UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/051
Judgment No.: UNDT/2021/137
Date: 23 November 2021
Original: English

Before: Judge Eleanor Donaldson-Honeywell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

AMANI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Setondji Roland Adjovi, *Etudes Vihodé*

Counsel for the Respondent:
Romy Batrouni, AAS/ALD/OHR, UN Secretariat
Jacob van de Velden, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant was an Engineer at the United Nations Multidimensional Integrated Stabilization Mission in Mali ("MINUSMA"). He held a fixed-term appointment at the P-3 level, and was based in Bamako, Mali, having previously served with the Organization since 2006. This Judgment determines his application challenging the Respondent's 22 April 2020 decision to separate him from service on disciplinary grounds with compensation *in lieu* of notice and 25% of the termination indemnity that would ordinarily be due to him.

2. The decision is challenged on two main grounds. Firstly, the Applicant contends that the decision was the outcome of a shoddy investigation. He submits that there was no clear and convincing evidence to prove the findings of misconduct for which he was disciplined. Those findings were as follows:

a. In 2007, while a staff member with the United Nations Operation in Côte d'Ivoire ("UNOCI"), he violated local laws relating to fraud by accepting payment from two Ivorian nationals in exchange for providing them with passports that were not genuine; and/or

b. In 2013, when submitting his Personal History Profile ("PHP") through the Inspira system in relation to a job application with the Organization, he knowingly submitted false information that he had never been indicted, fined or imprisoned for an offence other than a traffic violation.

3. Secondly, the Applicant raises issues as to a lack of respect for his due process rights in the disciplinary proceedings. His case is that there was undue delay in initiating disciplinary proceedings based on events that took place in 2007. The delay impacted adversely on his ability to collect information for his defence. The Applicant contends that the belated disciplinary proceedings were in retaliation for complaints he filed in 2017 against a former Office of Internal Oversight Services ("OIOS") staff member.

4. Prior to filing this substantive application, the Applicant filed three motions for extensions of time to obtain authentication evidence concerning a 2 March 2009 fraud conviction and Ivorian Court Judgment. The motions were opposed by the Respondent but granted by the Tribunal.

5. The Applicant's substantive application was eventually filed on 27 January 2021.

6. The Respondent filed his reply to the application on 26 February 2021 contending that the impugned decision was lawful. According to the Respondent, the Applicant's conduct of violating Ivorian laws in 2007 led to a criminal conviction on 2 March 2009 and failing to disclose this information in 2013 when applying for a job opening at MINUSMA contravened staff rule 1.2(b) and staff regulation 1.2(b). The Respondent contends that these two acts have been properly established as serious misconduct.

7. For reasons further explained in this Judgment, the Tribunal finds that the Applicant has not established unlawfulness, lack of evidence or lack of due process in the Respondent's decision to terminate his employment.

Procedural History

8. The case was assigned to the instant Judge on 1 September 2021.

9. The Applicant was unrepresented. On the advice of the Tribunal, the Applicant sought and retained the services of counsel who then assumed carriage of this case.

10. The Tribunal held a case management discussion ("CMD") on 14 September 2021. The Tribunal asked the parties if they were minded to engage in settlement discussions. The Applicant indicated that he was willing to engage in alternative methods of resolving this dispute. The Respondent took the clear position that this matter was not suitable for alternative dispute resolution, and must be concluded by litigation.

11. Order No. 199 (NBI/2021) recorded the contents of the discussion. The parties disagreed between themselves on the need for an oral hearing. The Tribunal took the view that an oral hearing was necessary, and to that end gave directions on the filing of witness statements.

12. There was extensive discussion at the CMD about the Tribunal's arrangements to have documents translated.

13. Disclosure requests were addressed amicably between the parties. Counsel for the Applicant agreed to disclose the latest authentication requests submitted on his client's behalf to the Ivorian Court. On 27 September 2021, he disclosed 18 documents, including a 31 August 2021 application made by the Applicant before the Ivorian Court seeking rectification of the Judgment. Counsel indicated that there had yet been no ruling on the rectification application.

14. Counsel for the Respondent, by motion filed on 28 September 2021, pointed out that the Applicant's disclosure established that he had unreasonably delayed proceedings before this Tribunal. The delay was caused by his motions for extended time when he said he was awaiting authentication from the Ivorian Court concerning the Judgment. Counsel for the Respondent underscored that the only recent request disclosed by the Applicant was dated after the filing of all three motions and months after the filing of the substantive application. That recent request did not seek the authentication that was the basis for the prior delays.

15. The Respondent moved the Tribunal to either draw adverse inferences against the Applicant or dismiss the substantive application as the Applicant relied on false information to obtain additional time to file it. Arguing that this was an abuse of process, the Respondent sought an award of costs to be paid by the Applicant.

16. By Order No. 218 (NBI/2021), the motion to dismiss and for an award of costs was refused. The Tribunal's view was that there was no intention by the Applicant to mislead or cause undue delay by seeking extensions of time to authenticate the Judgment. There is evidence on record that since October 2019 Ivorian counsel had

been taking steps to ascertain the extent to which the Judgment was authentic. The August 2021 request was merely the latest such effort.

17. The request for rectification as opposed to authentication may have been based on the limited options available to counsel. It remained open at that stage of the proceedings for the Applicant to call this Ivorian counsel as a witness at the oral hearing. She could have explained how her actions furthered the Applicant's efforts to verify the authenticity of the Judgment, if such testimony was required by the Applicant's current counsel in presenting his case.

18. The Respondent duly filed a witness statement signed by the OIOS Chief Resident Investigator, Investigations Division ("ID"), Resident Office in Bangui, Central African Republic. The Applicant filed only his own statement, a Chronology of Events, which was unsigned. A summary of evidence proposed to be tendered through three other witnesses was submitted instead of witness statements. Those witnesses were:

a. Mr. OS, the Applicant's childhood friend who was the other person involved with him in the situation that led to the Ivorian Court case in 2009.

b. Mr. DS, who helped the Applicant with negotiations towards amicable settlement with the Complainant.

c. Mr. DN, whose name did not previously appear in the OIOS report but who the Applicant contends is a national prosecutor who was in charge of the 2009 case in the Ivorian Court.

19. The parties were directed by Order No. 218 (NBI/2021) that no new information which was not included in the case file, the filed witness statements or summaries would be admissible for the oral hearing.

20. The oral hearing was set for three days to hear five witnesses. It was completed within the first day due to events arising on the eve of the oral hearing. Following

emailed inquiries by the Respondent, the Tribunal reminded the Applicant that there were no signed statements for his case and that witness testimony would have to be sworn. Thereafter, on the morning of the oral hearing the Applicant submitted signed statements in French for two of the witnesses, Mr. OS and Mr. DS. Additionally, the Applicant informed the Tribunal that all three of his supporting witnesses were not English speakers. The three witnesses failed to attend the hearing.

21. The Tribunal had to decide whether to adjourn proceedings due to the unavailability of interpretation services for the Applicant's three absent witnesses. It was noted that under the Tribunal's Rules of Procedure at arts. 16.1 and 2 and 17.6, there is an element of discretion to be exercised as to whether to hold oral hearings and if so, which witnesses must be heard. The application of this discretion is guided by UNAT jurisprudence. In *Sanwidi* 2010-UNAT-084 para. 42, the Appeal's Tribunal explained:

> In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this 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 decisionmaker's decision.

22. In *Mbaigolmem* 2018-UNAT-819, the Appeal's Tribunal observed at paras. 26, 27 and 29 that an appeal in disciplinary matters almost always will require an appeal *de novo*, comprising a complete re-hearing and re-determination of the merits of the case. However, at paragraph 28 UNAT explained,

> There will be cases where the record before the UNDT arising from the investigation may be sufficient for it to render a decision without the need for a hearing. Much will depend on the circumstances of the case, the nature of the issues and the evidence at hand. **Should the evidence be insufficient in certain respects**, it will be incumbent on the UNDT to direct the process to ensure that the missing evidence is adduced before it. [Emphasis added]

23. After hearing submissions on both sides, the Tribunal determined that in the instant case oral testimony would be taken from the Applicant and the Respondent's sole witness. The information that was on record when the decision was made provides sufficient evidence regarding the roles played by Messrs. OS and DS; as such their oral testimony was not required. Importantly, the Applicant was given an opportunity to have testimony taken from these two witnesses during the OIOS investigations. Unfortunately, attempts made to use the information provided by the Applicant to contact these persons failed.

24. As to the third witness, Mr. DN, his name was not given previously during the Applicant's OIOS interviews. There was information from the Applicant about a *gendarme* who was prosecuting the case and who had discussions with the Applicant after the 2009 Judgment. The information, that Mr. DN was the Prosecutor and that he told the Applicant that he did not pursue the matter in the Ivorian Courts, was not advanced by the Applicant and placed on record during the disciplinary proceedings. Testimony from Mr. DN, who did not file a witness statement before this Tribunal, is deemed inadmissible.

25. The oral hearing proceeded with the sole witness for each party presenting evidence and being cross-examined. The parties filed closing submissions on 5 November 2021.

Issues

26. UNAT Jurisprudence establishes that the Dispute Tribunal has "the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review."[1]

27. The subjects of review in disciplinary proceedings are well established as, in general terms, whether the facts are established, and they amount to misconduct,

[1] *Fasanella* 2017-UNAT-765, para. 20.

whether due process was observed and whether the sanction is proportionate[2]. More specifically, in the instant case issues have been identified as follows:

a. Were the facts established by clear and convincing evidence?

i. Firstly, was there proof that the payments accepted by the Applicant in 2007 were in exchange for the Applicant providing false Belgian passports for Ivorian nationals. If so, did the Applicant commit the criminal offence of fraud thereby violating Ivorian Laws? Alternately, was the Applicant's version of lawfully assisting with obtaining genuine visas for travel to Belgium credible or was he discredited by giving varying accounts?

ii. Secondly, regarding the 2 March 2009 Judgment document, does the Applicant's knowledge of it prove there was an indictment, fine or imprisonment which should have been disclosed by answering 'yes' on the PHP form?

b. Do the facts amount to misconduct?

c. Were the Applicant's due process rights observed during the investigation and disciplinary proceedings? In particular, to what extent did the Respondent's delay and/or motivation to retaliate for a complaint made by the Applicant lead to procedural unfairness?

d. Was the sanction proportionate to the gravity of the offence?

Facts

28. According to the Applicant, in 2007 he was informed by a friend about opportunities for Ivorians to migrate to Belgium with residency status and work permits. In his OIOS interview the Applicant said that these arrangements were through

[2] *Molari* 2011-UNAT-164, para. 29.

the Belgian Embassy. In the instant application, he said that the opportunity was to be arranged by a law firm that specialized in Immigration. The law firm was not named.

29. At the oral hearing, the Applicant was cross-examined about this inconsistency as to whether it was the Belgian Embassy or an immigration law firm making the arrangements. He responded that during his OIOS interview he may have forgotten some aspects of the process. These events happened years before the interview, and when being interviewed he had not yet returned to Ivory Coast. He later returned, checked documents, and spoke to people who clarified things. Hence the new information about an immigration law firm that appeared in his application.

30. The Applicant, who then worked at UNOCI, was approached in 2007 by two Ivorian nationals; Mr. TA ["the Complainant"] and Mr. AB whose travel to Europe the Applicant was to facilitate for this project.

31. As participants in the project, Messrs. TA and AB paid the Applicant, respectively 4 million and 4.9 million West African CFA francs. The Applicant collected their photos and birth certificates. In his interview with OIOS, he stated that he would have received a gift of 500,000 West African CFA francs if the project had succeeded. Under cross-examination before this Tribunal, the Applicant admitted that the value of the gift would be around USD853, which was the equivalent of about one month of his salary at that time.

32. The Applicant's case is that he was surprised when instead of Ivorian national passports with Belgian visas, his childhood friend Mr. SO received from his contact Belgian passports for Messrs. TA and AB. The Applicant did not at any time during the OIOS investigation give the name of the contact who his friend liaised with to receive the travel documents. That name has not been disclosed to date.

33. The Applicant stated in his OIOS interview that he saw the receipt of Belgian passports as a problem. In his application, he says he later discovered the immigration law firm was fake. However, although the Applicant realized there was a problem and sought to discourage use of the false passports, Mr. TA insisted on using his for travel.

34. The Applicant said in the OIOS interview that he gave the false Belgian passports to Messrs. TA and AB. In his application, the Applicant gives a different version of events. He says Messrs. TA and AB got in touch with his friend Mr. SO, who handed over the fake passports to them.

35. The Applicant was cross-examined about this inconsistency. The Applicant's more recent version of the passport delivery was not on record during the disciplinary proceedings. The Tribunal accepts as factual his prior admission, during his OIOS interview: that he personally handed the passports over although he suspected they were fake and they were not the visas he expected.

36. On 27 December 2007, while travelling from the Ivory Coast to Belgium, via Accra, Ghana, with the fake passport, the Complainant was stopped at the airport by the Ghanaian immigration. He was detained until 14 January 2008. Mr. AB did not attempt to travel using the fake passport.

37. The Complainant requested reimbursement of the money he had paid to the Applicant. The Applicant claims he tried to chase his contact to get the money back but failed. When the Applicant failed to reimburse him, the Complainant filed a complaint with the Ivorian Criminal Investigation Police, in Plateau, not far from the courthouse.

38. According to the Applicant, on or around February/March 2008, he received a summons to appear before the Criminal Investigation Police. On that day, when the Applicant arrived at work at UNOCI, a police officer was waiting for him in front of the then UNOCI compound. The police officer asked the Applicant to follow him to the Criminal Investigation Police, where, according to the Applicant, discussions were held.

39. There was an agreement that the Applicant would reimburse the Complainant. On the same day, the Applicant reimbursed him 1.95 million West African CFA francs. The Applicant was assisted in settlement negotiations by a friend, Mr. DS. He claims he was released; the case was closed and there were no charges.

40. After the Applicant failed to repay the rest of the money, the Complainant filed a second complaint. This second complaint was filed with the Ivorian *gendarmerie* in Abidjan. The Applicant received a summons on 22 April 2008, to appear before the *gendarmerie*. On that same day, the Applicant paid the Complainant an additional amount. He also agreed to a reimbursement plan for the amount that remained outstanding, which was to be paid by the end of August 2008. The Applicant claims that once again, he was released, the case was closed and there were no charges.

41. According to the Applicant, he thought the matter had been resolved based on the payment plan. He left the Organization to pursue a position at the World Bank. However, unknown to him, the matter was not resolved.

