



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/043

Judgment No.: UNDT/2022/041

Date: 9 May 2022

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BWALYA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Edwin Nhliziyo

Counsel for the Respondent:
Esther Shamash, UNDP

Introduction

1. By an application dated 8 April 2019, the Applicant is contesting the disciplinary measure imposed on him of separation from service with compensation *in lieu* of notice and without termination indemnity.

2. Pursuant to Order No. 176 (NBI/2020), the Respondent filed an amended reply on 22 September 2020 urging the Tribunal to dismiss the application in its entirety.¹

3. The Tribunal received oral evidence from the Applicant, from Ms. Helina Tadesse, Programme Specialist, United Nations Development Programme Country Office in Ethiopia (“UNDP Ethiopia”), Mr. Janvier Wussinu, then Deputy Country Director, UNDP Ethiopia and from Mr. Assefa Gebrehiwot, then Head of Procurement, UNDP Ethiopia for the Respondent. The Applicant called Dr Eyob Tesfaye, Team Leader, UNDP Economic Growth and Poverty Reduction, as his witness. The application is dismissed for reasons given below.

Facts

4. On 3 April 2011, the Applicant received his first appointment as a staff member with UNDP Ethiopia as an Economics Advisor at the P-5, step 4 level. On 1 July 2013, he was appointed Country Director, UNDP Ethiopia, at the D-1, step 1 level. On 11 June 2017, the Applicant was appointed Country Director in the UNDP Country Office in Nigeria (“UNDP Nigeria”) at the D-1, step 6 level. At the time of the events giving rise to this case, the Applicant was the UNDP Ethiopia Country Director.²

5. On 9 April and 21 July 2014, the Applicant, Ms. Tadesse and the Ethiopian

¹ The original reply was filed on 10 May 2019 but was not submitted in the appropriate form and within the 10-page limit.

² Amended reply, section II(A).

Minister for Agriculture (“MOA”) had a meeting to discuss renovating and refurbishing the National Soil Testing Center (“NSTC”).³ It was the understanding of both the Applicant and Ms. Tadesse that the Minister wanted the contract to be awarded to Digata.

6. It is alleged that on 31 July 2014, the Applicant, Dr. Tesfaye and Ms. Tadesse had a meeting at which Ms. Tadesse was instructed to draft two documents: a fraudulent Memorandum of Understanding (“MOU”), to be signed by the MOA and Digata, and a Letter of Request (“the Formal Request”).⁴ Ms. Tadesse prepared and transmitted the two documents to the Applicant and Dr. Tesfaye by email on 31 July 2014.⁵

7. On 14 August 2014, Dr. Tesfaye was proceeding on leave and left handover notes to UNDP Ethiopia Programme Staff. Item No. 10 of the handover notes instructed Ms. Tadesse to follow up on the signing of the MOU between MOA and Digata.⁶

8. In a letter dated 25 August 2014, the Minister of MOA, informed the Applicant, *inter alia*, that:

Currently, the Ministry of Agriculture with the support of UNDP would like to continue implementing NAPQI by renovating & upgrading the National Soil Testing Centre (NSTC) Laboratory. The core mandate of the project is to bring about a quality-driven paradigm shift at the NSTC laboratory in both expectations and in the desire to do things differently with a renewed mindset and professional commitment. The project aims to renovate and upgrade the NSTC facility into a state-of-the-art testing laboratory for the analysis of agricultural soils.

Given that the Ministry of Agriculture has successfully worked with Digata Industries in two other similar projects over the past four years, as indicated earlier, it would like to continue working with Digata

³ Ibid., Annex 3, Exhibits 17, 20 and 22.

⁴ Ibid., section III(A) and Annex 3, Exhibit 31.

⁵ Ibid., Annex 3, Exhibit 23.

⁶ Ibid., Annex 3, Exhibit 29.

Industries in this current project as well. Ministry of Agriculture would therefore like to request UNDP to arrange a contract for Digata Industries to undertake the renovation and upgrade of NSTC based on the both attached Terms of Reference.⁷

9. On 27 August 2014, Mr. Gebrehiwot addressed an email to Mr. Wussinu in which he expressed his reservations about the request from the MOA. He stated,

I have discussed with [Ms. Tadesse] and reviewed the request from MoA. I see the following issues.

The ministry entered an MOU with the private firm. This is not a contract, but it is a promise to engage the firm in future projects. I don't understand the purpose of a government office entering such an agreement with a private firm. From procurement point of view it violates all procurement principles. The MOU cannot be taken as a basis for UNDP to engage the firm.

The TOR tries to combine study of comprehensive requirement (personnel, equipment, structure, etc..) and actual implementation of the renovation and upgrade of the center. This cannot be done in one go through any of the procurement methods, as one needs to do the first part before they can submit a proposal on the second.

A study by an IC [Individual Consultant] or firm should come up with complete requirements report with detail schedule of equipment and specifications, training requirements, etc...

The TOR clearly mentions the firm. This is not acceptable.

From my discussion with [Ms. Tadesse] the case will cost around USD 900K. This is a huge contract. I don't think RACP [Regional Advisory Committee on Procurement] or ACP [Advisory Committee on Procurement] will approve this, **as we don't fulfil none of the factors required for direct contracting.**

My recommendation is that the MoA should handle this case. **If they want us to do it, we will need to launch two consecutive processes as indicated above.** (Emphasis added).

10. Mr. Gebrehiwot followed up with an email to the Applicant on 18 September 2014 advising him that he was following an improper procurement process.

11. On 22 October 2014, the Applicant, on behalf of UNDP Ethiopia, endorsed

⁷ Ibid., Annex 3, Exhibit 32.

the Consultancy Contract between MOA and Digata.⁸

12. On 18 November 2015, the UNDP anti-fraud hotline email account received two complaints alleging corruption in the award of the National Soil Testing Centre project to Digata Industries Public Limited Company (“PLC”) (“NSTC project”).⁹

13. On 23 April 2016, a local Ethiopian newspaper, The Reporter, published an article titled “Ministry denies blame against misuse of UNDP Fund” in reference to the NSTC project, the article alleged misuse of UNDP funds, reporting that the Ethiopian Ministry of Agriculture (“MOA”) hired Digata PLC in violation of formal bidding procedures exercised by public agencies in the country.¹⁰

14. In January 2017, the UNDP Office of Audit and Investigations (“OAI”) fielded an investigative mission to UNDP Ethiopia. The Applicant was notified that he was a subject of an investigation on 15 February 2017. The Applicant was interviewed by OAI on 22 February 2017. On 9 August 2017, OAI sent the Applicant a copy of the draft investigation report and requested that he provide comments and countervailing evidence by 23 August 2017. On 21 August 2017, the Applicant requested an extension of the deadline to provide his response. OAI granted this request, extending the deadline to respond to 20 September 2017. On 17 September 2017, the Applicant sent OAI his comments on the report. After reviewing the Applicant’s comments, OAI determined that the information provided did not warrant any changes to the investigation report.¹¹

15. By letter dated 12 July 2018 from Mr. Bruce McCarron, Officer-in-Charge, UNDP Bureau for Management Services (“BMS”), the Applicant was charged with instructing a UNDP staff member to forge a backdated MOU and making a misrepresentation in a second document, the Formal Request, intentionally acting to avoid or deviate from Financial Regulations, Rules and Procedures through the

⁸ Ibid., Annex 3, Exhibit 41.

⁹ Ibid., at section II(B) and Annex 3, Exhibits 2 and 3.

¹⁰ Ibid., Annex 10.

¹¹ Ibid.

creation of such documents, and demonstrating favouritism in the award of a contract.¹²

16. The Applicant provided his response to the charges on 16 August 2018, and additional supporting documents on 17 August 2018.¹³

17. Following a review of the evidence, on 8 January 2019, UNDP concluded that the charges were substantiated. On 8 January 2019, the Applicant was imposed with the sanction of separation from the Organization with compensation *in lieu* of notice but without termination indemnity.¹⁴

Submissions

The Applicant's case

18. The Applicant's case is summarized below.

a. The charge that he instructed a UNDP staff member to forge and backdate an MOU to avoid the UNDP procurement process is defective on the face of it and cannot be sustained. The staff member in question, Ms. Tadesse, never made that claim against him. She said it was either the Applicant or her Supervisor, Dr. Tesfaye, who gave her the instruction.

b. No good reason was given as to why a backdated MOU was needed and by whom. The possibility that Ms. Tadesse might have misunderstood what was intended was never considered by the investigators. This is consistent with the fact that: Ms. Tadesse could not remember which of her two Supervisors gave her the instruction; there was no logical reason why the MOU needed to be backdated because a current date would have served the purpose; and both the Applicant and Dr. Tesfaye have denied that Ms.

¹² Ibid, Annex 5.

¹³ Ibid., Annex 6(B).

¹⁴ Ibid.

Tadesse was instructed to backdate the document.

c. Ms. Tadesse never reported the incident in which she claims she was instructed to perform an illegal act until she was confronted by the investigators, prompting the response from Dr. Tesfaye that she was trying to shift blame. It sounds farfetched that Ms. Tadesse would not be sure which one of her two Supervisors gave her the instruction to draft and backdate the MOU and nobody “in their right mind would ask another staff member to commit a crime in front of a witness”.

d. The charges are based on an investigation report that is “replete with lies and distortions” that call into question the qualifications, competence, fairness and independence of mind of the auditors and investigators themselves. The facts were not established to the required standard of proof.

e. In addition to relying on a false or mistaken narrative by Ms. Tadesse to build the case against the Applicant, UNDP also relied on allegations received from a competitor of Digata Industries Public Limited Company (“Digata”) who had his own axe to grind.

f. The investigators never entertained the possibility that Ms. Tadesse was lying to cover up her tracks if the backdating was done to facilitate a fraud involving the President of Digata and the Ethiopian Minister of Agriculture. It is strange that the investigators did not see it necessary to question these two people to uncover the truth.

g. In all references to the MOU by both the Applicant and Dr. Tesfaye, they spoke in the present. According to the Letter of Intent received from the Ethiopian Government, there was in existence an MOU signed in 2011. There were potentially two MOUs. That was the extent of the Applicant's knowledge until he was confronted with the actual MOU purporting to have been signed in 2011 during his interview with investigators. It was the first time he was seeing the document.

h. The UNDP office in Addis Ababa, like the Government, looked forward to working with Digata on the NSTC renovations even before the Applicant's involvement as far back as May 2014. Some key emails between Ms. Tadesse and the President of Digata were not copied to the Applicant, contrary to office procedures. The investigators either failed to notice these discrepancies as red flags or chose not to address them.

i. The investigation report and interview statements are replete with inconsistencies, distortions and outright fabrications. The investigators invented facts.

19. The Applicant prays for rescission of contested decision, reinstatement and compensation for public humiliation.

The Respondent's case

20. The Respondent submits that there is clear and convincing evidence that the Applicant engaged in misconduct by instructing Ms. Tadesse to fraudulently backdate an MOU.

a. On 31 July 2014, in a meeting with the Applicant and her Team Leader, Dr. Tesfaye, Ms. Tadesse was instructed to draft two documents: an MOU backdated to 2011, to be signed by the Ethiopian MOA and Digata and a fraudulent Formal Request which would misrepresent that the MOU had indeed been signed in 2011. While Ms. Tadesse could not remember whether it was the Applicant or Dr. Tesfaye who had uttered the instruction, she understood that the Applicant, who was the most senior staff member present, at least endorsed this instruction.

b. Following the 31 July 2014 meeting in which she was instructed to prepare the two documents, Ms. Tadesse sent the Applicant the backdated MOU for his review. Had Ms. Tadesse backdated the MOU of her own accord

and behind the Applicant's back, she would not have sent it to him for his approval.

c. The Applicant's claim, that he did not read Ms. Tadesse's email and did not give her his approval for the MOU, is undermined by the fact that on the same day, Ms. Tadesse proceeded to send the MOU to the President of Digata. This indicates that, as he had been requested, the Applicant had approved the MOU and instructed Ms. Tadesse to send it to Digata, although he chose not to do so in writing.

d. In her email to the President of Digata, Ms. Tadesse indicated that the telephone call with Digata, to which she had referred in her first email to the Applicant, and which was to include the Applicant, had also taken place and she copied the Applicant on this email. Had Ms. Tadesse been acting of her own accord and behind the Applicant's back, she would not have copied him on the email in which she shared the fraudulent MOU with an outside vendor without his approval, which she had requested earlier. Neither would she have asserted that a telephone call, which as of that morning the Applicant had been meant to participate in, had taken place in the afternoon.

e. The Applicant argues alternatively that Ms. Tadesse misunderstood his instruction. He claims that she was not supposed to draft a backdated MOU, but only an MOU which would assert that the MOA and Digata had worked together since 2011. However, if indeed the Applicant had believed that all that was required was an assertion that the MOA had been working with Digata since 2011, then the assertions to that effect in the MOA's Formal Request to UNDP and in the Terms of Reference for the renovation would have sufficed. An MOU which also asserted, retroactively, that the MOA and Digata had worked together for four years would have served no purpose, as it would have added nothing to the assertions in the existing documents.

f. The evidence shows that to the contrary, the Applicant wanted an MOU which would purport to be a forward-looking document signed in 2011. In his response to the charges, the Applicant wrote that after the Government made its request to him that they wanted Digata to perform these services, he needed to be assured that the relationship between the Government and Digata was formalized. That was the reason for the MOU. This statement only makes sense if that MOU purported to be signed in 2011 as a forward-looking statement of intent. Unlike another assertion that merely duplicated the existing documents, a forward-looking agreement, made in 2011, to work together in the future would indeed have formalized the relationship between the Government and Digata.

g. On the following day, 1 August 2014, the Applicant specifically instructed Ms. Tadesse to wait for the signed MOU before sending the draft Terms of Reference and Consultancy Contract to Procurement. This indicates that the Applicant believed that the MOU was essential to underpin the MOA's contract with Digata.

h. Ms. Tadesse's statement to OAI, that the Applicant as Country Director, in the presence of her supervisor, either gave or endorsed the instruction to backdate the MOU and misrepresent the date of the MOU's signature in the Formal Request, together with the two corroborating emails of 31 July 2014, demonstrate clearly and convincingly that the Applicant was responsible for instructing Ms. Tadesse to backdate the MoU.

21. The Applicant's claims are contradictory and unsupported by the evidence.

a. At the crux of the Applicant's defence is his claim that he was not aware that the MOU was fraudulently backdated because he did not read Ms. Tadesse's emails of 31 July 2014. His claims in this regard are contradictory and are not supported by the evidence.

b. In his application, he states that “he remembers being copied on the [first] email and might have opened it on the morning of 31 July 2014 but he has no recollection of browsing through it.” The Applicant was not just “copied on [that] email”, however: it was addressed to him, using his first name.

c. His current claim, that he read the draft contract but not the MOU, contradicts his earlier admission that he “skimmed” the MOU.

d. The Applicant admitted that on 25 August 2014, he received the MOU and saw that it was dated in 2011 and claimed that he had been previously unaware of this document. But he was not unaware of it: this was the same MOU that, on 1 August 2014, he had specifically instructed Ms. Tadesse to wait for, because he “needed to be assured that the relation between the Government and Digata was formalized.”

e. The Applicant was the UNDP official responsible for UNDP’s operational and programmatic activities in Ethiopia. It was he who had financial authority for project approval. He retained the responsibility for internal controls in UNDP Ethiopia, including for the consistent application of UNDP’s Financial Regulations and Rules, and for the establishment and implementation of adequate internal controls to ensure the integrity of financial transactions. The Applicant had been warned that there were irregularities with regard to Digata; he knew that some people within the office were uncomfortable with Digata sole source status. It is inconceivable that someone in this position could have been paying so little attention that he failed to review the MOU when it was sent to him expressly for his review; failed again to notice that it was backdated when he was copied on the email in which it was shared with an external vendor, and then completely forgot about it, failing to recognize it when it came back to him, a third time, in support of a formal request from the Government.

f. On 23 April 2016, a report in the local media published allegations about the misuse of UNDP funds in connection with Digata and the NSTC renovation. Had the Applicant truly been ignorant of the backdated MOU, this would surely have prompted him to go back and read the documents. Had he done so, he would have seen that an MOU prepared by a UNDP staff member under his supervision was backdated, and he would have been obliged to report this. The Applicant took no such action. It is not credible that the Applicant could have remained unaware of the fraudulent MOU after that date, and the fact that he took no action then supports that he was aware that the MOU was fraudulent all along.

g. The Applicant claims in his application that “[e]ven if [he] had reviewed the template and failed to detect that it was backdated, that by itself would not constitute misconduct, unless it was shown that the Applicant had been grossly negligent.” The Respondent submits that, were the Tribunal to find that the Applicant had indeed failed to take note – in this case on four separate occasions – that the MOU was backdated, this would easily amount to gross negligence. However, the evidence indicates that the Applicant was not grossly negligent, but that he was acting intentionally and was well aware that the MOU was backdated.

22. The Applicant’s credibility is further damaged by several other inconsistencies.

a. The Applicant suggests that there may have been two MOUs both signed in 2011. However, the MoU at issue was signed in 2014 not 2011, and the Applicant instructed Ms. Tadesse to draft it because he believed that an MOU from 2011 was required and there was no such MOU. Had there been another MOU from 2011, there would have been no need for the Applicant to create a second, fraudulent one.

b. The Applicant questions whether there was any fraud at all. However, the Applicant himself admitted that the MoU was fraudulent. In his Response to the charges: “[a]n MOU drafted by [Ms. Tadesse] was backdated to 2011. This is the only crime that has been established in this case.”

23. The Applicant instructed Ms. Tadesse to misrepresent in the Formal Request.

a. Ms. Tadesse claimed that in the meeting with the Applicant and Dr. Tesfaye in which she was tasked to draft the backdated MOU, she was also instructed to draft the fraudulent Formal Request from the MOA to UNDP, which would misrepresent that the MOU had been signed in 2011. In his application, the Applicant implies that Ms. Tadesse drafted the Formal Request of her own accord, but this is contradicted by the Applicant’s comments on the draft investigation report. He also claims that the first time he read the Formal Request was when it was presented to him in his interview with OAI, but this is contradicted by the interview transcript, which shows that, before OAI Investigators offered to send him the Formal Request, the Applicant was able to describe it to them.

b. Taken together, the evidence that the Applicant instructed Ms. Tadesse to backdate the MOU, Ms. Tadesse’s statement that she was instructed to misrepresent in the Formal Request and the Applicant’s demonstrable falsehoods relating to that Formal Request amount to clear and convincing evidence that the Applicant also instructed Ms. Tadesse to misrepresent in the Formal Request, or that as Country Director, he endorsed that instruction.

24. The Applicant acted to avoid or deviate from the Financial Rules.

a. The fraudulent MOU and Formal Request which the Applicant instructed Ms. Tadesse to prepare were intended to justify the procurement of Digata and avoid the competitive bidding exercise required by Rule 121.03 and 121.05 of UNDP’s Financial Regulations and Rules. Paragraph 25(g) (formerly 24(g)) of the UNDP Legal Framework prohibits “[a]ction or

omission to avoid or deviate from Financial Regulations, Rules and Procedures.”

b. Although he denies it in his application, in his response to the charges, the Applicant admitted that he was aware that the Government wanted UNDP to contract Digata for a project valued at USD1 million without competitive bidding. Mr. Gebrehiwot also told OAI that the Applicant wanted to contract Digata without competitive bidding. The evidence that the Applicant acted to avoid the requirement for competitive bidding is clear and convincing.

25. The Applicant demonstrated favouritism in the award of a contract.

a. Paragraph 25(i) (formerly 24(i)) of the UNDP Legal Framework prohibits “favouritism in the award of a contract to a third party.” In his application, the Applicant concedes that “the plan” was to award the contract to Digata. In his response to the charges, the Applicant explained that though he did not personally favour it, he was trying to accommodate the MOA by exploring ways in which UNDP might favour Digata.

b. Mr. Wussinu stated that the Applicant had instructed him to comply with the request to contract Digata without a competitive bidding process and had personally vouched for Digata.

c. Mr. Gebrehiwot stated that the Applicant had pressured him to approve the contract because the Applicant had already promised the MOA that it could contract Digata, even though, based on the project requirements, Digata was not the right company for the job. Digata was ultimately awarded the contract, and the Applicant endorsed this contract. The evidence that the Applicant demonstrated favouritism is clear and convincing.

26. The sanction imposed by the Respondent was not unreasonable or disproportionate. Though the Applicant makes numerous allegations of deception or bad faith on the part of the OAI Investigators, he provides no evidence for these

claims, nor any evidence of procedural irregularities in the disciplinary process in his matter.

Considerations

27. In disciplinary cases, this Tribunal is called upon to examine the following: (i) whether the facts on which the disciplinary measure is based have been established (ii) whether the established facts amount to misconduct; (iii) whether the staff member's due process rights were respected and (iv) whether the sanction is proportionate to the offence. The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred. Where termination is the possible outcome such as in this case, the standard of proof is one on clear and convincing evidence meaning that the probability that the misconduct occurred is very high¹⁵. This is captured in *Turkey*, quoting *Mizyed* and others¹⁶ that:

Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT is “to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence”. And, of course, “the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred”. “[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence”, which “means that the truth of the facts asserted is highly probable”.¹⁷

The Charges

28. The Administration found, through that the evidence obtained by OAI that the Applicant:

¹⁵ *Suleiman* 2020-UNAT-1006, para. 10, also see *Nadasan* 2019-UNAT-918, para.38; *Siddiqi* 2019-UNAT-913, para. 28.

¹⁶ *Mizyed* 2015-UNAT-550, para. 18, citing *Applicant* 2013-UNAT-302, para. 29, which in turn quoted *Molari* 2011-UNAT-164.

¹⁷ *Turkey* 2019- UNAT-955, para. 32.

- a. Instructed the Programme Specialist to draft a backdated MOU and to misrepresent, in a second document, the date on which that MOU had been signed.
- b. Acted to avoid or deviate from UNDP's Financial Regulations, Rules and Procedures as the fraudulent MOU he instructed the Programme Specialist to prepare was intended to justify the direct procurement of Digata by UNDP and avoid a competitive bidding exercise as required by UNDP's Financial Regulations and Rules.
- c. Demonstrated favouritism to Digata in the award of a contract.

29. The Respondent concluded that the Applicant's actions constituted misconduct under:

- a. Staff rule 10.1 which provides that:
 - (a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.
- b. Paragraph 23 of the UNDP Legal Framework providing that:

... such a failure could be deliberate (intentional or wilful act), or result from an extreme or aggravated failure to exercise the standard of care that a reasonable person would have exercised with respect to a reasonably foreseeable risk (gross negligence) or from a complete disregard of a risk which is likely to cause harm (recklessness).
- c. Staff regulation 1.2(b) provides:

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.

d. Paragraph 24(e) of the UNDP Legal Framework prohibiting:

[m]isrepresentation, forgery, or false certification, such as, but not limited to, in connection with any official claim or benefit, including failure to disclose a fact material to that claim or benefit ...

e. Section 3 of the UNDP Policy on Fraud and other Corrupt Practices applicable at the time (UNDP Anti-Fraud Policy) defining fraud as

Any act or omission that intentionally misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation.

f. UNDP's Guidelines and Procedures on National Implementation by the Government of UNDP Supported Projects, ("Guidelines on NIM") issued on 1 July 2011 and applicable at the time, providing on page 109, that,

... in any procurement process where cost exceeds USD2,500, it is mandatory to obtain a minimum of three (3) competitive bids, in order to demonstrate the competitiveness of the process and to obtain the lowest evaluated price, as applicable.

30. The Applicant's main argument is that the Respondent's witness, Ms. Tadesse, lied to the investigators that she was instructed by the Applicant to forge an MOU. In particular, the Applicant through cross examination of Ms. Tadesse enquired whether at the meeting of 31 July with the Applicant, they discussed an MOU. The witness said they discussed a letter of intent not an MOU. She qualified her response by adding that the letter of intent which they discussed and prepared was adapted including the fraudulent date into an MOU, only the title of the document changed from letter of intent to MOU¹⁸. The Applicant also asked the witness several questions relating to her communication with the representatives of the MOA and Digata regarding the MOU, suggesting that she had no authority from the Applicant to engage in these discussions. Ms. Tadesse was also asked about the contents of the contract in particular the sum of the contract. The Tribunal ruled that this line of

¹⁸ Transcript of the proceedings dated 24 January 2022 at page 22.

questioning was irrelevant as the contract sum was not an issue in the present proceedings but the date of the MOU. Through the hearing the Tribunal found not only that Ms. Tadesse was a reliable and credible witness but that her testimony was coherent, consistent and corroborated by evidence pointing to a systematic plot that ensured that procurement rules and regulations were circumvented in favour of direct contracting of Digata as follows:

- a. Ms. Tadesse was firm during hearing that it was the Applicant who verbally instructed her, on 21 July 2014 after their meeting with the Minister of MOA, to forge a document to satisfy the Minister's wishes to work with Digata.
- b. In compliance with the instruction, Ms. Tadesse drafted the impugned MOU in the form of Letter of Intent and shared it with the Applicant in an email dated 31 July 2014 for his information.

From: Helina Tadesse [...]
To: Samuel Bwalya [...]
Cc: Eyob Tesfaye [...]
Sent: July 31, 2014 4:20:28 PM EAT
Received: July 31, 2014 4:24:00 PM EAT
Attachments: Letter of Intent.docx

Dear Sam,

As discussed this morning, I've prepared and attached a draft letter of Intent for your review and comment. I am available anytime this afternoon to contact Ato Girma, so please let me know when will be convenient for you.

Thanks,

Helina

- c. When the Applicant discussed with Head of Procurement about direct sourcing of Digata, he was advised that it could not be done as it was against

the rules and regulations¹⁹.

d. Evidence was produced in the form of handwritten notes dated 25 August 2014, from the Applicant to Mr. Wussin, then Deputy Country Director directing him to process the contract for Digata, but the Deputy Country Director refused to follow the directive because according to him, it was against procurement procedures to offer Digata a contract without a competitive bidding process. The note is reproduced below:

Please process the contract for Digata as requested in the attached letter + MOU. TOR are also attached²⁰.

31. The Applicant did not offer any contradictory evidence or challenge the authenticity of the above documentary evidence which directly connect him to the irregular activity. The Applicant opted not to offer any evidence whether in the form of a written or verbal statement²¹. He chose to remain silent.

32. According to the evidence from Ms. Tadesse, to directly contract Digata, there was need for proof to show that Digata had an existing continuing working relationship with the MOA dating back to 2011. To procure this proof, there was need for an agreement signed in 2011. This proof did not exist because there was no such continuing project between Digata and the MOA. The Applicant instructed Ms. Tadesse to create this document by forging the date²². Since the Team Leader, the Head of Procurement and the Deputy Country Director were not going to support this irregular procurement process, the Applicant had to go it alone using the most junior officer, Ms. Tadesse, to advise Digata and MOA how the contract could be awarded to Digata. Ms. Tadesse asserted that her communication with the two interested parties was on the advice of and sanctioned by her supervisors²³. Below are samples of the correspondence between Ms. Tadesse, and the two parties referring to the

¹⁹ Amended reply, Annex 3, Exhibit 38.

²⁰ Handwritten note filed pursuant to the Tribunal's direction on 22 September 2021.

²¹ Transcript of proceedings dated 23 August 2021, page 4.

²² Ibid., at pages 12 and 13.

²³ Transcript of hearing dated 23 August 2021, page 37.

fraudulent documents:

From: Helina Tadesse [...]

Sent: Friday, August 15, 2014 5:19 AM

To: getasil_69@yahoo.com

Subject: Draft letter and Terms of Reference - National Soil Testing Center

Attachments: ToR - Renovation and Upgrade of NSTC Laboratory.docx; Letter MoA - NSTC.docx

Your Excellency,

Your Administrative Assistant informed me that the MOU between MoA and Digata is now signed. I would therefore like to follow-up by sending you a draft letter for MOA requesting UNDP to sub-contract Digata to undertake the renovation and upgrade of the NSTC. I am also attaching a draft Terms of Reference for your review. The Terms of Reference also includes points that we discussed during our meeting in your office a month ago. Please let me know if I could be of further assistance to help in moving this process forward.

Sincerely,

Helina Tadesse [...]

Sent: Tuesday, August 19, 2014 3:19 AM

To: Girma Selassie

Subject: RE: MoU

Attachments: MoU MoA&DIGATA INDUSTRIES.PDF

Good Morning,

All is well here.

The MoU was signed by MoA last Friday. I got a copy yesterday (attached). I am now awaiting a letter from MoA requesting UNDP to prepare a contract for Digata. The letter should be sent either today or latest tomorrow.

Best regards,

Helina

From: Girma Selassie [mailto:amrig@pacbell.net]

Sent: Tuesday, August 19, 2014 7:44 AM

To: Helina Tadesse

Subject: RE: MoU

Good Morning Helina,

I hope all is well with you.

I thought that I should send this quick e-mail and enquire about the status of our project. Any news will be highly

appreciated.

Many Thanks,

Girma Selassie

President & CEO

DIGATA INDUSTRIES, INC.

33. The witness, Ms Tadesse, confirmed during the hearing that the emails concerned the fraudulent MOU which she had prepared under the direction of the Applicant as a letter of intent. With such clear and convincing evidence which is not undermined by any evidence to the contrary suggesting that the Applicant instructed his junior officer to commit fraud and that the Applicant favoured Digata through direct sourcing, the Tribunal is left in doubt that the facts are established.

(i) Whether the established facts amount to misconduct

34. The Tribunal recognises that the judicial review of decisions of whether misconduct has been established dictates that due deference be given to the Secretary-General to hold staff members to the highest standards of integrity and the standard of conduct preferred by the Administration in the exercise of its rule-making discretion. The Administration is better placed to understand the nature of the work, the circumstances of the work environment and what rules are warranted by its operational requirements²⁴.

35. The Respondent has proved that the Applicant's conduct was in breach of

²⁴ *Nadas an* 2019-UNAT-918, para. 41.

staff rules and regulations by exhibiting favouritism in procurement process. To this effect UNAT has counselled 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 vendors²⁵.

36. In favouring Digata by direct contracting it, the Applicant breached staff rule 10.1, paragraph 23 of the UNDP Legal Framework and staff regulation 1.2(b)

37. As Country Director, in instructing the most junior staff member within the chain of command in this procurement process, to forge a document and by acting on that document through his endorsement and approval of the Formal Request which was misrepresented, the Applicant breached the above cited rules and regulations in paragraph 36, additionally he violated paragraph 24(e) of the UNDP Legal Framework, Section 3 of the UNDP Policy on Fraud and other Corrupt Practices applicable at the time (UNDP Anti-Fraud Policy) and UNDP's Guidelines and Procedures on National Implementation by the Government of UNDP Supported Projects, ("Guidelines on NIM") issued on 1 July 2011.

(ii) Whether the staff member's due process rights were respected

38. It is well established that the essential question regarding procedural fairness is, "whether a staff member was adequately appraised of any allegations of misconduct and had a reasonable opportunity to make representations before action was taken against him or her. 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

²⁵ *Masri* 2010-UNAT-098, para 37.

charges against him/her, the identity of his/her accusers and their testimony and as such, was able to mount a defence and to call into question the veracity of their statements”²⁶.

39. The Applicant attacked the investigation process. In his opinion, the investigators were unprofessional, incompetent, inexperienced and liars. The Tribunal considered these allegations and ordered two witnesses not previously scheduled to testify, to appear at oral hearing to allow the Applicant an opportunity to confront these witnesses independently of the investigators. The Tribunal received evidence from witnesses other than Ms Tadesse that included the Deputy Country Director and the Head of Procurement who were non interested parties (not subjects of investigation in the disciplinary proceeding). The Tribunal also heard evidence from the Team Leader, Mr Tesfaye who was called by the Applicant.

40. What emerged from these witnesses’ testimonies, was the fact that interviewing the Minister and Chief Executive Officer of Digata to verify whether they signed a fraudulent MOU would not alter the charges of instructing a staff member to forge a document or favouritism; neither would corroborating evidence that Digata had successfully completed prior projects with MOA and that everybody but a few individuals were satisfied with its performance; nor indeed that the Applicant sought and took advice from procurement; nor that the Government wished to work with Digata and the Applicant was only implementing those wishes or indeed that the Country Office had prior to the Applicant's assuming his position considered sole sourcing of Digata.

41. Further, it transpired from the evidence that, the fact that procurement was not the Applicant's area of expertise or that he was a novice having just assumed the position of Country Director was contradicted by the oversight responsibility he held to oversee management of the procurement of Digata, to approve the Formal Request from the Ministry and endorse the MOU.

²⁶ *Andriantseho* 2021-UNAT-1146/Corr. 1, para. 57.

42. Furthermore, the charge was defective on the face of it because the Applicant was initially not specifically mentioned by the witness to have issued the instruction to forge a document. During trial, the witness was particular that the Applicant issued the instruction, and this was corroborated by circumstantial evidence namely (a) through email exchanges with the staff member, (b) through his endorsement of the fraudulent MOU and (c) through his approval of the misrepresented Formal Request both of which contained a 2011 date.

43. Indeed, there was no evidence to show that the Applicant and Ms. Tadesse were at cross purposes vis-à-vis the MOU and Formal Request. The witness was clear and precise that there was only one MOU under discussion at the material time and that once finalised, the whole package (MOU and Formal Request) were presented to the Applicant for his endorsement and approval without which the Minister's wishes would not have been carried out.

44. The Tribunal recalls the United Nations Appeals Tribunal precedent that proceedings in the Dispute Tribunal are administrative in nature and should not be turned into criminal proceedings which require strict rules of evidence and higher standard of proof, to wit, beyond reasonable doubt²⁷. It is only substantial procedural flaws that have the effect of changing the outcome of the disciplinary process in favour of the Applicant which may be taken into consideration to interfere with the Administration's decision²⁸.

45. In the case at bar, the Tribunal finds that the Applicant's due process rights were respected because he understood the charges against him, he had ample opportunity to seek clarification, he responded to the charges and gave his comments after what the record shows to be thorough consultations with his duly designated Counsel.

²⁷ See generally, *Wishah* 2015-UNAT-537.

²⁸ See *Andriatseho*, para 60.

(iv) Whether the sanction is proportionate to the offence

46. The Tribunal reminds itself that the Administration has a broad discretion in determining the disciplinary measure imposed on staff members because of wrongdoing. It is best suited to select an adequate sanction within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance. Thus, in determining the proportionality of a sanction, the Dispute Tribunal should observe a measure of deference, but more importantly, it must not be swayed by irrelevant factors or ignore relevant considerations²⁹.

47. The record shows that the Applicant as Country Director was responsible for applying UNDP's financial regulations and rules and implementing adequate internal controls to ensure the integrity of financial transactions and that as the second highest ranking official in UNDP Ethiopia, he was expected to be exemplary. The Respondent also considered the reputational damage suffered by UNDP Ethiopia. In mitigation the Respondent considered that the Applicant did not enjoy any monetary benefit from his actions. The misconduct was serious. The Respondent took relevant considerations and arrived at a proportionate sanction. The Tribunal is not convinced that the sanction may be interfered with.

Judgment

48. The Respondent having proved its case through clear and convincing evidence that the Applicant breached his terms and conditions of appointment, the application ought to and is hereby dismissed in its entirety.

²⁹ *Ali Halidou* 2020-UNAT-1070, para. 34.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 9th day of May 2022

Entered in the Register on this 9th day of May 2022

(Signed)

Eric Muli, Legal Officer, for

Abena Kwakye-Berko, Registrar, Nairobi