



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/170

Judgment No.: UNDT/2022/002

Date: 10 January 2022

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BUYOYA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Shubha Naik, OSLA

Counsel for the Respondent:

Jonathan Croft, AAS/ALD/OHR, UN Secretariat

Jacob van de Velden, AAS/ALD/OHR, UN Secretariat

Background

1. This is the Applicant's application contesting the Under-Secretary-General for Management Strategy, Policy and Compliance's ("USG/DMSPC") decision to impose on her the disciplinary measures of written censure and demotion of one grade with deferment for two years for eligibility for consideration for promotion in accordance with staff rule 10.2 (a)(i) and (vii) ("the contested decision").

2. In his reply, the Respondent argues that; there is clear and convincing evidence that the Applicant, on several occasions before and after completion of contractual arrangements with a vendor, suggested and requested the vendor to consider hiring one or more individuals, including her brother, in connection with the vendor meeting its obligations under the contract; that through her conduct, the Applicant violated staff regulations 1.2(b), 1.2(g), and 1.2(m), and staff rule 1.2(k), constituting misconduct and warranting the disciplinary sanction imposed on her; and that her application should be dismissed.

3. The Tribunal dismisses the application in its entirety.

Facts and Procedure

4. The Applicant is a Procurement Assistant with the United Nations Interim Security Force for Abyei ("UNISFA").

5. A contract between the vendor, Imdad Total Site Services ("ITSS"), and UNISFA was signed by ITSS on 14 November 2017 and by UNISFA on 24 November 2017 ("the Contract").

6. At the time of the formation of the Contract, the Applicant was acting as the Buyer and Officer-in-Charge ("OIC") of the UNISFA Procurement Section and she oversaw the communications with ITSS. She managed the procurement process and was responsible for duties up to and including the award of the Contract to ITSS and was responsible for any subsequent amendments to the Contract.

7. The contested decision was taken on 30 September 2019. Per the sanction letter¹, the decision was arrived at after the Applicant was informed through a memorandum, dated 28 May 2019, from the then Office of Human Resources Management, setting out allegations of misconduct against her, that she attempted to influence ITSS to hire one or more individuals, including her brother, having been involved in the management of the procurement process which resulted in ITSS being awarded a contract with UNISFA.²

8. In the said memorandum she was informed that if the above allegations were established, her conduct would constitute a violation of staff regulations 1.2(b), 1.2(g) and 1.2(m) and staff rule 1.2(k).

9. She was also asked to provide, within one month of her receipt of the memorandum containing the allegations, any written statement or explanation that she wished to provide in response to the allegations. She was advised that she was free to request at the earliest time possible for any extension of time to submit her response if she needed more time.

10. The Applicant was also advised that she could avail herself of the assistance of the Office of Staff Legal Assistance and that she could seek the assistance of any counsel at her own expense to assist her to prepare her defence.

11. After a thorough review of the entire dossier, including her comments, the USG/DMSPC concluded that the allegations against the Applicant were established, by clear and convincing evidence, hence the contested decision.

12. On 27 December 2019 and 13 January 21, the Applicant filed an application and a rejoinder to the reply, respectively, challenging the contested decision.

13. At a case management discussion held on 15 July 2021, the parties agreed that the case may be decided based on the documents on record.

¹ Application, annex 6.

² Reply, annex R/3.

14. On 26 July 2021, the Tribunal issued Order No. 143 (NBI/2021) which, *inter alia*, ordered the Respondent to produce the minutes of the Headquarters Committee on Contracts (“HCC”) of 18 October 2017 by 31 August 2021 and directed the Applicant to file submissions on the relevance of the minutes and on whether they were before the Investigators and the Administration at the time the impugned decision was made, by 7 September 2021. The Respondent filed the said minutes on 28 July 2021.

15. The parties filed their closing submissions on 13 September 2021.

Submissions

The Applicant

16. The Applicant submits that the Respondent: (i) has not established the facts underlying the sanction to the requisite standard; (ii) the established facts do not amount to misconduct; (iii) the sanction was disproportionate; and (iv) her due process rights were not respected during the investigation.

