



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/034

Judgment No.: UNDT/2021/090

Date: 28 July 2021

Original: English

Before: Judge Francis Belle
Registry: Nairobi
Registrar: Abena Kwakye-Berko

TEMU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Julia Kyung Min Lee, OSLA

Counsel for the Respondent:

Elizabeth Gall, UNDP

The Application and Procedural History

1. The Applicant was a Communications Specialist with the Country Office of the United Nations Development Programme (“UNDP”) in Tanzania.
2. In this application, filed on 25 March 2019, the Applicant challenges the Respondent’s decision to separate her from service of the Organization on grounds of misconduct with compensation *in lieu* of notice and without termination indemnities.
3. On 2 April 2019, the Respondent filed a Motion for Summary Judgment contesting that the application was not receivable *ratione temporis*.
4. On 12 April 2019, the Dispute Tribunal denied the Respondent’s motion and directed the Respondent to file a reply to the application pursuant to Order No. 049 (NBI/2019).
5. On 25 April 2019, the Respondent filed his reply.
6. Case management discussions were held on 8 and 22 September, 8 October and 17 November 2020.
7. The matter was heard over several days on 18, 19, 20, 24 November, 8 and 10 December 2020.

Facts and Submissions

8. On 2 January 2014, the Applicant joined the UNDP Country Office in Tanzania on a fixed-term appointment as Communications Specialist at the NO-C Grade.
9. On 17 January 2017, the Office of Audit and Investigations (“OAI”) received information regarding multiple issues in UNDP Tanzania regarding, *inter alia*, bullying amongst UNDP Tanzania staff members. The analysis of this information led to the opening of several interrelated investigations, including two concerning the Applicant.

10. On 20 March 2017, OAI informed the Applicant that she was the subject of an investigation into several allegations of misconduct. The allegations included using confidential information obtained in the course of official functions for the private gain of a family member; disclosing confidential internal UNDP documents and information to third parties; engaging in the misuse of the UNDP office and its assets; and misrepresenting official functions to advance a personal claim (“Allegations 1”).

11. On 3 July 2017, OAI provided the Applicant with a draft of its investigation report regarding Allegations 1. The Applicant provided her comments to OAI on 12 July 2017. Further to the review of the Applicant’s comments, OAI transmitted a final investigation report (S-R-1715) to the Legal Office, Bureau for Management Services (“LO/BMS”).

12. On 17 July 2017, OAI informed the Applicant that she was the subject of an investigation into allegations that she engaged in an unauthorized outside activity; used her private business to engage in business transactions with UNDP partners thereby engaging in conflicts of interest; used UNDP ICT resources to engage in unethical practices by using her business to collude with a third party to obtain undue advantages in a procurement process; and failed to cooperate with a duly authorized investigation (“Allegations 2”). The Applicant was interviewed with respect to these allegations on 25 September 2017.

13. On 18 September 2017, the Applicant was informed by Ms. Susan McDade, Assistant Administrator and Director, Bureau for Management Services that there was sufficient evidence to charge her with misconduct on the basis of the allegations contained in the 20 March 2017 investigation report (Allegations 1) and that she would be the subject of a disciplinary process.

14. On 19 September 2017, 27 September 2017 and 19 October 2017, the Applicant requested extensions of time to provide her response to the first Charge Letter. Each request for extension was granted.

15. On 15 November 2017, the Applicant submitted her response to Allegations 1 denying misconduct.

16. On 5 December 2017, OAI provided the Applicant with a draft of its investigation report regarding Allegations 2.

17. On 16 July 2018, the Applicant was notified of a second charge letter containing additional allegations of engaging in unauthorized outside activities, conflict of interest; and misuse of UNDP office and its assets.

18. On 18 July 2018 and 16 August 2018, the Applicant requested two extensions of time to respond to the second Charge Letter until 24 August 2018. Each request for extension was granted.

19. On 24 August 2018, the Applicant submitted her response to Allegations 2 requesting that the second set of charges against her be withdrawn.

20. On 3 September 2018, the Applicant went on maternity leave for 16 weeks expiring on 21 December 2018.

21. On 15 November 2018, the Applicant informed UNDP of the unfortunate death of her new-born child. On the same day, the Applicant was informed by Ms. Veronica Sigalla, Human Resources Officer, that she would be entitled to the full duration of maternity leave notwithstanding the death of her child in accordance with UNDP policy on maternity leave. It was also indicated that UNDP would be processing the funeral allowance upon receipt of the child's death certificate.

22. On 18 December 2018, the Associate Administrator, UNDP, issued his decision to separate the Applicant from service with compensation *in lieu* of notice and without a termination indemnity. The sanction was based on a review of the various investigation reports and the Charge Letters.

23. On 24 December 2018, Counsel for the Applicant acknowledged receipt of the disciplinary sanction.

24. On 4 January 2019, the Applicant wrote to Ms. Dancilla Mukarubayiza, Deputy Country Director of Operations, UNDP, requesting extension of her fixed-term appointment for medical reasons following the expiry of her maternity leave on 21 December 2018.

25. On 8 January 2019, Ms. Mukarubayiza replied stating “[t]he Associate Administrator’s decision to separate [the Applicant] for disciplinary reasons results in [the Applicant] no longer benefiting from rights that can only be afforded to staff members, including maternity and sick leave, as of the date that decision became effective 19 December 2018”.

26. The Applicant argues that the Respondent has failed to establish that there is clear and convincing evidence of the charges he has preferred against her. The Respondent disregarded the Applicant’s response that she was simply trying to reduce costs by gaining Ramada Hotel’s participation in the Long Term Agreement (“LTE”) because it was a new hotel that was popular and that all organizations wanted to book that hotel to organize retreats or events. Mr. Alvaro Rodriguez, who headed the UNDP Office (“Resident Coordinator/Resident Representative i.e. “RC/RR”) at the time and testified for the Applicant, corroborated her evidence and confirmed that Ramada Hotel was a new hotel that UNDP wanted listed as part of the list of pre-approved hotels to facilitate easy booking rather than having to run a full tender each time.

27. The Applicant submits that the Sanction Letter fails to show any actual gain by the Applicant or her sister from the disclosure of the vendor bids after the procurement process had ended. It simply states that “it may be noted that conveying an advantage to your sister’s employer would be reasonably perceived to convey a benefit to your family.” This allegation is not only in contradiction of the plain wording of regulation 1.2(g), but the “reasonably perceived” standard is at variance with the “clear and convincing” evidentiary threshold that is required for a finding of misconduct where separation from service is a possible outcome.

28. The Applicant argues that the Respondent has failed to show that she engaged in the misuse of her office and its assets, or that she misrepresented her functions to advance a personal claim. There is no evidence that she actually received any support from the Government to advance any personal claim or that she had the ability to influence the Government in any way to advance any personal claim.

29. The Applicant also argues that the Respondent has failed to prove by clear and convincing evidence that she improperly disclosed confidential UNDP documents to third parties that were not already publicly available. The Resident Representative’s evidence on this point was not put before the Respondent’s witness. A finding of misconduct would not have been established if the Respondent had properly appraised the evidence.

30. It was only after the Applicant sought the disclosure of Mr. Rodriguez’s unredacted transcript on 22 September 2020, that the Respondent disclosed that his “interview was not relied upon by OAI in the investigation reports as OAI determined that Mr. Rodriguez was not a credible witness” or that his testimony did not contain any exculpatory evidence. OAI’s assessment of the credibility of Mr. Rodriguez’s evidence was never disclosed to the Applicant until 12 October 2020.

31. It is the Respondent's case that the Applicant has engaged in multiple instances of misconduct between 2014 and 2016, repeated acts of serious misconduct, most significantly unauthorized outside activities, conflicts of interest; disclosure of confidential information, including for personal benefit, and unauthorized use of her office and its assets. In essence, the Applicant has shown a failure to respect her status as an international civil servant and regulate her conduct accordingly. The Applicant's multiple breaches of her obligations as a staff member constituted a fundamental breach and go to the root of her employment contract. Termination of her appointment was therefore a proportionate sanction.

32. The Respondent takes the position that the Applicant has not in fact challenged the proportionality of the sanction in her application. Thus, to the extent the facts are as the Respondent has made out, the sanction imposed was a proportionate one. The Applicant, who has been represented by counsel since the late stages of the first investigation, cannot raise issues at the oral hearing that have not been identified in the application.

Deliberations

33. The Applicant was charged with: (1) using confidential information obtained in the course of her functions for private gain of a family member; and (2) that she disclosed confidential internal UNDP documents and information to third parties. This charge had four components: (a) disclosing confidential competing bids in the procurement process; (b) disclosing internal email concerning staff grievances; (c) the email to Ms. Nyaradjo Chademuck and then to Mr. Lance Lowery; and (d) the RC/RR Speech.

34. Staff regulation 1.2 of the United Nations Staff Regulations and Rules states that:

(g) Staff members shall not use their office or knowledge gained from their official function for private gain, financial or otherwise or for the private gain of any third party, including family friends those they favour. Nor shall staff members use their office for personal reasons to prejudice the positions of those they do not favour.

35. At paragraph (i), staff regulation 1.2 states:

Staff members shall exercise the utmost discretion with regard to all matters of official business. They shall not communicate to any government, entity, person or any other source any information known to them by reason of their official position that they know or ought to have known has not been made public except as appropriate in the normal course of their duties or by authorization of the Secretary-General. These obligations do not cease upon separation from service.

36. The Applicant was charged additionally with engaging in the misuse of her office and her assets (i) by making representations to the government and (ii) sending personal complaint letters to government agencies. This is contrary to staff regulation 1.2 (q) which states:

Staff members shall use the property and assets of the Organization only for official purposes and shall exercise reasonable care when utilizing such property and assets.

37. Finally, it is alleged that the Applicant misrepresented her functions to advance a personal claim.

38. The first aspect of this consideration that must be settled is the standard of proof which is to be achieved by the investigation to support the disciplinary step of separation from service.

39. In *Negussie* 2020-UNAT-1033, the United Nations Appeals Tribunal (“UNAT/Appeals Tribunal”) opined as follows:

What is the nature of “clear and convincing” evidence? Clear and convincing evidence of misconduct, including as here, serious misconduct,

imports two high evidential standards. The first (“clear”) is that the evidence of misconduct must be unequivocal and manifest. Separately, the second standard (“convincing”) requires that this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance. Evidence, which is required to be clear and convincing, can be direct evidence of events, or may be of evidential inferences that can be properly drawn from other direct evidence.

40. Clear and convincing evidence is not as high a threshold as “beyond reasonable doubt.” “[W]hen termination is a possible outcome”, the Appeals Tribunal has held that the evidentiary standard is that the Administration must establish the alleged misconduct by “clear and convincing evidence”, which “means that the truth of the facts asserted is highly probable.”¹

41. UNAT explained in *Mbaigolmem* 2018-UNAT-819 that in a disciplinary case what is required is consideration of whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct and whether the sanction is proportionate to the offence. A *de novo* hearing into the findings on misconduct is not always necessary. It depends on the available evidence and the circumstances of the case.

42. The Applicant has argued that the application should succeed because the Administration has failed to establish the charges laid to the acceptable standard of clear and convincing evidence. The crux of the argument is that the Resident Representative, Mr. Rodriguez, supported the actions of the Applicant in a number of respects and disagreed with the investigator’s characterisation of a number of the Applicant’s acts.

¹ See, for instance, *Turkey*, 2019-UNAT-955 at para. 32.

Disclosure of confidential information contrary to staff regulation 1.2 (i)

43. Instances of this disagreement were that firstly, Mr. Rodriguez did not agree that the disclosure of information to the Ramada corporation was harmful since it assisted UNDP Tanzania to secure the quality, services and standards that Ramada offers when such facilities are needed.

44. Another issue that was raised was that there is no evidence that the Applicant's sister benefited from the disclosure of the competing information from the other bidders. The Respondent argued that UNAT has previously held that proof of benefit is not necessary to establish the charge. However, in this case the question of benefit arises on the basis that the information given to the Applicant's sister was to invite Ramada to offer United Nations rates. It has not been established in any evidence that United Nations rates were not accessible to the public. Hence the advice offered may have appeared to be accessible to any interested bidder to provide services to the United Nations agency. Consequently, there is no clear and convincing evidence of the harm done in this case because Ramada could have offered the relevant rates by researching them and offering them on the next occasion. In any event, the explanation provided by Mr. Rodriguez totally discredits the notion that the information shared with Ramada was to the benefit of the Applicant's sister and not to the benefit of the Organization.

Copying internal emails contrary to staff regulation 1.2(q)

45. The second charge was that the Applicant copied internal emails and shared them with outside entities. Again, it is not clear what the harm done here was. The emails shared were in relation to a matter personal to the Applicant; it served to inform the Director of Public Prosecutions of Tanzania that the information had been scrutinized internally and should be acted upon nationally. Mr. Rodriguez agreed that it would have been appropriate for the national agency to request the information from UNDP and allowed the agency to respond with that information. But this was in the context of the Applicant being told that she would have to go to the national authorities

because the person against whom the complaint was being made was not a United Nations employee. There was certainly some doubt as to whether the contents of the email were already in the public domain. The charge in this case was proved by clear and convincing evidence.

46. The next charge was the use of the United Nations agency's letter head. The letter head should not have been used by the Applicant. But this could easily have been cleared up by the withdrawal of the email and the reissue of it by the Applicant. Apparently, this is exactly what was done. But the procedure used to discover it was lawful and the Applicant was given an opportunity to refute it, which she attempted to do. The crux of the matter on this charge was whether it was the kind of charge that would attract dismissal. The Tribunal does not think that it should.

Whether the Applicant was Chief of Communications contrary to staff rule 1.2.

47. Staff rule 1.2 provides that:

(h) Staff members shall not intentionally misrepresent their functions, official title or the nature of their duties to Member States or to any entities or persons external to the United Nations.

48. The Tribunal is of the view that using the designation Chief of Communication was a minor misrepresentation which showed a level of unprofessional behaviour but nothing requiring more than a reprimand. The Applicant has argued that this action had been helpful since the true designation of her office would have been difficult to translate into Swahili. The Tribunal is not of the view that this action was in any way helpful because of difficulties with identifying the Applicant's actual designation in Swahili. However, Mr. Rodriguez told the Court that the Applicant was in fact heading his Office's communication arm.

49. In light of the impact of the evidence given by Mr. Rodriguez, the Tribunal does have misgivings about the tactic of omitting his statement from the investigation report.

Due process would have required that his evidence on the issues would be relevant and helpful in establishing whether the charges could be proved by clear and convincing evidence. The idea that he may not have been credible and therefore his evidence could not be relied upon was not a proper determination to be made by the investigator in a case such as this.

50. While the investigators may have had reason to be suspicious of the RC/RR's conduct and statements during the course of the events in question and their investigation, the evidence he gave should have been included in the investigation report from the beginning and properly weighed rather than excluded or suppressed (placing it in a foot note or reference) to give the impression that it was of little consequence.

The Communications Company and conflict of interest contrary to staff regulation 1.2

51. Staff Regulation 1.2 of the United Nations Staff Regulations and Rules states that:

(g) Staff members shall not use their office or knowledge gained from their official functions for private gain, financial or otherwise, or for the private gain of any third party including family friends and those they favour.

(m) A conflict of interest occurs when by act or omission a staff member's personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity independence and impartiality required by the staff member's status as an international civil servant, when an actual or possible conflict of interest does arise the conflict shall be disclosed to their head office, mitigated by the organization and resolved in favour of the interests of the Organization.

52. The other charge which was made was that the Applicant had a conflict of interest and involved herself in circumstances where permission should have been

sought. The Organization alleged that the Applicant maintained her ownership interest in the business Anderson PR and admitted to having a continued interest in the performance of Anderson PR's business while working in the United Nations Resident Coordinator's ("RCO") office as a Communications Specialist.

53. The investigation also revealed that the Applicant continued business activities in support of Anderson PR using her UNDP email account, including sending emails from it to the Head of the European Union ("EU") delegation to Tanzania who awarded the contract on behalf of the EU delegation to Anderson PR.

54. The Applicant also received Mr. Makani, of SAGCOT (a UNDP partner and vendor), in her UNDP Office shortly before emailing with him from her UNDP email regarding Anderson PR and she was later provided with privileged information regarding a tender request and corresponding budget that was later awarded to Anderson PR by SAGCOT

55. The charges outlined by the Organization showed that the Applicant's position as Communications Specialist in RCO which involved having regular interaction with UNDP's partners placed her in a privileged position to solicit business for Anderson PR. The evidence indicated that she took advantage of it.

56. The investigations found that the Applicant was always part of the conversation regarding Anderson PR's interest in submitting a proposal to organize a SAGCOT annual event; contrary to the Applicant's claim that her interaction with the EU's Public Information Officer would not be perceived as an attempt to influence their choice of who should be [awarded] and which company should take the business.

57. The Tribunal is of the view that this charge is proved by clear and convincing evidence. The number of emails and constant contact between Mr. Sakar, who testified as a witness, and the Applicant cannot be explained other than by the fact of the Applicant having an interest in the company, Andersen PR.

58. The Applicant's witness, Mr Sakar, had stated that he had purchased Andersen PR's shares. But it emerged from the evidence that the shares were to be returned to the Applicant. The Tribunal also agrees with the Respondent that the fact that the shares were to be returned to the Applicant in due course made sense, since this was the position of the Applicant herself, and could not be denied with any credibility by another witness. Indeed, it makes no sense that a company would be sold to someone, but the price is never stated.

59. The investigators had checked and discovered that the alleged new ownership of Anderson PR was not reflected in the registered records of Anderson PR. Indeed, the fact that the registry had no record of the new company dispensation supported the view that nothing had changed in the ownership or leadership of the company.

60. In my view, this charge is proved by clear and convincing evidence. There is no doubt in the process and the ability of the Applicant to understand the charge and make representation about it. Any difficulty in contradicting the charge during the process with documentary evidence was cured by the fact that the matter was provided an oral hearing before the Tribunal.

61. The difficulty that arises then is to determine the position of the Tribunal on the issue of the disciplinary measure to be meted out to the Applicant. The Tribunal is not to substitute its view for that of the administration.

62. The Tribunal is guided by the Appeals Tribunal in *Sanwidi* 2010-UNAT-084²:

² See also *Schook* 2012-UNAT-216, para. 34; *Lauritzen* 2013-UNAT-282, para. 39; *Jibara* 2013-UNAT-326, para. 31; *Pérez-Soto* 2013-UNAT-329, para. 32; *Egglesfield* 2014-UNAT-399, para. 23; *Benchebak* 2014-UNAT-438, para. 19; *Balan* 2014-UNAT-462, para. 25; *Cobarrubias* 2015-UNAT-510, para. 19; *Karseboom* 2015-UNAT-601, para. 43.

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

63. The outcomes on the various charges in this case has been a mixed bag. The Tribunal accepts that the process was generally sound, but for the Respondent's treatment of Mr. Rodriguez's evidence. Proper evaluation of his statements to the investigators have made a difference in some of the charges brought against the Applicant.

64. The disciplinary measure meted out to the Applicant must therefore be viewed within the context of the Tribunal's findings on the charge relating to conflict of interest.

65. The Tribunal accepts that this charge was properly investigated and proffered. There was due process of law and the Applicant at all times had every opportunity to refute the charge and show that UNDP had failed to prove it by clear and convincing evidence or that there were mitigating circumstances.

66. The Applicant stated that the investigator's failure to include the witnesses named by the Applicant again would have had the impact of procuring a biased result. I do not agree. At the end of the day, only one witness was brought when the Tribunal permitted the Applicant to produce these witnesses for the hearing.

67. The Applicant's conduct in this respect rendered her continued employment with UNDP untenable. The Tribunal finds that the Respondent acted correctly and properly on this set of facts and the charge and process that followed.

68. The Tribunal therefore will not order rescission of the decision to separate the Applicant from service of the Organization, in the circumstances.

Dismissal during maternity leave.

69. The International Labour Organization (“ILO”) Maternity Protection Convention No 183 states in part:

The standard also prohibits employers to terminate the employment of a woman during pregnancy or absence on maternity leave, or during a period following her return to work, except on grounds unrelated to pregnancy, childbirth and its consequences, or nursing. Women returning to work must be returned to the same position or an equivalent position paid at the same rate. Also provides a woman the right to one or more daily breaks or a daily reduction of hours of work to breastfeed her child.

70. The Tribunal disapproves of the decision to separate the Applicant during maternity leave. The argument that having been separated she was no longer eligible for any benefits runs into conflict with the clear social benefit of maternity leave, not only to the Applicant but also to the child. In this case emphasis would have been the benefit to the Applicant since the new-born child died. It is also clear that the matter could have been cured by ordering the separation three days later. The fact that the Applicant may have asked for her contract to be continued was of no consequence.

71. It is noted that the ILO Convention implies that a dismissal may take place on grounds unrelated to pregnancy. Although the Respondent may argue that they had such grounds, it is clearly not the kind of dismissal which was required without notice of any kind. In the circumstances, her maternity leave was seen to be an opportune time to carry out the dismissal. Maternity leave, just like sick leave, should have been respected and allowed to be completed. In light of the failure to do so, the Tribunal will consider awarding moral damages.

72. In this case the Tribunal will not order rescission of the Respondent's decision or damages but will refer the matter to the Secretary General for action on accountability pursuant to Article 10.8 of the Tribunal's Statute for accountability in relation to the decision to order separation of the Applicant during maternity leave.

73. **Final Comment**

74. It is hoped that this decision would shed some light on problems in the process where choices are made to exclude the evidence of important witnesses. Additionally, it should also contribute to a greater effort being made by the Organization to minimise the impact of community gossip and jealousies may have on the office life of employees. This is significant in this case because the Applicant complained that the Organization's failure to act forced her to take steps to refer her complaints to the Director of Public Prosecutions of Tanzania and thus attempt to stop the alleged harassment she suffered on her own. It therefore raises the question of what measures may be taken to guide and protect the interests of employees of the Organization, but in particular those who are part of the community where the office is based.

(Signed)

Judge Francis Belle

Dated this 28th day of July 2021

Entered in the Register on this 28th day of July 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi