



Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

JAMA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Timothy Liko

Teddy Okello

Counsel for the Respondent:

Federica Midiri, UNDP

Introduction and procedural history

1. The Applicant is a Human Resources Analyst working with the United Nations Development Programme (“UNDP”). She filed this application on 22 November 2021 to contest the decision by the UNDP Associate Administrator to impose on her the disciplinary measure of loss of four steps in grade, from National Officer (“NO”) - A step 9 to NO-A step 5, and deferment, for two years, of eligibility for consideration for promotion, in accordance with staff rules 10.1(a) and 10.2(a)9ii) and (iv).¹ The Applicant seeks the following remedies: (i) rescission of the contested decision; (ii) reinstatement to her previous employment status of NO-A step 9; (iii) permanent prohibition of the Respondent from subjecting her to any further investigations or adverse actions on the basis of the same complaints which formed the basis of the contested decision; and, (iv) compensation in the sum equivalent to her two years’ net salary for emotional distress.²

2. The Respondent filed a reply on 2 January 2022.

3. By Order No. 073 (NBI/2022) issued on 30 June 2022, the Tribunal scheduled a case management discussion (“CMD”) that was to be held on 7 July 2022, but neither the Applicant nor her Counsel appeared for the CMD and there was no response to Order No. 073 (NBI/2022). The Applicant’s Counsel did not also respond to the emails and phone calls from the Registry.

4. On 14 July 2022, the Tribunal issued Order No. 080 (NBI/2022) and directed the Applicant to file submissions addressing: (i) matters that were to be discussed at the CMD; and (ii) if she needed an oral hearing, to file a list of witnesses and a summary of what each witness would testify about. The Applicant did not comply with this order as well.

5. By Order No. 084 (NBI/2022), the Tribunal directed the Applicant to file her closing submissions not later than 1 August 2022. On 21 July 2022, through an email,

¹ Application, annex 2.

² Application, section IX.

the Respondent was equally instructed to file his closing submissions by the same deadline. Both parties filed their closing submissions on 1 August 2022.

Facts

6. At the time of the imposition of the disciplinary measure, the Applicant was serving as a Human Resources Analyst at the NO-A level, step 9, but effective 23 August 2021, as a result of the sanction, she became an NO-A step 5.³

7. Between September and October 2019, while conducting an investigation into a matter unrelated to this case, the Office of Audit and Investigations (“OAI”) came across information which indicated that the Applicant may have engaged in improper recruitment practices and failure to comply with her obligations as a staff member.⁴

8. Upon receipt of the information which implicated the Applicant, the OAI conducted formal investigations between September 2019 and February 2020.⁵

9. On 1 October 2019, the Applicant was informed by OAI that she was the subject of an investigation and she was interviewed the same day.⁶

10. On 12 October 2019, the Applicant contacted OAI seeking clarification regarding her subject notification and inquired whether she could seek advice from the UNDP Staff Association.⁷

11. On 16 October 2019, the OAI replied and provided her with copies of the documents relevant to the investigations. The OAI also advised the Applicant that the matter was confidential and that the allegations should not be discussed with anyone else.

12. Between 18 to 29 October 2019, the Applicant and OAI exchanged phone calls and several emails. The Applicant insisted on speaking to the UNDP Staff Association

³ Ibid., annex 4, Reply, section II.

⁴ Investigation report, para. 3; Application, annex 4.

⁵ Application, annex 4, section B.

⁶ Ibid.

⁷ Investigation report, exhibit 4.

to get advice and guidance about her case. On 29 October 2019, the OAI referred her to the Office of Staff Legal Affairs (“OSLA”) and advised that OAI would not be privy to the discussions she would have with OSLA who would be protected by legal professional privilege.⁸

13. On 13 May 2020, OAI provided the Applicant with a copy of the draft investigation report for review and comments,⁹ and the Applicant provided her comments on 23 May 2019.¹⁰

14. By a letter dated 7 April 2011, the Applicant was charged with misconduct including: (i) sharing sensitive and confidential information relating to recruitments on multiple occasions with a staff member who did not have a human resource function and who was not involved in the concerned recruitment; (ii) showing inappropriate favouritism in the performance of her functions; and (iii) using the knowledge gained from her official function to favour Mr. DH (anonymised for confidentiality purposes) in receiving funding for learning activities. The Applicant was allowed 10 working days to provide comments to the charges.¹¹

15. The Applicant submitted her comments on 22 May 2021.¹²

16. In a letter dated 23 August 2021, the Associate Administrator, UNDP, informed the Applicant that based on the available evidence, including her statements, there was sufficient evidence to establish that her actions constituted misconduct and as a result the contested disciplinary measure was imposed on her.¹³

⁸ Ibid, exhibit 6.

⁹ Ibid, exhibit 69.

¹⁰ Ibid., exhibit 75.

¹¹ Application, annex 4.

¹² Ibid, annex 3.

¹³ Ibid, annex 2.

Standard of review and burden of proof.

17. The Appellate Tribunal’s jurisprudence establishes the following principles; 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.¹⁴

18. It is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him or otherwise “substitute its own decision for that of the Secretary-General”. In this regard, “the Tribunal is not conducting a merit-based review, but a judicial review” explaining that a “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”.¹⁵

19. The role of the Tribunal is “to ascertain whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence”.¹⁶

20. The Administration bears the burden of establishing that the misconduct has occurred,¹⁷ and the misconduct must be established by clear and convincing evidence.¹⁸ This has been interpreted to mean that the truth of the facts asserted is highly probable.¹⁹

21. The Tribunal will determine whether it is established that the Applicant:

¹⁴ *Sanwidi* 2010-UNAT-084; *Santos* 2014-UNAT-415, para. 30.

¹⁵ *Sanwidi op. cit.*, para. 42.

¹⁶ *Mahdi* 2010-UNAT-018, para. 27; *Haniya* 2010-UNAT-024, para. 31; *Sanwidi* 2010-UNAT-084, para. 43; *Masri* 2010-UNAT-098, para. 30; *Portillo Moya* 2015-UNAT-523, paras. 17, 19-21; *Ibrahim* 2017-UNAT-776, para. 48; see also *Mbaigolmem* 2018-UNAT-890, paras. 15 and 16.

¹⁷ *Diabagate* 2014-UNAT-403.

¹⁸ *Molari* 2011-UNAT-164.

¹⁹ *Appellant* 2013-UNAT-302.

- i. shared sensitive and confidential information relating to recruitments on multiple occasions with a staff member who did not have a human resource function and who was not involved in the concerned recruitment;
- ii. showed inappropriate favouritism in the performance of her functions; and
- iii. used the knowledge gained from her official function to favour Mr. DH in receiving funding for learning activities.

22. The Applicant did not deny any of the above allegations and did not even challenge the fact that they were proved.

23. She specifically admitted that, on 8 August 2018, she sent an email and an Excel attachment to DH. The attachment presented a list of over 150 service contractors including their base pay and proposed pay increases at two different levels.²⁰

24. She also admitted that on 6 February 2017 she shared a draft of the Learning Committee minutes with DH.²¹ The minutes final recommendation is that DH's training was approved by majority. In the email to DH, the Applicant writes, "*I will put format no worries ... see the content.*"²²

25. The Applicant confirmed that she shared the minutes with DH who had never been on the Learning Committee and acknowledged that it was not appropriate to share the minutes with him.²³

26. Based on the above admissions, the Tribunal finds that the facts on which the

²⁰ Reply, annex 3, exhibit 29 (email dated 8 August 2018 sharing salary information with Mr DH); Reply, annex 3 (Applicant's investigation interview transcript - IS-2019-10523, p. 52, para. 936); Reply, annex 3, exhibit 3 (interview transcript - IS-2019-10523, p. 52, para. 937-938) and Reply, annex 3, exhibit 76 (Applicant's response to the investigation report, p. 2, point 123).

²¹ Reply, annex 3, exhibit 23 (Applicant sharing Learning Committee minutes with Mr DH -with attachment).

²² Ibid.

²³ Reply, annex 3, (Applicant investigation interview transcript - IS-2019-10523, pp. 41-43 and IS-2019-10523, p. 42).

sanction is based have been established.

Whether the established facts qualify as misconduct.

27. While the Applicant does not challenge the finding of misconduct in her application, the Tribunal needs to emphasise that by sharing sensitive and confidential information relating to recruitments with a staff member who did not have a human resource function and who was not involved in the concerned recruitment, the Applicant offended staff regulation 1.2 which provides that;

(b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status;

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

28. When she showed inappropriate favouritism in the performance of her functions, and used the knowledge gained from her official function to favour Mr. DH in receiving funding for learning activities she offended regulation 1.2(g) which provides that;

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

29. The Tribunal finds that the established facts qualify as misconduct.

Whether there were any due process violations in the investigation and the disciplinary process leading up to the disciplinary sanction against the Applicant.

30. The Applicant contends that the disciplinary measure was imposed in violation of established principles of law and rules of natural justice, which include: the right to

a fair trial; the right to procedural fairness; the principle of legal certainty, and legitimate expectation in an administrative action.

31. The Appeals Tribunal's jurisprudence emphasises that all of the due process rights provided in former staff rule 110.4 and ST/AI/371 (Revised disciplinary measures and procedures) (abolished), cannot apply during the preliminary investigation because they would hinder it, and that these provisions only apply in their entirety once disciplinary proceedings have been initiated.²⁴

32. And, even if the Tribunal were to find that some acts and omissions amounting to violations of the Applicant's rights indeed existed, since the Applicant does not dispute the factual basis of the decision and does not claim that she suffered any prejudice on account of any procedural transgression, the Tribunal would not be inclined to grant the remedies she seeks.

33. Assertions that the Applicant was not immediately informed, with sufficient clarity, the reasons for commencement of investigations against her, that she was not immediately informed of the complaints against her at commencement of the investigations, and that she was not furnished with all exhibits constituting the alleged primary evidence forming the basis for commencement of investigations and resultant proceedings would fall in the above category.

34. The Tribunal does not agree with the assertion that the Applicant's rights were violated. As has been demonstrated by the Respondent, the investigation and the disciplinary process leading up to the disciplinary sanction were conducted in accordance with the legal framework and investigation guidelines to which the Applicant committed to comply when she joined the Organization.

35. The assertion that she was denied the right to the assistance of Counsel during her subject interview by the OAI investigators is without merit given that a staff

²⁴ *Powell* 2013-UNAT-295.

member has no right to the presence of legal counsel during the investigation.²⁵

36. The complaint that the Applicant was only issued with a draft investigation report thereby compelling her to comment or provide responses and/or defence to a Draft Investigation Report which would subsequently be subjected to further amendments to develop the Final Investigation Report similarly lacks merit, since she was only entitled to a draft report at that stage.²⁶ She does not deny that she was at the right time availed the final investigation report and charge letter on 9 April 2021.

37. The complaint that the Applicant could not prepare her defence because her computer was not available is without merit. As explained by the Respondent, the seizure of the laptop was in accordance with the UNDP Bring Your Own Devices and Acceptable Usage of UNDP ICT Resources (Article 21) (Annex 10) establishing that “[a]ll use of information and Communication Technology (ICT) resources and ICT data may be subject to technical monitoring and investigation”. The Applicant does not deny that she was informed that she could request information from the UNDP-issued laptop and that she did not do so during either the investigation or the disciplinary process.

38. The Applicant raised arguments relating to the legality of aspects of the law relating to the conduct of investigations in the Organization. She argues that paragraph 63 of the Investigation Guidelines represents a material error in procedure in that in a quest for expeditious disposal of the case, it denied her the right to a fair hearing. Further that it entrenches cross examination of the Applicant with no corresponding opportunity for re-examination in violation of the Principle of Legal Certainty.

39. She further argues that paragraph 65 of the UNDP OAI Investigation Guidelines (“Investigation Guidelines”) violates the rule on access to effective legal representation, a principle of natural justice and procedural law, since OAI does not share final investigation reports with investigation subjects, complainants, or other

²⁵ See art. 67 of the UNDP Legal Framework for non-compliance with UN Standards of Conduct and art. 53 of the UNDP Investigations Guidelines.

²⁶ See art. 78 of the UNDP Legal Framework for non-compliance with UN Standards of Conduct and art. 65 of the UNDP Investigation Guidelines.

investigating participants, but only sends a copy of the final investigations report to staff members who are the subject of the investigations when a decision is made to charge them with misconduct.

40. She challenges the legality of paragraph 43 of the Investigation Guidelines as it prohibited the Applicant from discussing or disclosing the investigation or her testimony to anyone except the investigators, the effect of which was to unreasonably bar her from seeking and/or engaging the advice and/or guidance of legal counsel of her choice.

41. Further, that while paragraph 42 of the Charter of the Office of Audit and Investigations (“COAI”) directs UNDP’s personnel to promptly allow access to the Organization’s records, it does not grant a similar or equal right to the staff member under investigations for purposes of preparing her defence. In effect, paragraph 42 of the COAI unlawfully limits the Applicant’s right to share the Draft Investigation Reports with her legal counsel for purposes of preparing her response and/or defence. In totality, it implies that protection of the Respondent’s functioning supersedes the Applicant’s legal right to access and share with her counsel all the evidence used against for purposes of preparing an effective defence to Charge Sheet. The guideline is unreasonable, unconscionable and highly prejudicial.

42. The Tribunal can only take note of the above complaints since its jurisdiction which is defined by law,²⁷ does not include the power to judicially review the Respondent’s legislative decisions.

43. The Applicant does not deny that she was duly informed of the nature of the allegations against her, was provided with a copy of the Draft Investigation Report and related exhibits and with a copy of the Final Investigation Report together with the Charge Letter. She does not dispute the assertion that she was provided with opportunities to reply to both the Draft Investigation Report and the Final Investigation Report and Charge Letter.

²⁷ See art. 2 of the UNDT Statute.

44. The Tribunal finds that the process leading to the imposition of the disciplinary measure was carried out in compliance with due process, the UNDP Legal Framework for Addressing non-compliance with United Nations Standards of Conduct and the UNDP OAI Investigation Guidelines and that there were no due process violations in the investigation and the disciplinary process leading up to the disciplinary sanction against the Applicant.

Whether the sanction is proportionate to the offence.

45. In *Samamdarov*,²⁸ the Appeals Tribunal held that,

the proportionality principle limits discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired result. The purpose of proportionality is to avoid an imbalance between the adverse and beneficial effects of an administrative decision and to encourage the Administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end. The essential elements of proportionality are balance, necessity and suitability.

46. The Organization has a wide degree of discretion in determining the appropriate disciplinary measure, and the Tribunal will only overturn a measure as disproportionate if it finds it to be excessive or unreasonable.²⁹

47. The Applicant does not challenge the proportionality of the sanction to the offence and rightly so, since in the Tribunal's view, all relevant factors were considered before arriving at the sanction decision. It is on record that mitigating factors such as the Applicant's unblemished record, the fact that she expressed remorse for her actions and that she did not favour specific candidates during the staff recruitment processes in which she discussed with DH, further that her conduct did not cause any damage to the Organization, were considered.

48. On the other hand, it was considered that the misconduct involves breach of confidentiality regarding information the Applicant had access to in her official

²⁸ *Samamdarov* 2018-UNAT-859 (citing *Sanwidi* 2010-UNAT-084).

²⁹ *Portillo-Moya* 2015-UNAT-523.

capacity. The Applicant engaged in repeated separate acts of misconduct, yet she is a professional staff member with human resources functions and is therefore expected to know the requirements of the Staff Regulations and Rules and the important limits set on United Nations staff members and staff with human resources functions.

49. All factors considered, including that the misconduct represents a breach of trust that characterizes the relationship between the employer and employee, the Tribunal determines that the sanction of loss of four steps and deferment, for two years, of eligibility for consideration for promotion was proportionate to the offence.

JUDGMENT

50. The application is dismissed for lack of merit.

(Signed)
Judge Margaret Tibulya
Dated this 12th day of September 2022

Entered in the Register on this 12th day of September 2022

(Signed)
Abena Kwakye-Berko, Registrar, Nairobi