17. In arguing that the facts underlying the sanction have not been established to the requisite standard, the Applicant submits:

a. Considering that she was awarded a sanction below termination, the standard of proof in the instant case was “preponderance of evidence”.

b. The Respondent alleges that she had for her own volition before the award of the contract sent names of individuals to be employed to ITSS and was persistent upon their employment as seen from the various WhatsApp messages and deposition of representative of ITSS. The Applicant maintains that the requirement of staff was raised by ITSS themselves in a meeting held on 8 November 2017.

c. The request for staff was expressed by an ITSS representative in the meeting held on 8 November 2017. This is supported by the email dated 8

November 2017 from the Proposal Manager, ITSS, to the Applicant in which Mr. Haddadin, Chief Engineer, UNISFA, was copied, where Ms. Dadaa says to call on a particular number³. This indicates that there was a telephonic conversation/meeting on 8 November 2017.

d. An email she wrote on 10 November 2017 to the Proposal Manager, ITSS, with a copy to the CEO clearly indicates that there was a meeting and that during this meeting such a request was definitely made by ITSS. This claim has not been refuted by the Administration in the Sanction Letter nor in the reply.

e. After this email, there is no email from ITSS or any evidence which has emerged that ITSS was averse to this email request and denial by them that there was such a request made. When the Applicant sent the WhatsApp messages, she was being transparent and, aware that the information could be shared since the request was already made during the telecom with Mr. Haddadin and ITSS.

f. The HCC minutes of 18 October 2017, at paragraph 3.06(c), refer to the fact that the Statement of Works (“SOW”) and technical part of the contract recommended that the vendor hire current and ex-individual contractors (“ICs”) and during the bidder conference, all the vendors were interested in hiring ICs as that would ease their efforts specially at the initial period of the contract. This fortifies her claim that there could have been a request from ITSS for people already employed and there was always an understanding even on the Administration’s side that people already working could be continued with the new vendor.

g. Once she forwarded the names to ITSS, she did not pursue or try to find out the status, which would be the natural behaviour of a person who was

³ Annex 8- correspondence Christine and ITSS 08 November 2017 (Applicant’s closing submissions para. 4)

insistent on appointment of certain people. She only sought the status for Dr. Mekonnen due to humanitarian concerns. Dr. Abere was scheduled to move out of the mission by the month end and the Applicant, not due to her position but because of her helping nature, had told him that she would try and help him. Therefore, she interacted with Mr. Al Armouti of ITSS to follow up on his employment. She did so on humanitarian grounds and was just merely following up for him.

h. There is no proof that she pressured ITSS to employ the suggested staff. All her messages were in the form of pleadings and requests. All her WhatsApp messages to Mr. Armouti and calls/messages to Ms. Dina had no single word to indicate that these individuals were to be employed. There were only requests and pleadings on their behalf, words used were to the effect “please help him”, “who can consider(sic) if possible”, “please do what you can do”. Mr. Armouti had never expressed to the Applicant he felt pressured, embarrassed, confused or upset due to the Applicant’s requests. In fact, Mr. Armouti sounded cooperative and accommodative of her requests. If there was the slightest indication of the same, the Applicant would have immediately stopped and not pursued the matter.

i. There is no proof that she would retaliate if ITSS did not employ these individuals or indeed was in a position to retaliate against ITSS. Vide her emails to ITSS on 26 and 29 November 2017, she had dissociated herself with the contract and told ITSS that any queries on execution or otherwise be directed to the Chief, Engineering Section. By doing so, the Applicant indicated to ITSS that she had no power to influence anything related to the contract. Further, suggestions of individuals for employment was made after the contract was awarded to ITSS and therefore she had no leverage/power over ITSS.

j. The Respondent has tried to characterise that her persistent inquiry would give an impression to ITSS that if they heeded to the Applicant they

could potentially be rewarded in a future procurement process or could otherwise be negatively affected if they offended and/or did not oblige her. This is merely a surmise drawn by the Respondent based on speculation. None of the witnesses from ITSS in their depositions have alluded to this benefit or threat.

18. On the ground that the established facts do not constitute misconduct, the Applicant submits:

a. She acted based on the request of the vendor, ITSS. Moreover, she was acting for the best interest of the Organization as she had witnessed the difficulty in obtaining skilled personnel and visas in Abyei.

b. It was known that the previous contract had been terminated because the Sudanese Government denied visas. In Abyei, labour which was skilled and experienced to carry out the obligations stated in the Contract was tough to find as indicated in the HCC minutes. She did not receive any gain in trying to facilitate the recruitment of individuals whom she considered had the right skill set and experience that would benefit both ITSS and the Organization. Neither the Investigation Report nor the Sanction Letter mention any private gain obtained by her. As far as causing personal gain to a third party, although admittedly their employment by ITSS would be a personal gain for the individuals, the Applicant had not in any manner used her office to coerce ITSS for the employment of the individuals but had merely pleaded/requested them to consider those individuals.

c. The established facts show that she forwarded names of individuals based on the request from ITSS and as encouraged by the Administration to employ already existing staff. She pursued the matter for Dr. Mekonnen on a humanitarian basis. Although she submitted her brother's name, she subsequently withdrew it when she realised the impropriety of it. None of these established facts can rise to the level of misconduct. Even in her

brother's case, submitting his curriculum vitae ("CV") was bad judgment on her part but does not amount to misconduct.

19. The Applicant avers that her due process rights were not protected as evidenced by the following:

a. Records reveal that the Office of Internal Oversight Services ("OIOS") investigators had taken the deposition of two witnesses, namely, Mr. Al Armouti and Ms. Al Armouti together. This was a clear violation of due procedure. This issue goes to the crux of the confidentiality of the investigation proceedings. OIOS warns every witness at the end of deposition that they should not disclose about their testimony to other persons to avoid matching of depositions and improvisation as well to protect the integrity of the investigation. In the instant case, two important witnesses who were complainants were interviewed together whilst they were sitting side by side.

b. The perusal of the audio recording of the interview shows that throughout the depositions the witnesses were assisting each other in answering the questions and supplementing the answers given by the other. Such deposition of witnesses together not only helped the witnesses in coordinating their stories but also helped them in improvising their versions. Such gross violation of propriety in the conduct of the investigation should have been taken into consideration by the Administration and their depositions discarded.

c. Perusal of the WhatsApp messages shows that the conversation is disjointed and appears to have been selectively screenshot without sharing the complete conversation, as such the context of the conversation is lost. It, therefore, cannot be ruled out that the messages could have been manipulated/doctored especially since the complete conversation had not been forwarded by Mr. Armouti. The investigators relied completely on the WhatsApp messages given by Mr. Armouti without checking them by way of

forensic tools for their authenticity and completeness whereas the whole of the Respondent's case is based on the WhatsApp messages. Such evidence should have been discarded by the Administration when considering the case.

d. The Sanction Letter was not sufficiently reasoned. Thus, the Respondent violated its obligation to state the reasons for the administrative decision. A well written statement of reasons is fundamental for identifying the matters, concerns and reasoning process of the decision-maker, especially in a case of such gravity. However, the Sanction Letter only devoted one cursory paragraph to explaining the reasons for a decision with career-breaking consequences. The Applicant's arguments included in her response to the allegation were not properly addressed or considered. In the instant case, the Sanction Letter miserably fails to show the same which is indicative that there was no proper consideration/application of mind by the Administration before it decided to sanction the Applicant.

e. A highly irregular statement was taken upon the direction of the Administration by the investigators. The Respondent admitted that OHRM had issued a directive in May 2019 to OIOS to interview Mr. Haddadin whereas the charge letter was issued on 28 May 2019. Therefore, OHRM chose to issue the charge letter even before it had gathered all the evidence there was to make up its mind that there was a charge made out. If the Administration indeed had sought to take a new statement from Mr. Haddadin to verify the Applicant's claim about the meeting and request of ITSS for staff, it raises the question why the charge letter was issued if all facts were not before the Administration and there were still doubts. In addition, there was a delay of approximately three months before the statement was finally shared with the Applicant and her comments sought.

20. The Applicant argues that the sanction imposed was disproportionate to the misconduct that was finally established. The case against her was based on an investigation which was fraught with irregularities, most crucial elements of the

charges were not proven. Many if not all the allegations, cannot be said to be proved by clear and convincing evidence or even by a preponderance of evidence. The Administration has failed to show private gain obtained by her or by a third party. It has also failed to show any personal interest of the Applicant's to prove the charge of a conflict to interest.

21. She further submits that the Administration failed to consider mitigating factors such as her excellent professional performance and that in the past 13 years of her service in the procurement field, she did not have any case of financial impropriety or otherwise and has been an exemplary staff member who was given tasks higher than her level. A failure to consider relevant mitigating factors can vitiate a discretionary decision.

22. Consequently, the Applicant seeks rescission of the contested decision.

The Respondent

23. The Respondent urges the Tribunal to reject the application because there is sufficient evidence that the Applicant suggested to and requested ITSS to consider hiring one or more individuals, including her brother, both before and after the completion of contractual arrangements with the United Nations valued at USD12,601,191.32, in connection with ITSS's obligations under the Contract.

24. The Respondent submits that the Applicant admits her conduct, which included, *inter alia*, submitting her brother's CV and information related to other individuals, including Dr. Mekonnen, to ITSS. The relevant facts are therefore sufficiently established.

25. The Respondent further submits that during the investigation, in explaining her continuous insistence on WhatsApp texts messages of 7 December 2017, 9 December 2017 and 13 December 2017 after she had been informed by ITSS that it already had employees, the Applicant stated that, it was because the people she had suggested knew how to do their jobs, and that she wanted to help the Organization.

The Applicant said that, with regards to Dr. Mekonnen, it was because he was already on the ground and he would be an asset for the Organization since he knew the area and did not need a visa.

26. The Respondent states that the Applicant violated staff regulations 1.2(b), 1.2(g), 1.2(m) and staff rule 1.2(k), amounting to serious misconduct. The Applicant violated staff regulation 1.2(b) in that she failed to uphold the highest standard of integrity. She was in a position of influence and authority by way of her position with the Organization, and she played a significant role in the awarding of the contract to ITSS, and by repeatedly suggesting and inquiring about the possibility of hiring her brother and her other candidates, she placed undue pressure on ITSS to accede to her requests. By extension, the Applicant violated staff regulation 1.2(g) by using her office for the private gain of any third party, including family, by using her position and office to advocate for the hiring of her brother and other acquaintances.

27. Given her position with the Organization and, more specifically, her role involving contracting with ITSS, it was inappropriate for the Applicant to advocate for the hiring of her brother or other acquaintances. Her acts of doing so, for her brother as well as for her acquaintances, created a conflict of interest. The Applicant stated during the investigation and in her comments that she regretted submitting her brother's CV but advised both her brother and ITSS not to pursue the matter further in light of the potential conflict. While the Applicant may have had second thoughts about pressuring ITSS to hire her brother, she nevertheless pressured a vendor to the Organization to hire her brother for a position with it. This was a conflict of interest and a third party was aware of that serious reputational impact.

28. By seeking, in the context of her position with the Organization, the hiring of her brother and other acquaintances, the Applicant violated staff rule 1.2(k), as her role regarding the awarding of the contract created a reasonable impression that she exercised authority over it and future awards. The Applicant's contentions that she had not acted for her own personal benefit are not correct as the hiring of her brother would have benefitted her family and she would have likely had, at a minimum, the

gratitude of any others she helped to gain employment. Moreover, staff rule 1.2(k) expressly prohibits the seeking of favour and the Applicant violated this provision by her persistence and pleading that the candidates who she put forward be given consideration and positions.

29. Through her position in the Organization, the Applicant held considerable influence and authority as regards procurement processes. By repeatedly suggesting and inquiring about the possibility of various candidates, she put pressure on ITSS, a company that was awarded a high value contract through a process in which the Applicant had played a significant role. Putting pressure on ITSS to hire certain staff exhibited a serious lapse of integrity. By advocating for the hiring of her brother and other acquaintances, the Applicant used her office for the private gain of others, including her brother. This constituted a serious conflict of interest. Given the Applicant's role in awarding the contract to ITSS, her persistent pressures on ITSS also created the reasonable impression that ITSS would potentially be rewarded in a future procurement process or could otherwise be negatively affected if they offended and/or did not oblige the Applicant.

30. The Applicant engaged in serious misconduct, and the sanction imposed was proportionate. The sanction imposed on the Applicant was not the most severe available. Given the seriousness of the Applicant's misconduct, it would have been in the Organization's discretion to terminate her from service. Instead, the sanction allows the Applicant to remain employed by the Organization. The deferment period set forth in the sanction expired on 30 September 2021, at which point she is again eligible for promotion.

31. The Applicant's sole line of defence is that she had good intentions in her actions in that she had the best interests of the Organization in mind and that she derived no personal benefit from her actions. She contends that she had acted in an effort "to avoid visa issues" which, according to her, could have "stalled the implementation of the contract" as she claimed had occurred in the past. The Respondent argues that this contention fails as it is not borne out by the evidence on

the record. No such sentiment is apparent in any of her communications in which she suggested that her brother and other individuals be considered for employment by ITSS. It is contradicted by the fact that she continued to persist regarding Dr. Mekonnen even after she was informed that another doctor was already under contract.

32. The Respondent further argues that the Applicant has not claimed that she had concerns over the visa status of the doctor who was under contract. On the contrary, the Applicant, in her communication to ITSS, indicated that Dr. Mekonnen was due to leave the area shortly. Accordingly, Dr. Mekonnen would have benefitted from the ability to remain in the area, in addition to his employment. Similarly, her brother would have benefitted by his employment which would have brought benefit to her family. The record therefore rather demonstrates that the Applicant's actions were about the Applicant's family and other individuals, not the interests of the Organization. Her acts were clearly not in the interest of the Organization; she exploited her position with the Organization and potentially put at risk the Organization's reputation and ability to accomplish its goals and mandates by violating the integrity of the procurement process.

33. The Respondent submits that contrary to the Applicant's statement during the investigation that she wanted to help the Organization, that the people she put forward for hiring by ITSS knew how to do their jobs and that ITSS had expressed concern over the ability to find qualified employees during a meeting, there is no evidence for this. Mr. Haddadin, the individual the Applicant claims was part of such a meeting when ITSS purportedly expressed such concern, stated that he had not attended any meeting or participated in any phone call during which ITSS had requested assistance in sourcing employees.

34. With respect to the Applicant's contention that she would have ceased her inappropriate behaviour had she been informed that pressure or coercion was being felt, the Respondent submits that this does not excuse her conduct. The Applicant should not have needed to be told that her actions were not appropriate. She should

have been aware that her actions were inappropriate in view of her position within the Organization and vis-à-vis ITSS, the power imbalance created by her position with the Organization as compared to that of ITSS, a company attempting to do business with the Organization.

35. The Applicant states that when she realized that her having sent the CV of brother had not been appropriate, she “informed Mr. Armouti to keep her brother’s name on hold”. However, this does not justify her prior misconduct nor her conduct regarding her other candidates for hiring she pressed on ITSS.

36. The Respondent submits that the Tribunal should dismiss the application in its entirety.

Considerations

37. 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 decision-maker’s decision. Due deference is always shown to the decision-maker, who in this case is the Secretary-General.⁴

38. There are four essential elements that the Tribunal must evaluate during the judicial review of a disciplinary case. These are: (i) whether the facts on which the disciplinary measure is based have been established (where termination is the sanction imposed, the facts must be established by clear and convincing evidence; in all other cases preponderance of the evidence is sufficient); (ii) whether the

⁴ *Sanwidi* 2010-UNAT-084, para. 42.

established facts amount to misconduct; (iii) whether the sanction is proportionate to the offence; and (iv) whether the staff member's due process rights were respected.⁵

39. In a disciplinary matter where the sanction is not separation from service the standard of proof is one on a preponderance of the evidence. The Tribunal must ask itself whether it is more probable than not that the staff member committed the alleged acts of misconduct.⁶ This standard is lower than the standard of clear and convincing evidence required in disciplinary matters that result in separation from service. The Tribunal makes the following determinations on the four essential elements as found on the question before it:

Whether the facts on which the disciplinary measure is based have been established?

40. The Respondent imposed on the Applicant the disciplinary measures of written censure and demotion of one grade with deferment for two years for eligibility for consideration for promotion in accordance with staff rule 10.2 (a)(i) and (vii). The standard of proof is therefore one on a preponderance of evidence.

41. The Applicant was charged with attempting to influence ITSS to hire one or more individuals, including her brother, having been involved in the management of the procurement process which resulted in ITSS being awarded a contract with UNISFA.

42. The Applicant admitted that she indeed submitted her brother's CV and employment information related to other individuals, including Dr. Mekonnen, to ITSS, a UNISFA vendor, so that ITSS could consider them for recruitment.

43. The Applicant conceded that she became aware of the need for personnel to work for ITSS through her position as a Procurement Assistant for UNISFA and her role as Buyer and OiC of UNISFA procurement section responsible for

⁵ *Suleiman* 2020-UNAT-1006, para. 10, citing *Nadasan* 2019-UNAT-917, para. 38; *Siddiqi* 2019-UNAT-913, para. 28.

⁶ *Suleiman* 2020-UNAT-1006.

communicating with ITSS during the procurement process and awarding of the contract to ITSS.

44. The Applicant agreed that her conduct to submit her brother's CV to ITSS was inappropriate and as such, she advised ITSS to pend consideration of his recruitment.

45. The Applicant admitted that she submitted Dr. Mekonnen's name and other individuals' employment information and sent several reminders to ITSS requesting and pleading with it to consider employing Dr. Mekonnen.

46. The question is whether the Respondent has not established the facts underlying the sanction to the requisite standard? The Tribunal finds that having admitted the facts, there is no issue whether the facts on which the sanctions were imposed are established. These facts have been established by the Applicant's own unequivocal admission. The issue is whether the established facts constitute acts of misconduct.

Whether the established facts amount to misconduct

47. The Respondent cited the following provisions to have been violated by the Applicant through her admitted conduct; (a) staff regulation 1.2(b), 1.2 (g) and 1.2 (m) and staff rule 1.2 (k). The Tribunal addresses these provisions as follows:

Staff regulation 1.2(b)

48. This regulation requires staff members to 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.

49. The Respondent argues that the Applicant failed to uphold the highest standard of integrity because she used her position of influence and authority in the Organization to request and plead with a vendor to hire her brother and other

individuals. The Applicant has admitted that she made the requests and pleadings but disagrees with the Respondent that by so doing she acted without integrity.

50. The Tribunal agrees with the Respondent that the Applicant, failed to uphold the highest standard of integrity. She was in a position of influence and authority by way of her position with the Organization, and she played a significant role in the awarding of the contract to ITSS, and by repeatedly suggesting and inquiring about the possibility of hiring her brother and her other candidates, she placed undue pressure on ITSS to accede to her requests. It is true that, through her position, in the Organization and especially the significant role she played in the procurement of ITSS, the Applicant held considerable influence and authority. For instance, the Applicant was not only responsible for communicating the outcome of the procurement process to ITSS but also its management. To then turn around and ask the vendor for favours regarding execution of the contract was a serious lapse of integrity with dire consequences on the Organization's reputation.

51. The Applicant proposes that she submitted the names to ITSS upon their request for staff members. She referred the Tribunal to a meeting held on 8 November 2017 where a representative of ITSS raised the requirement of staff. She further referred the Tribunal to the minutes of an HCC meeting at paragraph 3.06(c) which makes reference to the fact that the statement of works and technical part of the contract recommended that the vendor hire current and ex-individual contactors ("ICs") and that during the bidder conference, all vendors were interested in hiring ICs as that would ease their efforts especially at the initial period of the contract.

52. The Respondent has disputed these facts and argues that the Applicant was informed by ITSS that it already had employees. It is therefore, not correct that ITSS asked for assistance from the Applicant to identify candidates. The Tribunal finds the Respondent's argument more probable than that of the Applicant because the Applicant has not sufficiently proved that she was acting on ITSS's request. The unnamed ITSS staff member's request does not appear in any of the Applicant's submissions. The Chief Engineer of UNISFA, Mr. Haddadin disputed having been

privity to this request and the HCC minutes which shows that Mr. Haddadin was in attendance are not relevant either on the issue as they do not contain any express or implied request for the Organization to assist ITSS with recruitment procedures.

53. Further, the Applicant alleges that she submitted the name of Dr. Mekonnen in particular because he was an asset to the Organization since he was already on the ground, knew the area and did not need a visa. The Respondent disputes this and argues to the contrary, that neither the Organization nor the vendor raised any concerns with visa processes for this particular contract.

54. The Tribunal finds that these factors do not exonerate the Applicant from the misconduct. As an international civil servant, the Applicant ought to have acted with integrity. Her actions compromised the reputation and image of the Organization.

Staff regulation 1.2 (g)

55. The regulation provides that 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. Nor shall staff members use their office for personal reasons to prejudice the positions of those they do not favour.

56. The Applicant admitted having asked favours from a vendor with whom she was interacting through her official duties. She submitted her brother's name and CV to ITSS to be considered for a job with ITSS in order for ITSS to execute a contract awarded to it by the Organization. She also submitted names of other individuals that she favoured, including one Dr. Mekonnen, to be considered for jobs. The Applicant also conceded that she gained the knowledge through her office and her official functions that ITSS would be requiring staff members. The Applicant attempted to enrich her brother, Dr. Mekonnen and others using her official connections to get them employment with a vendor. She attempted to use her office for the private gain

of her brother and her acquaintances, including Dr. Mekonnen, in violation of regulation 1.2 (g)⁷.

Staff regulation 1.2(m)

57. A conflict of interest occurs when a staff member's personal interests interfere with the integrity, independence and impartiality required by the staff member's status as an international civil servant and that when an actual or possible conflict of interest does arise, the conflict shall be disclosed by staff members to their head of office, mitigated by the Organization and resolved in favor of the interests of the Organization.

58. The Tribunal agrees with the Respondent that advocating for the hiring of her brother and other acquaintances, the Applicant used her office for their private gain. This constituted a conflict of interest as described in regulation 1.2(m) because: (i) the Applicant was motivated by her personal interests in submitting her brother's and acquaintances' names to be considered for jobs; (ii) as found above, in doing so she compromised her integrity as an international civil servant and brought the image of the Organization into disrepute; and (iii) the Applicant did not disclose either to head office or in the HCC minutes or the alleged meeting of 8 November that she had a list of suitable candidates to be considered for jobs in ITSS so that any possible conflict could be resolved in favour of the interests of the Organization⁸.

Staff rule 1.2(k)

59. Staff members shall neither offer nor promise any favour, gift, remuneration or any other personal benefit to another staff member or to any third party with a view to causing him or her to perform, fail to perform or delay the performance of any official act. Similarly, staff members shall neither seek nor accept any favour, gift, remuneration or any other personal benefit from another staff member or from

⁷ Masri 2010-UNAT-098, para 39.

⁸ Ganbold 2019-UNAT-976, para 23.

any third party in exchange for performing, failing to perform or delaying the performance of any official act.

60. In violation of the above provision, the Applicant in her own statements conceded that she submitted her brother's CV and those of her other acquaintances to ITSS so that ITSS can consider employing them. The perception is that she was calling in a favour in exchange for the role that she played in awarding ITSS the contract. It is clear that the Applicant through her position as OiC of the UNISFA Procurement Section and Buyer in this procurement process had performed an official act and she in turn sought favours for her personal benefit through her brother and her friends, contrary to the regulations.

Whether the sanction is proportionate to the offence

61. When the Tribunal is considering the proportionality of a sanction, the United Nations Appeals Tribunal ("UNAT") has reiterated that:

In the context of administrative law, the principle of proportionality means that as administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective.⁹ Any disciplinary measure imposed on a staff member must be proportionate to the nature and gravity of his or her misconduct.¹⁰

62. The sanction imposed on the Applicant in the instant case was not the most severe under the circumstances. The Respondent considered that the Applicant held a position of influence and authority in procurement processes in the Organization. Hence her conduct had an adverse impact on the reputation and image of the Organization. Her misconduct was serious, and the Organization could have used its

⁹ *Akello* 2013-UNAT-336, para. 41, citing *Sanwidi* 2010-UNAT-084, para. 39.

¹⁰ Staff rule 10.3(b).

discretion to terminate the Applicant's services¹¹, however it took mitigating factors into consideration and instead the Applicant was allowed to remain in employment. The effects of her sanction expired on 21 September 2021. She is now eligible for promotion.

Whether the staff member's due process rights were respected

63. "The essential question regarding procedural fairness is whether a staff member was adequately apprised of any allegations of misconduct and had a reasonable opportunity to make representations before action was taken against him. The Tribunal is generally satisfied that the key elements of the rights of due process are met when the staff member was fully informed of the charges against him, the identity of his accusers and their testimony and as such, was able to mount a defense and to call into question the veracity of their statements."¹²

64. UNAT has further given guidance to the UNDT that:

Only substantial procedural irregularities will render a disciplinary measure unlawful. Even a very severe disciplinary measure like separation from service can be regarded as lawful if, despite some procedural irregularities, there is clear and convincing evidence of [grave misconduct]¹³.

65. In the case at bar the Applicant averred that her due process rights were not protected because: (i) the OIOS investigators had taken depositions of two witnesses together. She alleged that this conduct by the investigators violated the principle of confidentiality in disciplinary investigations; (ii) that the audio recording of the interview shows that the witnesses assisted each other in answering questions and supplemented each other's answers, some of them constituting improvised versions; (iii) that the Respondent relied on WhatsApp messages which were not subjected to forensic examinations; (iv) the sanction letter was not sufficiently reasoned; and (v) the Applicant was charged before the Administration had gathered all the evidence in

¹¹ *Jenbere* 2019-UNAT-935.

¹² *Andriantseho* 2021-UNAT-1146/Corr. 1, para 57.

¹³ *Sall* 2018-UNAT-889, para 33.

the case and it took three months before one witness' statement was shared with the Applicant for her comments. The Applicant, however, does not show how these flaws affected the outcome of the case considering that the facts were admitted. The Applicant knew the nature of the allegations against her, was aware of the particulars of the allegations and the identity of the witnesses. She was at liberty to ask for clarity or confront her accusers. She has not alleged that she was prevented from exercising any of these rights during the investigations. The Tribunal finds that the Applicant's due process rights were respected. In terms of the investigation's procedures, the Tribunal finds that the anomalies relating to confidentiality or sharing notes as alleged by the Applicant were not substantial enough to render the decision unlawful.

Conclusion

66. The Tribunal wishes to emphasize sentiments expressed more than a decade ago by UNAT that:

Staff members exercising procurement functions are required to conduct themselves, from an objective standpoint, in an impartial and honest way and act in the interests of the United Nations only. To comply with this duty, staff members must be seen to act with integrity, obtain no personal benefit from third parties and not engage in any conduct which could create the impression of favouring third parties, that is to say, they must be and appear to be above reproach, particularly when interacting with persons or entities who could potentially become involved in supplying goods or services to the Organization, or are currently in such a relationship, like vendors.¹⁴

JUDGMENT

67. The Tribunal may interfere with the Secretary-General's discretion in disciplinary matters where it finds that the exercise of that discretion is unlawful. The Applicant has a duty to show that the discretion was exercised unlawfully leading to a violation of her employment rights. In this case the Tribunal finds that the discretion

¹⁴ *Masri* 2010-UNAT-098, para 37.

was lawful. The application is dismissed.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 10th day of January 2022

Entered in the Register on this 10th day of January 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi