was carried out under the modality of direct implementation on the basis of a field operational advance. This entails that a UNHCR staff member is personally responsible for the funds used in the project. The Senior Reintegration Officer, UNHCR, was the staff member responsible for the field operational advance in this project;
- b. On 21 March 2017, the Senior Reintegration Officer gave the NGO Coordinator a first instalment of XAF5,500,000 in cash for the project. The former retained part of the project cost as a performance guarantee which he deposited in the Mission's safe;
- c. Later that day, the Applicant met with the NGO Coordinator approximately 2 kms away from UNHCR premises and received XAF2,000,000 from him in an envelope. The Applicant did not provide the NGO Coordinator with a receipt;
- d. The Applicant then brought the envelope to the Senior Programme Officer who did not inform anyone about the amount of money received from the NGO Coordinator;
- e. On 25 April 2017, the NGO Coordinator sent an email to the Applicant informing him that UNCHR had visited the project, and that without the money requested by the Applicant the works were not going well. The NGO Coordinator requested the Applicant to tell his "boss" to return him the money unconditionally, otherwise he would denounce the matter as he could no longer keep the secret. The NGO Coordinator forwarded this email to a Field Associate (Shelter Cluster), UNHCR; and

f. On 26 April 2017, the Applicant forwarded the NGO Coordinator's email to the Senior Programme Officer who then instructed the Applicant to return the money to the NGO Coordinator. On that same day, the NGO Coordinator received XAF2,000,000 from the Applicant on UNHCR premises and issued a receipt to document the payment.

43. The Applicant does not contest having received the amount of XAF2,000,000 from the NGO Coordinator and alleges that:

a. The amount of XAF2,000,000 was requested and kept safely as a performance guarantee;

b. The accusations of the NGO Coordinator are unreliable to the point of lacking any probative value. In fact, the version provided by the NGO Coordinator when he recanted is more credible than his initial accusations;

c. It is unquestionable that the NGO Coordinator lied. He either lied when he made his accusations or when he retracted them. In such circumstances, his allegations should not be given any probative value and should be disregarded;

d. The Applicant suggested to the Senior Programme Officer to request a performance guarantee from the NGO Coordinator, and the Senior Programme Officer, as Head of Section, adopted the suggestion and instructed the Applicant to execute it;

e. The Applicant only followed the Senior Programme Officer's orders in asking for XAF2,000,000. There is an operational advance document with written instructions from the Senior Programme Officer to withhold the guarantee;

f. The issue of the second performance guarantee was due to a lack of communication between the Applicant, the Senior Programme Officer and the Senior Reintegration Officer; and

g. The fact that the Applicant did not provide a receipt to the NGO Coordinator was an oversight.

44. The Tribunal will assess the evidence on record in light of the Applicant's arguments challenging the facts on which the disciplinary measure was based.

The Applicant's involvement in the project

45. The Applicant, a staff member within the Programme Section, UNCHR, claims that one of his tasks was to assure the proper execution of projects, including the Yaloke project.

46. However, the Senior Reintegration Officer testified at the hearing that the role of the Programme Section in the project was only to approve its budget and clear the operational advance.

47. The evidence shows that neither the Applicant nor the Senior Programme Officer were involved in the implementation of the project. In fact, the Senior Reintegration Officer had overall responsibility for it as he is the one who requested the operational advance and, consequently, was personally responsible for the funds.

48. Therefore, the Applicant had no authority to request a performance guarantee from the NGO Coordinator.

The alleged performance guarantee

49. The Applicant claims that the amount of XAF2,000,000 was retained as a performance guarantee to ensure that the Yaloke project would be completed.

50. The evidence shows that a performance guarantee had already been retained by the Senior Reintegration Officer prior to the disbursement of the initial instalment to the NGO Coordinator. There were therefore no grounds to request another performance guarantee.

51. According to the NGO Coordinator's testimony during the investigation, on 21 March 2017, after receiving the first instalment for the project, he received a call from the Applicant requesting him to meet. They met in the city and the Applicant asked him to pay XAF2,000,000 for "the boss", without naming the Senior Programme Officer. The Applicant told him that if he did not pay such amount, his NGO would not be able to work for UNHCR in the future. The NGO Coordinator then decided to give the Applicant the requested amount in cash. The NGO Coordinator further testified that he had been a victim of fraud and that it was clear to him that he would not recover the amount of money given to the Applicant.

52. After a careful analysis of the evidence, the Tribunal notes that the NGO Coordinator kept the same version of the events in at least three different occasions: 1) in his statement before the Field Associate (Shelter Cluster) following the inspection visit to the project, 2) in his 25 April 2017 email to the Applicant asking him to tell his "boss" to return the money unconditionally, otherwise he would report the matter as he could no longer keep the secret; and 3) in his 30 May 2017 letter to the Senior Reintegration Officer officially informing him *inter alia*, that he had been a victim of fraud since he was requested to pay XAF2,000,000 to the "big boss".

53. The Applicant argues that the NGO Coordinator's testimony is unreliable to the point of lacking any probative value. However, the Tribunal does not see any reason for the NGO Coordinator to fabricate the alleged facts, particularly considering that by his testimony he incriminated himself in a fraud scheme.

54. Furthermore, the Applicant has not provided any evidence supporting the alleged bad relationship between him and the NGO Coordinator. There is no apparent reason for the NGO Coordinator fabricating the allegations against the Applicant. The Tribunal recalls that the onus is on the Applicant to substantiate his allegations of improper motives.

55. The Tribunal notes that the NGO Coordinator's testimony during the investigation is consistent with that of the Field Associate (Shelter Cluster). It also notes with concern that neither the Applicant nor the Senior Programme Officer made any attempt to document their actions or at least provide the NGO Coordinator with a receipt for the alleged performance guarantee.

56. The Tribunal is not convinced by the Applicant's argument that the failure to provide the NGO Coordinator with a receipt is an oversight, particularly considering that the Applicant testified that he did not consider the NGO Coordinator being a reliable person.

57. The Tribunal further notes that neither the Applicant nor the Senior Programme Officer informed the Senior Reintegration Officer, who was the staff member responsible for the project, or anyone else about the alleged performance guarantee. Any reasonable person acting in good faith would have, at least, informed the Senior Reintegration Officer.

58. The Tribunal is therefore not convinced by the Applicant's argument that the alleged second performance guarantee was due to a lack of communication between the Applicant, the Senior Programme Officer and the Senior Reintegration Officer.

59. Consequently, taking into consideration the evidence on record, the Tribunal finds that the Applicant's intention, even if acting on the instructions of the Senior Programme Officer, was not to keep a performance guarantee but rather to obtain a bribe from the NGO Coordinator.

60. While the Tribunal notes that there is no evidence to suggest that the Applicant personally profited from the amount taken from the NGO Coordinator, his involvement in the fraud scheme is established.

The alleged documentary evidence

61. The Applicant refers to a handwritten note by the Senior Programme Officer in the operational advance form dated 20 March 2017. This handwritten note reads as follows:

Dear [Applicant], given the nature of the works, I suggest payment of XAF6,000,000 the rest to be paid after the report by the colleagues in Shelter.

62. The authenticity of the handwritten note is disputed by the Respondent who suggests, based on the Applicant and the Senior Programme Officer's failure to mention this crucial element in a timely fashion, that it was written *ex post facto* for the sole purpose of responding to the allegations of misconduct.

63. Given that neither the Applicant nor the Senior Programme Officer were involved in the implementation of the project, the Tribunal finds no logic in the existence of a handwritten note. If the Senior Programme Officer's intention was to request a performance guarantee, his instruction would have been addressed to the Senior Reintegration Officer instead of to the Applicant.

64. Even assuming that the handwritten note was authentic, the Tribunal finds unreasonable that neither the Applicant nor the Senior Programme Officer referred to it during the investigation. The Tribunal notes that in his interview with the IGO Investigator on 11 July 2017, the Applicant recognized that there was no written document indicating that the Programme Section would retain XAF2,000,000 as a performance guarantee.

65. Furthermore, the Tribunal notes that the facts are not in line with the alleged instruction in the handwritten note. According to that instruction, the Applicant should have retained an amount of XAF2,139,300, that is, the difference between the total amount of the project (XAF8,139,300) and the suggested payment (XAF6,000,000). However, the Applicant obtained an amount of XAF2,000,000 from the NGO Coordinator without documenting such action.

66. The Tribunal is therefore not convinced of the probative value of the alleged handwritten note.

The return of the alleged performance guarantee

67. The Applicant advances that the Senior Programme Officer instructed him to return the money to the NGO Coordinator when the Senior Programme Officer learned that the Senior Reintegration Officer had not paid the NGO in full.

68. The Tribunal recalls that the Senior Programme Officer instructed the Applicant to return the alleged performance guarantee only after the NGO Coordinator sent an email to the Applicant on 25 April 2017 informing him of the UNHCR inspection visit and requesting him to tell his “boss” to return the money, or else “he would denounce the matter as he could no longer keep the secret”. The Tribunal notes that neither the Applicant nor the Senior Programme Officer replied to the NGO Coordinator’s strong accusations.

69. Furthermore, while the aim of a performance guarantee is precisely to ensure that a contractor fulfils contractual obligations, neither the Applicant nor the Senior Programme Officer informed or consulted the Senior Reintegration Officer or the Field Associate (Shelter Cluster) about the progress of the work before returning the alleged guarantee.

70. Under such circumstances, the Tribunal is of the view that by returning the alleged performance guarantee, the real intention of the Applicant and the Senior Programme Officer was to avoid that the NGO Coordinator denounce the matter to the Administration. Indeed, the evidence shows that on 26 April 2017, when the Applicant returned the money to the NGO Coordinator, the Applicant and the Senior Programme Officer ignored that the NGO Coordinator had already forwarded his accusatory email to the Field Associate (Shelter Cluster).

The retraction of the NGO Coordinator’s initial testimony

71. The Applicant asserts that it is unquestionable that the NGO Coordinator either lied when he made his accusations or when he retracted them. In such circumstances, the Applicant claims that the NGO Coordinator’s allegations should not be given any probative value and should be disregarded.

72. The Tribunal recalls that the NGO Coordinator was interviewed during the investigation. The NGO Coordinator testified, under oath, on 7 July 2017. His testimony reads in its relevant part as follows:

I was victim of fraud ... when it was noticed that the works hardly progressed, I had to disclose what had occurred to [the Field Associate (Shelter Cluster)]. I told him that [the Applicant] had taken the money. I then requested [the Applicant] to reimburse me. It was at that moment that he reimbursed me.

73. According to the testimony of the IGO Investigator at the hearing, the NGO Coordinator's account of the events was always clear and objective. The Investigator testified that he explained to the NGO Coordinator why he was being interviewed and informed him that his testimony was being recorded.

74. Therefore, it is irrelevant, from the Tribunal's point of view, whether the transcript of the NGO Coordinator's interview was signed or not. What is essential is that the NGO Coordinator knew that he was being interviewed in the context of a formal investigation, that he testified under oath and was aware that his testimony was being recorded.

75. The NGO Coordinator's testimony is corroborated by at least three separate facts as mentioned in para. 52 above and there is no evidence that his testimony was manipulated or influenced by bias or ulterior motives against the Applicant or the Senior Programme Officer.

76. However, the Tribunal notes that the NGO Coordinator wrote a letter dated 20 August 2018 to the UNHCR Representative in Bangui where he appears to depart from his initial testimony. In this letter, the NGO Coordinator indicates that after further reflection and "following consultations", he wished to clarify his statement to the IGO Investigator in relation to the project. He states that "following the site visit and the delay incurred ... he understood that by sharing the blame with the staff of the Programme Section, he could continue with the project".

77. The Tribunal considers dubious that the retraction letter was produced 13 months after the NGO Coordinator's interview and only after the filing of the Respondent's reply on 10 August 2018.

78. The Tribunal also notes that the reasons for writing this letter and the context in which it was produced remain obscure.

79. The Tribunal also recalls that it was not possible to examine nor cross-examine the NGO Coordinator during the hearing to question him over the content of the letter or the reasons for his apparent retraction and, consequently, there is not much weight the Tribunal can give to a piece of evidence that was not subject to a critical assessment by the parties nor by the Tribunal.

80. It suffices to note that the 20 August 2018 letter is unclear, it contradicts the evidence on record and appears to be driven by ulterior motives. Consequently, the Tribunal finds that it is not reliable evidence and cannot be used to override the NGO Coordinator's initial testimony and the contemporary evidence collected during the investigation.

81. The Tribunal is therefore not convinced by the Applicant's argument that the version provided by the NGO Coordinator when he recanted is more credible than his initial accusations.

82. In light of the above, the Tribunal finds that the facts on which the disciplinary measure was based have been established through "clear and convincing evidence" and will now turn into the analysis of other elements subject to judicial review.

Do the established facts amount to misconduct?

83. It has been established that the Applicant and the Senior Programme Officer colluded to solicit and obtain a bribe of XAF2,000,000 from the NGO Coordinator in relation to the Yaloke project. Following the Senior Programme Officer's instructions, the Applicant received the money in an envelope and handed it to the Senior Programme Officer.

84. The Applicant's behaviour amounts to corruption as per para. 3.8 of IOM No. 044/2013-FOM 044/2013 "Strategic Framework for the Prevention of Fraud and Corruption" which defines it as follows:

The offering, giving, receiving or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party. Corruption may take the form of an undisclosed conflict of interest, unauthorized acceptance of honours, gifts or remuneration, bribery (including kickbacks), illegal gratuities or economic extortion.

85. By engaging in corruption, the Applicant also breached obligations as a staff member set forth in staff regulation 1.2; in particular he failed:

- a. To uphold the highest standards of integrity (staff regulation 1.2(b));
- b. To discharge his functions and regulate his conduct with the interests of the Organization only in view (staff regulation 1.2(e)); and
- c. To conduct himself at all times in a manner befitting his status as an international civil servant and not to engage in any activity that is incompatible with the proper discharge of his duties with the United Nations (staff regulation 1.2 (f)).

86. The Applicant further violated his obligations under staff rule 1.2 as he failed:

- a. To not seek nor accept any favour, gift, remuneration or any other personal benefit from a third party in exchange for performing, failing to perform or delaying the performance of any official act (staff rule 1.2 (k)); and
- b. To not accept any gift, remuneration or favour from any source having or seeking to have any type of contractual relationship with the Organization (staff rule 1.2 (p)).

87. Consequently, the Tribunal finds that the Applicant's behaviour as per the established facts amounts to misconduct.

Was the disciplinary measure applied proportionate to the offence?

88. It is well-established jurisprudence that the Secretary-General has wide discretion in applying sanctions for misconduct and that at all relevant times he must adhere to the principle of proportionality (*Applicant* 2013- UNAT- 280). Once misconduct has been established, the level of sanction can only be reviewed in cases of obvious absurdity or flagrant arbitrariness (*Aqel* 2010-UNAT-040).

89. In *Rajan* 2017-UNAT-781, the Appeals Tribunal held that

The most important factors to be taken into account in assessing the proportionality of a sanction include the seriousness of the offence, the length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency.

90. In his letter dated 2 May 2018, imposing the contested disciplinary measure on the Applicant, the High Commissioner indicated that in his assessment of the proportionality of the disciplinary measure, he considered mitigating and aggravating circumstances of the case as well as his and the Secretary-General's prior practice in disciplinary matters.

91. As a mitigating circumstance, the High Commissioner considered the fact that the Applicant acted following the instructions of the Senior Programme Officer, his hierarchical superior.

92. As an aggravating circumstance, the High Commissioner considered that the Applicant's actions had a detrimental effect on a project destined to persons of concern to UNHCR. The High Commissioner noted that the contractor's inability to complete the project was in large part attributable to the fact that he had to pay as a bribe a substantial part of the sum received from UNHCR.

93. The Tribunal agrees with the Respondent in that the Organization cannot tolerate corruption since it goes against its core values, jeopardizes its mission, and affects its image as well as the trust donors have placed on it.

94. The Tribunal also notes that in similar cases of fraud or corruption, the practice of the Secretary-General and the High Commissioner has been to impose disciplinary measures of dismissal or separation from service with compensation in lieu of notice.

95. In light of the above, the Tribunal finds that in his assessment of the proportionality of the disciplinary sanction, the High Commissioner properly considered mitigating and aggravating circumstances of the case as well as his and the Secretary-General's practice in similar cases.

96. Given the gravity of the Applicant's misconduct, the Tribunal considers that the decision to dismiss him from service is not arbitrary but a reasonable exercise of the High Commissioner's discretion in applying sanctions for misconduct. Consequently, the Tribunal confirms the disciplinary sanction imposed on the Applicant.

Were the Applicant's due process rights respected during the investigation and the disciplinary process?

97. According to the Appeals Tribunal's jurisprudence, due process entitlements only come into play in their entirety once a disciplinary process is initiated (*Akello* 2013-UNAT-336), whereas at the preliminary investigation stage only limited due process rights apply (*Powell* 2013-UNAT-295).

98. After having carefully reviewed the case record, including the investigation stage and the disciplinary process, the Tribunal is satisfied that the Applicant's due process rights were fully respected throughout both phases.

99. During the preliminary investigation, the Tribunal notes that the IGO Investigator informed the Applicant about the allegations against him prior to his interview. The interview was recorded, and its verbatim transcript was shared with the Applicant for his comments and signature. The draft investigation report was also shared with the Applicant for his comments, which were taken into account in the final version of the report.

100. During the disciplinary process, the Tribunal notes that the Applicant was informed of the charges against him and of his right to be assisted by Counsel. He was also twice given the opportunity to provide his comments on the allegations of misconduct, which were considered in the decision letter of 2 May 2018.

101. The Applicant claims that the investigation was tainted by procedural flaws that compromised his due process rights and are indicative of bias against him, namely that:

- a. The sanction letter was not sufficiently reasoned;
- b. The IGO Investigator:
 - i. Failed to interview key witnesses;
 - ii. Failed to adequately interview the NGO Coordinator;
 - iii. Failed to secure all documentation related to the project to safeguard the forensic integrity of the evidence;
 - iv. Failed to give weight to exculpatory evidence such as the operational advance form with written instructions from the Senior Programme Officer to the Applicant; and
 - v. Failed to re-open the case when new evidence emerged.

102. The fact that the sanction letter is concise does not lead to conclude that there was a breach of the Applicant's due process rights. On the contrary, the evidence shows that the Applicant was well-aware of the accusations against him and that his due process rights were respected.

103. The Tribunal recalls that an investigator has a certain margin of discretion, based on a critical assessment of the evidence produced, to decide what is relevant or not for the purpose of the investigation (*Pappachan* UNDT-2019-118).

104. The IGO Investigator explained during the hearing that he decided not to travel to Bangui as he considered that it was not necessary to do so considering the alleged facts and the relatively small number of people involved. In his view, it was possible to conduct the investigation remotely.

105. The IGO Investigator also explained that he decided not to interview the two witnesses proposed by the Applicant and the Senior Programme Officer because he considered that their testimony was not relevant for the investigation. The Applicant and the Senior Programme Officer had proposed these witnesses indicating that they would be able to testify about the poor quality of the NGO Coordinator's work in a previous project and his limited capacity to complete the present project correctly. However, the NGO Coordinator's capacity or quality of work was not contested as indicated in para. 35 of the investigation report.

106. The Tribunal considers that the length of the NGO Coordinator's testimony does not support finding that the way his interview was conducted was "inadequate". Furthermore, the fact that he did not sign the transcript of his interview does not amount to a procedural irregularity for the reasons explained in para. 74 above. In this respect, the IGO Investigator clarified at the hearing that it is normal practice not to require witnesses other than staff members to sign the transcript of their audio recorded interviews because, in most cases, they have limited access to internet, a computer and a scan to be able to do so. In such circumstances, the transcript of the interview is normally signed by the investigator.

107. The Applicant claims that the IGO Investigator failed to secure all documentation related to the project to safeguard the forensic integrity of the evidence and that, as a result of this serious omission, he missed the exculpatory operational advance document with the written authorization for the alleged performance guarantee. The Tribunal is not convinced by this argument as the record of the Applicant's interview shows that he admitted that there were no written instructions in relation to the alleged performance guarantee. Therefore, if the alleged exculpatory evidence was not secured at the time it is because the Applicant failed to point to it.

108. The Tribunal notes that the IGO Investigator only had knowledge about the alleged handwritten note in the operational advance form after the conclusion of the investigation. He testified that he assessed its probative value and decided, within his discretion, not to reopen the investigation. However, the evidence shows that the content of the handwritten note was considered in the contested decision.

109. The Tribunal recalls that it has already addressed the issue of the operational advance form in paras. 61 to 66 above and it is not convinced of its probative value.

110. For the above-mentioned reasons, the Tribunal finds that the Applicant's allegations on procedural irregularities are unsubstantiated and that his due process rights were respected during the investigation and the disciplinary process.

Conclusion

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

The application is rejected in its entirety.

(Signed)

Judge Teresa Bravo

Dated this 21st day of May 2021

Entered in the Register on this 21st day of May 2021

(Signed)

René M. Vargas M., Registrar, Geneva