42. The Complainant filed a disciplinary complaint in July 2008 against the Applicant with the Conduct and Discipline Team at UNOCI. UNOCI investigators' attempts to contact the Applicant failed. Internal investigations were discontinued in 2008 as the Applicant was no longer a United Nations staff member. It was felt that the matter should be handled by the Ivorian police where the Complainant had already made a report.

43. The Applicant later was made aware that in July 2008, the Complainant filed a third complaint in the Ivorian criminal justice system. This time it was with the Ivorian Court and it resulted in conviction, the 2 March 2009 Judgment.

44. The case for the Respondent is that on 2 March 2009, the Ivorian Court of First Instance of Abidjan rendered Judgment No. 1048/2009. In the Judgment it was noted that the accused person, who was the Applicant, was neither served nor present for the trial. However, a lawyer purporting to represent the Applicant was present so the Court deemed it fit to proceed to judgment, criminal conviction, and sentence. There is a summons document dated 28 July 2008 on file but there is no proof of service.

45. According to the judgment, the Applicant had been indicted for fraud. The Court found the Applicant guilty of fraud, sentenced him to 12 months' imprisonment and a fine of 100,000 CFA francs. The Complainant's civil claim for reimbursement

was included as part of the trial proceedings. The Court ordered the Applicant to pay the Complainant 2.1 million francs. He was also ordered to pay the legal costs of the case in the amount of 400 francs plus stamp duty, registration fees and the cost of serving the judgment.

46. A bailiff notified the Applicant of the judgment sometime after it was delivered. The Applicant then went to see the *gendarme* and the Prosecutor who had been in charge of the case. He claims he was told that the decision handed down had no legal effect, the sentence did not apply and would not be entered on his criminal record, as there was a payment plan in progress.

47. The Applicant did not appeal the Judgment. He continued with his payment plan. He paid the Complainant as ordered by the Court, in five installments, between 30 December 2009 and 1 June 2010, in the presence of a bailiff. The Applicant was however not called upon to pay the fine nor serve the prison sentence imposed in the judgment.

48. The Applicant was re-employed with the Organization in July 2009. The matter of the events of 2007 to 2009 were never raised until April 2019 when he was invited to an OIOS interview. The Applicant contends that this was in retaliation for a complaint he made against a former OIOS staff member in 2017.

49. In 2013, the Applicant applied for the position of Engineer at MINUSMA, using the Inspira online application system. This required him to complete a PHP. The PHP contained the following question: "Have you ever been indicted, fined or imprisoned for the violation of any law (excluding minor traffic violations)?" The PHP specified that if the answer was "Yes", he was to provide the reason, the resolution, and a brief explanation. The Applicant answered "No".

50. Before submitting his application, the Applicant certified as follows:

> I certify that all of the statements made in this application are true, complete and are made in good faith. I understand that falsifying or intentionally withholding information will be grounds for rejection of

> my application or the withdrawal of any offer of appointment or, if an appointment has been accepted, for its immediate cancellation or termination.

51. By memorandum of 30 August 2019, the Director, ID/OIOS referred the Applicant's matter to the Office of Human Resources ("OHR") for appropriate action. The referral was based on an investigation report, also dated 30 August 2019, prepared by ID/OIOS, together with supporting documentation.

52. In his OIOS interview, the Applicant explained his reason for withholding information about the judgment in his PHP in 2013. He stated that he thought he was not required to give information regarding his conviction, as the sentence of imprisonment had not been executed and he had reimbursed the Complainant. The Applicant further contended that the Judgment was "not noteworthy" and that it was rendered in the context of an "amicable settlement".

53. By memorandum of 16 October 2019 ("allegations memorandum"), formal allegations of misconduct were sent to the Applicant. The Applicant was asked to provide, within one month of receipt, any written statement or explanation in response to the allegations made against him. The Applicant received the allegations memorandum on 22 October 2019.

54. After several extensions of time, the Applicant provided his response to the allegations memorandum on 31 January 2020. The issue of a lack of validity or authenticity of the judgment was first raised in this response.

55. By sanction letter dated 22 April 2020, the Applicant was informed that based on a review of the entire dossier, including his comments, the Under Secretary-General of the Department for Management Strategy, Policy and Compliance ("USG/DMSPC") had concluded that the allegations against him were established by clear and convincing evidence. The USG/DMSPC had decided to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and with 25% of the applicable termination indemnity.

Considerations

Whether the facts are established by clear and convincing evidence?

56. The function of the Tribunal in considering the challenged decision is that of judicial review. In reviewing the Secretary-General's exercise of discretion, the Tribunal follows the well-established standard of review as provided in *Sanwidi* 2010-UNAT-084 at para. 40:

> [W]hen 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.

57. In this context, the Tribunal considered whether the Respondent in deciding on the sanction of separation was seized of facts based on which it was clearly and convincingly proven that:

a. he violated Ivorian law in 2007 and/or

b. while pursuing a job opening, he failed to uphold high standards of integrity when he submitted false information in the PHP by omitting to disclose any indictment, fine or imprisonment arising from the 2007 to 2009 events.

58. The Tribunal's determination is that there was, on record before the USG/DMSPC when the decision was made, clear and convincing evidence in support the second of the two offences. The reasons for this finding will now be explained.

Violating Ivorian Law

59. The Respondent had no clear and convincing evidence on which to decide on dismissal of the Applicant for violating Ivorian law in 2007 by accepting payment to produce false passports and committing fraud.

60. The OIOS Report does not include clear and convincing proof, by admissions or otherwise that the Applicant's version of events, that he was arranging for genuine visas for a fee as opposed to selling false passports was not true. On this version, the Applicant was a victim, along with the Complainant, of the fraudulent actions of an unnamed Belgian Embassy contact of his childhood friend Mr. OS.

61. In deciding on whether the alleged disciplinary charge was substantiated, the Respondent was required to make findings based on clear and convincing evidence. It is not clear and convincing from the record how the Applicant and his version of events would be considered less credible than the Complainant who provided information against him to the investigators. That individual was willingly involved in a project to travel to Europe using false travel documents.

62. On the other hand, the factors that shed doubt on the credibility of the Applicant's version included certain admissions, gaps in information about who was actually working on the travel documents and received the Complainant's money and the unavailability of any of his witnesses for the disciplinary proceedings. Adverse inferences, that these witnesses never intended to truthfully assist the OIOS or this Tribunal, are drawn from the fact that they failed to produce timely statements before this Tribunal and to attend the oral hearing.

63. The versions recounted by the Complainant and the Applicant were evenly balanced in lacking credibility. Neither version was clearly and convincingly proven. Despite the Respondent's heavy reliance on the 2 March 2009 judgment, it did not provide credible evidence to tip the balance to the point where it could clearly and convincingly have been determined that the Applicant committed fraud in 2007.

64. The Respondent's case is that any procedural matters leading up to the judgment are irrelevant, including whether the Applicant was arrested. The Applicant

was informed in the annex to his separation letter that "[y]our violation of Ivorian laws stems from the Judgment that you were fully aware of and is unaffected by preliminary procedures."

65. The OIOS's sources of information as to there being a valid judgment that confirms the Applicant's guilt for the alleged 2007 offences are suspect. The judgment itself was received from the Complainant who was known to have attempted the dishonest act of using a false passport. A copy of the judgment was handed over by the Complainant to the OIOS investigators at a petrol station.

66. The Respondent's witness, Mr. LN, testified at the oral hearing that his attempt to verify whether the judgment was authentic involved meeting with members of the judicial brigade of the *gendarmerie* in 2019. The fact that those meetings took place is supported by a note-to-file dated 15 April 2019.[3] The witness testified that the *gendarmes* he met told him that proceedings against the Applicant were authentic and criminal in nature.

67. On a review of the note-to-file referred to by Mr. LN, the proceedings referred to therein were those related to the complaint to the *gendarmerie* and the resulting summons dated 22 April 2008. The note-to-file does not verify the subsequent 28 July 2008 summons to attend Court; nor does it make mention of the 2 March 2009 judgment.

68. Mr. L.N also told the court that he relied on the admissions made by the Applicant during his interview; particularly that he accepted the judgment. This was another basis for the OIOS accepting the authenticity of the Ivorian Court criminal proceedings.

69. Many procedural matters leading to the judgment and its contents should reasonably have raised red flags as to the judgment's authenticity during the Respondent's disciplinary proceedings. Importantly, there is no proof on the

[3] Doc 44 attached to the OIOS Investigation Report at pg. 164 of R/2.

Respondent's record that a summons to attend a court hearing leading to the judgment was ever served on the Applicant. Moreover, the Complainant admitted tipping *gendarmes* and court staff with transport costs in his pursuit of recovering money from the Applicant.

70. The judgment states that the Applicant was not summoned to appear in person but was nevertheless aware of the proceedings since he appointed a lawyer. Proof of the Applicant's appointment of that lawyer is not addressed.

71. The Applicant attached to his application a summons dated 28 July 2008, which he says was one of the documents discovered in 2019 during searches of the Court records. He asserts that he was never served with that summons. The judgment records that the Applicant was found guilty in his absence and sentenced to imprisonment and a fine.

72. Although a lawyer was present purporting to represent the Applicant, only the case for the Complainant is reflected in the judgment. There is no indication that the Applicant's defence to the criminal charges and civil claims was presented. He had no opportunity to be heard. There is no mention of even a plea in mitigation of sentence by the lawyer who purported to act on the Applicant's behalf.

73. Although the judgment records the Applicant's status as an Engineer at the United Nations, there is no indication whether processes were undertaken to ensure that the Applicant's privileges and immunities were properly waived by the Secretary-General.

74. Finally, there is absurdity in the subject matter of the judgment. It is baffling that an individual who has been caught attempting illegal entry to another country by using a false passport, could be both a complainant in criminal proceedings arising from his own crime and a civil claimant seeking in the same criminal trial to recover the money he paid to have something illegal done!

75. The Complainant was detained for two weeks by Ghanaian immigration and prevented from traveling to Europe using the fake passport obtained from the Applicant. The crux of his complaint against the Applicant has not been to prove the Applicant's fraud regarding the passports. It has always been based on being the victim of his own fraudulent actions. He sought, by various means, culminating in the questioned judgment, to make the Applicant pay, whether or not he too was duped by another person who received the Complainant's money.

76. The Respondent's case is that the UNDT and by extension the Organization is required to accept judgments resulting from judicial processes in member states. The Respondent cites Article 2(7) of the United Nations Charter as preventing the Organization from second-guessing national court orders. On this basis, the Respondent asserts that in sanctioning the Applicant, reliance was properly placed on a binding judgment rendered by the Ivorian Court. The Respondent cites *Benamar* in contending that the Tribunal does not have jurisdiction to reconsider or ignore judicial decisions of a national court.[4]

77. There is no indication in the authorities cited that all documents said to be judgments, however sourced, must be accepted as genuine court judgments. In cases of doubt, an authenticity check may be a required step for the Organization's investigators, where clear and convincing evidence is required to support a dismissal. This would have been especially important in the instant case where the credibility of the divergent accounts of the Complainant and the Applicant was evenly balanced. Furthermore, although the Applicant appeared to accept the judgment as valid during his 2019 interview, his response to the allegations memorandum highlighted sufficient red flags in the document that verification of its authenticity was necessary.

78. Overall, there was insufficient credible evidence on the record, that was clear and convincing that the Applicant breached Ivorian Law or committed fraud in 2007.

[4] 2017-UNAT-797.

Submitting false information in a PHP through Inspira for job application process

79. It was mainly based on the Applicant's admissions that the Respondent had clear and convincing evidence that he committed the second offence: saying 'no' in response to the question "[h]ave you ever been indicted fined or imprisoned for the violation of any law (excluding minor traffic violations)?" on the PHP.

80. The Applicant was candid and forthcoming during his OIOS interviews as to his knowledge of the judgment. Although subsequent to the interviews there is consistency in the Applicant's contentions that the judgment was improperly obtained, invalid and bogus, he did not raise these concerns at the outset. There was no indication from the Applicant during his interviews that he had ever doubted the authenticity of the Judgment. He in fact first raised this issue after his two interviews, by which time he had retained counsel.

81. In his OIOS interview, the Applicant said he did not receive the summons dated 28 July 2008 that led to the Judgment. However, he admits he received a prior summons to the criminal investigation police in February/March 2008. He further admits that on 22 April 2008 he received a second summons – a court notification to attend at the Investigative Unit which is part of the *gendarmerie*.

82. The Applicant asserts that after his interviews and around the time that he received the allegations memorandum, he hired Ivorian counsel to authenticate the Judgment and understand the circumstances surrounding its establishment. There is evidence of that lawyer's written inquiries to the Ivorian Court on 1 November 2019.

83. The Applicant's Ivorian counsel also conducted searches of court documents. Copies of documents examined form part of the Applicant's case before this Tribunal.

84. The Ivorian counsel had written on 25 October 2019 seeking information from the Attorney who purported to represent the Applicant in his absence for the trial that led to the 2 March 2009 Judgment. That lawyer was asked to explain how he purported

to represent the Applicant who had never retained him. The letter was acknowledged but there was no meaningful response.

85. In his 31 January 2020 statement in response to the allegations memorandum, the Applicant said that his counsel's recent searches uncovered numerous irregularities on the face of the record demonstrating that the alleged Court hearings never took place and the alleged sentence was invalid. He said that after completing the authentication research, the next step for counsel would be to apply to have the court declare the judgment a false document. Correspondence proving that authentication efforts were in progress were attached.

86. The Applicant contended in his response to the allegations memorandum that "the Complainant helped by some corrupted *gendarme* and staff of the [Ivorian Court] have produced false documents to set a false Judgment. The Complainant himself disclosed to the OIOS investigator that he had to bribe the Police Staff, *gendarme* and some [Court] staff, in order to succeed" in charging the Applicant in such a way that he "would be found to be guilty anyway".

87. He said further that the document (the putative judgment) obtained by OIOS from the Complainant was 'established under undue process' or not compliant with Ivorian laws. Furthermore, he was informed by the prosecuting *gendarme* that the judgment document was invalid because proceedings were not initiated by the *gendarme*. The *gendarme* advised the Applicant to continue with the previously agreed payment plan arrived at during prior informal dispute resolution negotiations.

88. This was the Applicant's basis for submitting that the judgment was "not noteworthy" to be reported in the PHP during his application process. He had not appealed it because the time for an appeal may have elapsed when it came to his attention and because he was told it was invalid.

89. After receiving the separation letter on 22 April 2020, the Applicant was assisted by counsel for the filing of an application for suspension of action filed on 25 April 2020. Therein it was highlighted that there was no clear and convincing evidence

as to the authenticity of the judgment against the Applicant. Instead "what seems clear is that the complainants were able to use the police and court system to exert pressure on the staff member to reimburse them for fees paid to a third party through the staff member."

90. In a management evaluation request filed on 27 April 2020, the Applicant described the documents relied on by the United Nations in the disciplinary proceedings against him as bogus. He contended that it was incumbent on the Organization's investigators to approach the court of jurisdiction to verify the documents.

91. The Applicant filed three motions on 9 July 2020, 29 October 2020, and 3 December 2020 for extensions of time to file this application as he was awaiting a response from the relevant authorities and court regarding authentication of the 2009 judgment.

92. In his substantive application filed in January 2021, the Applicant indicated he was informed of the alleged Court trial long after the March 2009 Judgment was issued. He then went to the prosecuting *gendarme* who informed him the case was closed at the *Gendarmerie* since April 2008 and the alleged March 2009 Court document was invalid and would have no effect. The Applicant reiterated in his substantive application that he was still pursuing authentication of the judgment through the Ivorian Court as no competent and qualified Ivorian Judge would release such a document with numerous irregularities.

93. In an August 2021 application to the Ivorian Court seeking rectification of the Judgment, the Applicant's Attorney set out the irregularities gleaned from her searches. She said the Applicant "believes that everything has been orchestrated to harm his professional status as an international staff of the UN where he is currently undergoing a disciplinary procedure of dismissal."

94. Although the Applicant may have come to believe the Judgment was procedurally improper and invalid there is no evidence on record that he was of that

view before 2019. It is clear from the Applicant's interview that he received the Judgment in 2009 and there is no indication that he doubted its authenticity. As such, even if upon advice from counsel in 2019, the Applicant became aware of glaring irregularities in the Judgment, he was obligated to have disclosed it in his 2013 job application process. This was specifically required in response to the question in the PHP which was part of his job application process in Inspira.

95. There is an element of truth in his answering 'no' to having been indicted, as he was never served with a summons or indictment for the proceedings that led to the trial and his criminal conviction in March 2009. However, the Applicant candidly admitted in his interview that he was served with two prior summonses. These were clearly in a criminal investigation context. This was enough for him to have erred on the side of full disclosure by responding 'yes' to the question about prior indictments.

96. The Applicant was truthfully never imprisoned. However, he admits to having been served with the judgment, which indicates that following his conviction there was a sentence which included that he was fined and to be imprisoned.

97. The Applicant's explanation that he did not view the 2009 judgment as noteworthy enough to cause him not to answer in the negative is unacceptable under the circumstances. Whatever his views on the validity of the judgment, the fact is that there is a judgment against him which he was aware of at the time of his application for the position.

98. The Applicant knew that the history of the subject matter dealt with in the judgment included him being confronted by police officers in front of the UNOCI building in 2007. That connection to the Organization should have brought to the Applicant's mind the importance of disclosing it in his PHP. The questioned judgment itself has an appearance that was clearly taken by the Applicant as one of authenticity. It was not the type of document that could reasonably be dismissed as not being noteworthy, when required to disclose being previously indicted, fined or imprisoned.

99. The Applicant's belated attempts to seek to prove that the judgment was not authentic are of no probative value as to whether or not he should have responded 'yes' in 2013. These attempts, which commenced after the investigation in 2019, do not change the fact that the Applicant was aware of the judgment when he responded 'no' in 2013.

100. The Applicant conceded under cross-examination, that the judgment cannot be changed by way of his most recent attempt i.e. the application for rectification made pursuant to Article 185 of the Ivorian Code of Civil Procedure on 31 August 2021. This provision only permits correction of clerical errors that do not undermine the binding nature of the judgment. Based on the Applicant's delay in checking on the judgment, it is impossible to have its suspected lack of authenticity addressed by way of appeal.

101. There could be no doubt in the Applicant's mind when he completed the PHP in 2013 that to answer in the negative to the question about prior indictments and fines would be to withhold required information. Answering 'no' was the wrong judgment call on his part.

102. Even though the Applicant was never called upon to pay the fine, the prudent and transparent course would be to answer 'yes' as he was aware of the judgment whereby, he had been fined. Thereafter, he could have opted to add an explanation. The PHP specifically provides for explanations to be given after such an answer.

103. Accordingly, the Applicant's duty was to answer truthfully 'yes' and then explain that the fine and imprisonment were not executed, based on a prior arrangement whereby he was re-paying the Complainant. He could have further explained that he had been informed by a *gendarme* who was prosecuting the case that the judgment was of no effect and would not be enforced.

104. Failing to answer 'yes' not only falsified the Applicant's job application but tainted the recruitment process. The Respondent's objective of having knowledge to ensure the integrity of potential staff members was undermined.

105. The PHP included a certified statement by the Applicant, confirming his knowledge of the implications of giving false information. He duly certified that he knew that intentionally withholding information would be grounds for termination. He then submitted his job application, with false information that he had never been fined and withholding information about the Judgment.

106. For these reasons the Respondent's decision to dismiss was justified by clear and convincing evidence on the ground of submitting false information in the PHP.

Whether the facts amount to misconduct?

107. The Respondent's allegations against the Applicant were framed as misconduct in breach of staff rule 1.2(b) and staff regulation 1.2(b) as follows:

> Staff Rule 1.2 (b) Staff members must comply with local laws and honour their private legal obligations, including, but not limited to, the obligation to honour orders of competent courts.
>
> Staff Regulation 1.2(b) 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.

108. On a literal interpretation of staff regulation 1.2(b), the Applicant engaged in misconduct. His negative response to the PHP question about prior indictments, fines or imprisonment amounted to an intentional withholding of required information pertinent to the Organization's background integrity checks. The answer was neither truthful nor honest.

Whether the Applicant's due process rights were observed?

109. ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), which regulates the investigations and disciplinary process, includes mandatory due process protections for staff members. The Appeal's Tribunal in *Michaud* 2017-UNAT-761 provided guidance on the nature of due process rights to be afforded by the Organisation to staff members as follows:

> 56. Procedural fairness is a highly variable concept and is context specific. The essential question is whether the staff member is adequately apprised of any allegations and had a reasonable opportunity to make representations before action was taken against him.

110. It is clear from the procedural background to his disciplinary sanction that the Applicant was afforded due process rights. He was fully informed of the matters being investigated, he was interviewed, and efforts were made to have him provide contact information for persons referred to in his interview so they could also be interviewed. Contrary to the Applicant's submission, there was full compliance by the Respondent with sections 6.10(f) and (g) of ST/AI/2017/1. The Respondent allowed for the Applicant to be fully heard orally during the interview and extended time for him to provide any further information in writing thereafter.

111. The Applicant's specific complaints regarding the Respondent's responsibility for delays in initiating the disciplinary process and alleged improper motives of retaliation, have not been proven. On the other hand, there is merit to the Respondent's submissions refuting that he was either at fault for any delay or improperly motivated in initiating disciplinary proceedings.

112. The Applicant's reliance on the passage of time, from the events of 2007/2009 to 2019 when disciplinary proceedings commenced, as proof of lack of due process by the Respondent, is misplaced. On the contrary, the Applicant must accept responsibility for failing to disclose and/or explain, in the 2013 PHP, the judgment of which he was fully aware.

113. The Applicant has not proven his complaint against the Respondent regarding a lack of due process.

Whether the sanction imposed was proportionate to the Offence?

114. In *Portillo Moya*, 2015-UNAT-523, paras. 19-21, the Appeal's Tribunal explained the limited circumstances when there can be a ruling against proportionality of the Respondent's sanction. For the Tribunal to interfere with a disciplinary sanction

decision based on a finding on proportionality, the sanction must be "blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity."

115. The Applicant certified in his PHP that he understood that the intentional withholding of information would be grounds for immediate cancellation or termination of any appointment obtained in his application process. On this basis alone it is clear that, as certified by the Applicant, the sanction of separation from service is proportionate to the offence.

116. In addition to the foregoing, the disciplinary sanction imposed on the Applicant is in line with past cases involving the submission of false information for a job application. Those cases resulted in dismissal or separation from service.[5]

117. Trust between the Organization and a staff member is essential to the employment relationship. By submitting false information in support of a job application, the Applicant undermined trust, thereby rendering continuation of the employment relationship untenable.

118. As set out in the sanction letter, the Administration considered that there were no aggravating factors. With respect to mitigating factors, the Administration considered: (i) the Applicant's long service; (ii) his sincere remorse and (iii) the impact of the COVID-19 pandemic.

119. In all these circumstances, termination of the Applicant's employment was justified on grounds of his withholding of pertinent information about his background which was specifically required in his job application process. The conditions of the termination were at the least severe end of the termination spectrum. The Applicant was not summarily dismissed. He was afforded compensation *in lieu* of notice and 25% of termination indemnity.

[5] See Compendium of disciplinary measures, Ref. 398, 402, (from 1 January 2018 to 31 December 2018); 336 (from 1 July 2016 to 30 June 2017).

120. The Tribunal determines that there was nothing absurd, arbitrary, or excessive about the sanction imposed. It serves to protect the integrity of the United Nations recruitment process, insulates the Organization as an employer from continuing in a relationship where trust had been undermined and sets an example in enforcing the United Nations integrity ethos. It was proportionate to the offence.

Conclusion

121. The application is dismissed.

(Signed)

Judge Eleanor Donaldson-Honeywell
Dated this 23rd day of November 2021

Entered in the Register on this 23rd day of November 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi