



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/012

Judgment No.: UNDT/2022/059

Date: 20 June 2022

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Nicole Nyamai

Counsel for the Respondent:

Angela Arroyo, UNDP

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

INTRODUCTION AND PROCEDURAL HISTORY

1. The Applicant is a former staff member of the United Nations Development Programme (“UNDP”). She filed an application with the United Nations Dispute Tribunal (“UNDT/the Tribunal”) in Nairobi on 30 January 2020 to contest the decision by the UNDP Acting Associate Administrator to impose on her the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity, in accordance with staff rules 10.1(a) and 10.2(a)viii). The Applicant seeks the following remedies: (i) rescission of the contested decision; (ii) dismissal of the Investigation Report as defective and unlawful; and (iii) 12 months’ salary as compensation for the unlawful separation and the continuous mental and emotional harm that she has suffered.

2. The Respondent filed a reply on 4 March 2020.

3. In accordance with Order No. 209 (NBI/2020) of 26 October 2020, the parties informed the Tribunal that the matter did not require a hearing, that they did not wish to adduce any oral evidence or file documents, and that they agreed to the matter being decided on the existing record.

4. By Order No. 065 (NBI/2022), the parties were requested, if they wished to do so, to file any closing submissions. On 10 June 2022, the Respondent filed his closing submissions, while the Applicant did not respond to the order.

FACTS

5. At the time the Applicant was separated from service, she was serving at the GS-7/10 level as an Executive Associate in the Office of the United Nations Resident and Humanitarian Coordinator (“RCO”), UNDP Kenya.¹ The Applicant was known

¹ Reply, annex 2, p. 247, line 2.

and referred to as “Dottie”.²

6. While conducting an investigation into allegations of procurement fraud against another staff member and a vendor at UNDP Kenya, the Office of Audit and Investigations (“OAI”) conducted a forensic analysis of the staff member’s digital devices, email communications as well as financial and procurement documentation and identified evidence of potential misconduct that may have been committed by the Applicant in 2015 during a procurement process.³

7. In January 2015, a procurement process was initiated for the United Nations Development Assistance Framework Meeting and the United Nations Country Team Annual Retreat (“UNDAF/UNCT conference”) in Kwale County, Kenya, for a conference space and hotel for participants. Although PK, the Head of the RCO; the PM, the RCO Coordination Assistant; JL, the RCO Coordination Specialist; and the Applicant worked together on coordinating the UNDAF/UNCT conference,⁴ PM was the designated focal point for the procurement process.

8. On 5 January 2015, PM emailed UNDP vendors requesting that they submit a quote (“RFQ”) for provision of services for the UNDAF/UNCT conference by close of business on 8 January 2015.⁵ Vendor DB submitted a bid on 6 January 2015; vendor LL submitted a bid and an amended bid on 7 and 8 January 2015; and vendor SBR submitted a bid and an amended bid on 8 January 2015.⁶ The bids were sent to PM who prepared an evaluation matrix, which she emailed to the Applicant and JL on 9 January 2015.⁷ The evaluation matrix reflected the amended bids provided by SBR and LL, showed that LL had the highest bid, SBR had the lowest bid, and recommended that SBR be awarded the contract. The Applicant did not respond to this email.⁸

9. On 10 January 2015, JL emailed the Applicant, PM and PK that: “*SBR has the*

² Ibid., p. 251, line 78.

³ Reply, annex 1, p.3, para. 3.

⁴ Reply, annex 5, p. 24, lines 322-323.

⁵ Reply, annex 2, pp. 5-9.

⁶ Ibid, pp. 15-29; 228-236

⁷ Ibid., pp. 11-13.

⁸ Ibid., p. 742.

lowest quote. We'll have to check with UNDSS if they have cleared SBR. If they have, which is a possibility, then we may have difficulty justifying LL".⁹ OAI did not find a response from PK, PM or the Applicant to this email.¹⁰

10. On 13 January 2015, after the deadline for submission of bids had passed, LL submitted an additional bid to UNDP with an email addressed to PM and the Applicant stating: "*Following a conversation between [the LL Executive Director] and Dottie, kindly find attached an amended quotation reflecting changes on the accommodation and conference rate [...]*". PM responded to LL with an instruction to "*resend the quote backdated to 06 Jan 2015*", which LL did, copying the Applicant.¹¹ PM claimed that she sent this instruction to LL based on verbal directions she had received from the Applicant.¹² The LL staff member, who prepared the bids and sent the email, confirmed that the LL Executive Director, had directed her to amend the bid and supplied the Applicant's name and email address.¹³ The LL Executive Director, however, denied knowing or having a conversation with the Applicant/Dottie about the UNDAF/UNCT conference procurement process.¹⁴ The Applicant confirmed that she had a conversation with the LL Executive Director about billing but did so because she thought the RCO had settled for LL and they were now working on finer details.¹⁵

11. PM prepared and signed a revised evaluation matrix that included the same bids for SBR and DR as were reflected in the 9 January 2015 evaluation matrix but reflected the new amended bid provided by LL on 13 January 2015 but backdated to 6 January 2015. Also, in the revised evaluation matrix, the requirement for breakout rooms was removed, where LL's quote was four times as much as the other hotels. As a result, LL had the lowest bid and was the recommended vendor for the procurement process. The contract was awarded to LL, which hosted the UNDAF/UNCT conference in Kwale County between 1 and 6 February 2015.

⁹ Ibid., p. 223.

¹⁰ Reply, annex 1, para. 61.

¹¹ Reply annex 2, pp. 237-247.

¹² Reply, annex 5, p. 242, lines 1465-1483.

¹³ Ibid., pp. 424-428, lines 990-1077.

¹⁴ Ibid., pp. 351-352, lines 985-994; p. 354, lines 1021-1030.

¹⁵ Reply, annex 2, pp. 336-341; lines 1993-2096.

12. PM was interviewed on 25 September 2017¹⁶; the LL Executive Director was interviewed on 22 September 2017¹⁷; and the LL staff member was interviewed on 24 September 2017¹⁸. OAI informed the Applicant on 8 March 2018 that she was the subject of an investigation and interviewed her on 15 March 2018¹⁹. PK was interviewed on 19 March 2018²⁰.

13. OAI provided the Applicant with a copy of its draft investigation report on 3 July 2018 for her review and comments.²¹ The Applicant provided her comments on 16 July 2018.²²

14. The Applicant was charged with misconduct by a letter dated 19 January 2019.²³ In her response to the charges, the Applicant raised concerns about redactions in some of the witness transcripts and claimed that her ability to mount a defence to the charges was compromised.²⁴ In view of her concerns, on 7 August 2019, the Applicant was provided with revised versions of the transcripts, with most of the redactions removed, for her review and comments.²⁵ On 21 August 2019, the Applicant replied, indicating that she did not have any further comments.²⁶

15. In a letter dated 6 January 2020, the Acting Associate Administrator, UNDP, informed the Applicant that based on the available evidence, including the Applicant's statements, there was sufficient evidence to establish that the Applicant had: (i) engaged in procurement fraud by "*assisting LL, a UNDP vendor, to present a bid after the deadline that purported to be compliant with the deadline and was lower than its original bid during a procurement process in January 2015*"; and (ii) misused her office by using her access to information about the procurement process to facilitate

¹⁶ Ibid., pp. 85-289.

¹⁷ Ibid., pp. 290-380.

¹⁸ Ibid., pp. 381-444.

¹⁹ Ibid., pp. 247-356.

²⁰ Reply, annex 5, pp. 6-84.

²¹ Reply, annex 2, pp. 936-937.

²² Ibid., pp. 942-950.

²³ Reply, annex 3.

²⁴ Reply, annex 4; annex 5, p. 2.

²⁵ Reply, annex 5, p. 1

²⁶ Ibid.

the procurement fraud. Consequently, the Applicant was informed of the decision to impose on her the measure of separation from service with no termination indemnities.²⁷

ISSUES

16. The Appeals Tribunal has clarified that “When judging the validity of the Secretary-General’s exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse”.²⁸

17. In disciplinary cases where termination is a possible outcome, the Administration must establish the alleged misconduct by “clear and convincing evidence”, which “means that the truth of the facts asserted is highly probable”.²⁹

18. The Dispute Tribunal examines the following elements in disciplinary cases:

- a. Whether the staff member’s due process rights were guaranteed during the entire proceeding;
- b. Whether facts were established by clear and convincing evidence;
- c. Whether the facts amount to misconduct; and
- d. Whether the sanction is proportionate to the gravity of the offence.³⁰

Were the Applicant’s due process rights guaranteed during the proceedings?

Submissions

19. The Applicant submits that her due process rights were not respected during the

²⁷ Reply, annex 6.

²⁸ *Sanwidi* 2010-UNAT-084, para. 40.

²⁹ *Turkey 2019-UNAT-955*, para. 32.

³⁰ *Ibid*; *Miyzed* 2015-UNAT-550, para. 18; *Nyawa* 2020-UNAT-1024.

investigation and disciplinary processes. The investigation and disciplinary processes were tainted by abuse of authority, discrimination, and harassment by the Organization. The investigation report upon which the sanction decision was based was grossly defective and highly selective. Four people were involved in the procurement process for the UNDAF/UNCT conference and yet she was the only one found guilty of alleged procurement fraud after the investigation. She did not award the bid to LL as she had no delegated authority to do so. The delegated authority lay with the Head of Procurement, MM, and the Operations Manager, JG, but they failed to notice or act on the anomaly. Crucial witnesses like JL, MM and JG were not interviewed or investigated.

20. The Applicant further submits that the five-year delay in the investigative and disciplinary processes is unconscionable. The investigation commenced in 2015 and yet the Applicant was informed of it only in 2018. She was then given only 7 days to respond to the allegations in the draft investigation report. After her response, it then took almost two years for the impugned decision to be made. This contravened section 85 of the UNDP Legal Framework for Addressing Non-Compliance with United Nations Standards of Conduct, which envisages that the investigation process and determination of a case should be completed within a maximum of 450 days. She was prejudiced by this lapse of time because it was difficult to remember specific facts, dates and discussions.

21. The Respondent submits that the Applicant's due process rights were respected during the investigation and disciplinary processes because OAI: informed her of the allegations against her before her subject interview; gave her an opportunity to respond to the allegations and evidence against her before issuance of its investigation report; interviewed all relevant witnesses during the investigation; and properly decided not to interview MM and JG. The Applicant was also given an additional opportunity to comment on the testimony of witnesses to the investigation after she raised concerns with redactions in the transcripts that had been initially provided.³¹

³¹ *Applicant* 2013-UNAT-302, para. 39.

22. The Respondent further submits that there was no undue delay during the investigation and disciplinary processes because the allegations against the Applicant came to light through a separate unrelated investigation that was conducted by OAI in Kenya in 2018. The lengthiness of the investigation is in part due to the Applicant's failure to timely disclose her conduct. Further, the Applicant has not submitted any evidence that she was harmed by any alleged delay.³² On the contrary, the Applicant benefitted from remaining in service with UNDP during the investigation and disciplinary proceedings with full salary.³³

Considerations

23. The Tribunal finds no indication that the Applicant was improperly singled out for disciplining. The investigative report demonstrates that other persons had also been interviewed as subjects of the investigation. The fact that other staff members may have engaged in similar conduct does not negate the responsibility of the Applicant for carrying out the conduct at issue.³⁴ If indeed the Respondent ultimately chose not to take any further steps in relation to these persons, this does not render the case against the Applicant selective on discriminatory basis. The Applicant, in any event, was disciplined for her individual acts.

24. As concerns the argument of failure to interview MM and JG, the Applicant has never alleged what facts they could possibly supply. Based on the investigative report, MM could have had hearsay knowledge confirming backdating the winning bid on instruction from the Applicant. The Tribunal agrees that interviewing MM would have been reasonable from the point of completeness of the investigation, it however sees no way how it could benefit the Applicant. As concerns JG, there is no indication he could have any relevant knowledge. However, the Applicant, who is represented by Counsel, did not request interviewing any witness whereas evidence against the Applicant is mainly garnered from documents contemporaneous with the events.

³² *Nasrallah* 2013-UNAT-310, para. 27; *Sina* 2010-UNAT-094, para. 3.

³³ *Nasrallah* 2013-UNAT-310, para. 27.

³⁴ *Atana*, UNDT/2013/068, para. 108; *Portillo-Moya*, UNDT/2014/021, para. 42.

25. Regarding the complaint about a short time for furnishing observations on the investigative report, the Applicant was given an additional opportunity to comment on the testimony of witnesses to the investigation after she raised concerns with redactions in the transcripts. On this point the Tribunal notes, *ex officio*, that portions that remained redacted after her intervention (mainly personal data of the interviewees, such as private emails and social media accounts, and facts regarding another procurement) do not have bearing on facts relevant for the case at bar. The Applicant did not claim any additional time after her final review of the investigative report, she does not claim that the time allotted caused her loss of any procedural opportunity, nor has she offered any new observations in her application to the Tribunal.

26. Finally, overall lengthiness of the investigative process, while regrettable, is not unusual given the scope of OIOS investigation where the Applicant's case emerged as an issue in the course of another matter. Whereas the Tribunal does not see merit in the Respondent's argument about the Applicant's "failure to timely disclose her conduct", it agrees with his argument that the Applicant benefitted from remaining in service with UNDP pending the completion of the investigation and disciplinary proceedings.

27. In conclusion, the Tribunal finds that the alleged failures and shortcomings in the investigation did not prejudice the Applicant's case.

Were the facts established by clear and convincing evidence?

Submissions

28. Relying on paragraph 111 of the Investigation Report, the Applicant submits that no evidence was adduced to establish that she had instructed PM to request LL to amend its quote. The bulk of the evidence indicating her involvement in the alleged procurement fraud is based upon suppositions and circumstantial evidence - just because she was copied on JL's 10 January 2015 email does not prove that she was actively involved in ensuring that LL won the bid. It is also clear that PM is not a credible witness. The Applicant admitted to having a telephone conversation with the LL Executive Director but did so in the context of discussing billing issues for the

UNDAF/UNCT conference. They did not discuss the procurement process.

29. The Respondent's case is that there was clear and convincing evidence that the Applicant engaged in serious misconduct. The uncontradicted evidence is that the Applicant: met with LL while the January 2015 procurement process was on-going; was aware that the January 2015 procurement process was still on-going when she had that meeting; and provided LL with inside information about the procurement process that allowed it to manipulate its bid to be the most competitive bidder and, ultimately, to be awarded the procurement. The unsigned 9 January 2015 evaluation matrix put the Applicant on notice that the procurement process was not completed, and that LL was not the most competitive vendor as the matrix indicated that SBR was the lowest bidder, with DR as the second lowest and LL as the least competitive. Also, even if the Applicant was unaware of the status of the procurement process when initiating the meeting with the LL Executive Director, the on-going status of the procurement process certainly would have been confirmed during her conversation with him, given his role. Her failure to alert her colleagues to this meeting supports the argument that her actions were intentional in the first place and directed at assisting LL to manipulate its bid.

30. The Respondent further submits that the Applicant's responsibility for the conduct at issue is not negated because other staff members may have engaged in similar conduct.³⁵ The Applicant was held responsible for her own individual actions in meeting with the LL Executive Director and providing him with information that facilitated the manipulation of LL's bid. That meeting was a violation of numerous procurement rules, including that a staff member should not meet with a vendor while a process is on-going and should not provide information to that vendor not provided to others.

Considerations

31. It is undisputed and results clearly from documents, that, through her official

³⁵ *Atana* UNDT/2013/068, para. 108; *Portillo-Moya* UNDT/2014/021, para. 42.

functions, the Applicant had access to information about the January 2015 procurement process and the bids of other vendors. In particular, she was sent the 9 January 2015 evaluation matrix, which reflected that LL was the highest bidder and, as such, would not be awarded the procurement contract in the regular course of action.³⁶ The Applicant was admittedly aware that LL was the preferred bidder, as also evidenced through JL's email of 10 January 2015, alerting that "we may have difficulty justifying LL"³⁷ and the statement of PM that "the management", including the Applicant, clearly preferred LL.³⁸ Then, admittedly, the Applicant discussed with the Executive Director of LL.

32. The Applicant claimed during the investigation that the purpose of the discussion was a billing formula, namely, rolling the opening cocktail and high dinner into the accommodation rate, and she undertook this discussion based on her understanding that LL was the selected vendor³⁹. The Applicant, however, does not in any way explain on what basis she could have possibly considered that LL had formally been selected, despite the fact that, at the time: (i) the LL had not yet been formally selected; (ii) it had been offering services at the highest price; (iii) the fact that the process was ongoing must have transpired from her discussion with the CEO; and (iv) rolling in the opening cocktail and high dinner into the accommodation rate must have had impact on the rates and thus was relevant to the bid. The Applicant's contention about the context of the discussion with the LL Executive Director is thus not credible. It is, moreover, belied by further evidence: an email from VM, a sales manager of the LL, dated 13 January 2015, where the amended bid was offered in a clear reference to the conversation between the Executive Director and the Applicant, and VM's statement before the investigators that the content of the email and the Applicant's name and address resulted from instructions obtained from the Executive Director. Notably, this email, in all appearances, is the first communication introducing the Applicant into exchanges involving LL and refers to her by a nickname, signifying

³⁶ Reply, annex 2, Exhibit 3.

³⁷ Reply, annex 2, p. 223 (10 January 2015 email); *ibid.*, statement of PM, p. 507-508.

³⁸ Reply, annex 2, interview of PM, p. 439.

³⁹ Reply, annex 2, Exhibit 14, pp. 96-98; Annex 4, para. 26.

familiarity between her and LL.⁴⁰ Further emails on 13 January 2015, concerning the submission of backdated bid, where the Applicant is in copy, clearly convey that the procurement process was ongoing, and an effort was being made to help LL win while concealing the lateness of their winning bid.

33. Whereas in the investigation the Applicant did not recall previously seeing PM's email of 9 January 2015 with the first evaluation matrix, JL's email of 10 January 2015 that seemed to indicate a preference for LL, and PM's email of 13 January 2015 instructing LL to backdate its quote, her denial of the knowledge of their content is not plausible in light of her undisputed role in coordinating the UNDAF/UNCT conference⁴¹ which was at the time the highest priority for the team; the fact that of the persons involved in the correspondence she had the most experience in procurement; that she would usually deal directly with hotels on such occasions⁴²; that, on her own words, being copied on an email signifies being "in the know" regarding the matter⁴³; that in the email of 9 January 2015, with the unsigned draft procurement matrix, PM deferred to her and JL's opinion on it; and that the email of 13 January 2015 mentioned her personally and thus even more warranted her attention. Altogether, while the Tribunal might accept that a busy bureaucrat may occasionally miss or skip reading an email that appears irrelevant, it nevertheless rejects as entirely improbable that the Applicant would have ignored several emails related to the procurement for the upcoming conference, especially given the time pressure and the importance of the determination of the conference's venue for the preparation of every subsequent step.

34. It is obvious and confirmed by the interviewees⁴⁴ that irregularities in the procurement process, that is: varying the terms of reference, maintaining email correspondence that was subsequently not put on the file⁴⁵ and allowing multiple amendments of the bids, concerned all three contenders. It was suggested by PK⁴⁶ that

⁴⁰ Reply, annex 2, p. 885-886 interview of VM.

⁴¹ Ibid, interview of PM, p. 478.

⁴² Reply, annex 2, Exhibit 14, Applicant's interview p. 21.

⁴³ Ibid., p.41.

⁴⁴ Reply, annex 2, Exhibit 015, interview of PK, interview of PM.

⁴⁵ Reply, annex 2, Exhibit 015, interview of PK p. 429-430.

⁴⁶ Ibid., interview of PK p. 404.

irregularities could be attributed to haste and the desire to deliver in time for the conference. The Applicant, however, went beyond a mere shortcut, such as in this case were slight changes in the Request for Quotations and/or accepting amended bids within the time limits. Her intervention involved acting in favour of a particular bidder, in violation of the confidentiality of the bidding process, of its deadline, and of the obligation on her part to act impartially. Notably, the Applicant did not offer explanation based in haste, zeal to deliver or any other necessity justification; rather, she largely claims ignorance of the context of the pending procurement, despite the documentary evidence to the contrary. The lack of transparency in denying that LL was preferred and the initial denial of dealings with the Executive Director both indicate consciousness of impropriety of her actions.

35. In conclusion, the Tribunal finds it demonstrated by clear and convincing evidence that the Applicant discussed an amended procurement bid to enable LL to be awarded the procurement contract; that, as a result, the bid was amended and with the Applicant's acquiescence fraudulently included in the procurement dossier as valid, and that, as a result, the contract was awarded to LL.

Did the facts amount to misconduct?

Submissions

36. The Applicant's case is that the established facts do not amount to misconduct. She denies engaging in procurement fraud and denies assisting LL to consolidate costs to reduce its overall quotation to win the bid, as she genuinely believed that LL had been selected when she talked to the LL Executive Director.

37. The Respondent's case is that the applicable rules and policies explicitly prohibit staff from engaging in fraud and corruption, particularly in the procurement context (see staff regulations 1.2(b) and 1.2(e); the UNDP Legal Framework for addressing non-compliance with United Nations standards of conduct⁴⁷; the UNDP

⁴⁷ Reply, annex 7, para. 24.

policy on fraud and other corrupt practices⁴⁸; and the UNDP procurement ethics, fraud and corrupt practices policy⁴⁹. The Applicant violated these rules and policies by meeting with the LL Executive Director under the auspices of carrying out her official functions and provided him with information that gave LL with an unfair advantage in the January 2015 procurement process.

Considerations

38. Having accepted as proven facts described in the preceding section, including that the Applicant acted with the knowledge of the context of the pending procurement process in order to give LL an undue advantage, the Tribunal is satisfied that the Applicant's actions amount to misconduct, in violation of the rules cited by the Respondent in the Charging Letter.

Was the sanction proportionate to the gravity of the offence?

Submissions

39. The Applicant submits that even if she had committed the alleged offence, the sanction decision imposed on her was not proportionate to the offence, especially since her colleagues who worked with her during the procurement process were not found guilty. After working for UNDP for more than 11 years, it was a grave violation of staff rule 9.3(c) to separate her from service without termination indemnities. The contested decision has caused serious damage to her career, image, integrity and reputation as she is unable to find employment, within and outside of the United Nations.

40. The Respondent submits that all relevant factors were properly weighed in meting out the disciplinary sanction.

Considerations

⁴⁸ Reply, annex 8, para. 5.

⁴⁹ Reply, annex 9, paras. 12, 19-21.

41. The sanctioning decision⁵⁰ properly noted that the United Nations Appeals Tribunal (“UNAT”) has consistently upheld an organization’s assessment that procurement fraud is a serious offense, particularly where the staff used their role to carry out the conduct.⁵¹ The sanction imposed on the Applicant is consistent with UNDP’s past practice in similar cases and with its zero tolerance policy for fraud and corruption.⁵² UNDP took into consideration the seriousness of the Applicant’s conduct, including that the Applicant took active steps, ostensibly in the course of official duties, to individually meet with LL, which facilitated the manipulation of the procurement process, effectively undermined the integrity of its result and demonstrated disregard for the Organization’s own rules causing damage to its reputation.⁵³ UNDP further took into account the Applicant’s attitude in respect to the investigation findings, where she did not take any degree of responsibility for her actions, despite evidence that she had met with a vendor while the procurement process was on-going and subsequently compromised the whole process. UNDP thus invoked concerns that, should the Applicant continue in her current position, she would continue to carry out this type of conduct in the future.⁵⁴ The UNDP noted in favour of the Applicant her 11-year tenure at UNDP and unblemished record, however, found it to be of a limited weight, specifically, given that the Applicant had well known the rules and all the more should have respected them.

42. The Tribunal is satisfied that the Respondent appropriately identified the relevant factors and meted out a proportional disciplinary measure.⁵⁵

⁵⁰ Reply, annex 6.

⁵¹ *Masri* 2010-UNAT-098; *Konaté* 2013-UNAT-334.

⁵² Reply, annexes 8 and 9, *Rajan* 2017-UNAT-781, para 48-49.

⁵³ The Tribunal notes that allegations were made in the case about general irregularities in UNDP procurement processes, involving informing hotels of competing bids and accepting gratuities by UNDP staff, see annex 2, interview of JM, VM, DA.

⁵⁴ Reply, annex 6 p. 3.

⁵⁵ This notwithstanding instances of circular logic and misrepresentation included in the reply. The reply puts forth as aggravating circumstance that the conduct happened within the procurement process. Such circumstance is not mentioned in the charging letter nor in the sanctioning decision, which is quite correct. The Applicant has been disciplined for procurement fraud. Where the elements of procurement fraud are established, it does not pose an aggravating circumstance that it happened in the procurement process, because otherwise it would not have been a *procurement* fraud. Moreover, the reply argues that the aggravating circumstance was in that the Applicant “took no actions to alert colleagues of her conduct”. This is not what the sanctioning decision says. Rather, the charging letter and the sanctioning

JUDGMENT

43. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 20th day of June 2022

Entered in the Register on this 20th day of June 2022

(Signed)

Eric Muli, Legal Officer, for

Abena Kwakye-Berko, Registrar, Nairobi

decision argue the fact of not alerting of her interaction with LL to support the conclusion that the Applicant had been acting intentionally, with the knowledge of the procurement context, and not as an aggravating circumstance. Expecting a staff member to report own conduct, i.e., “alerting colleagues”, and prosecuting for a failure to do so in cases of intentional disciplinary infractions would be nonsensical on many levels. While auto-denunciation may amount to active remorse and be a mitigating circumstance, not reporting on oneself is already included in the concept of intent.