



Before: Judge Eleanor Donaldson-Honeywell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NDAMBUKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Kenneth Wilson

Counsel for the Respondent:
Rebecca Britnell, UNHCR
Francisco Navarro, UNHCR

Introduction

1. The Applicant is a former Senior Supply Associate working with the United Nations High Commission for Refugees (“UNHCR”). He filed an application with the United Nations Dispute Tribunal in Nairobi on 7 March 2022 to contest the decision to impose on him the disciplinary measure of dismissal in accordance with staff rule 10.2(a)(ix).¹

2. The Respondent filed a reply on 19 April 2022 and requests the Tribunal to reject the application.

3. The Tribunal held a case management discussion (“CMD”) on 29 September 2022. The Applicant’s views on the need for a hearing of the case differed with the Respondent’s with the latter contending that the case can be determined on the papers. The Applicant’s Counsel argued for an oral hearing during which the Applicant would testify on his own behalf. He further requested that the Respondent produce for cross-examination, Mr. JO, a UNHCR driver/mechanic who was one of the witnesses during the investigation. The Tribunal included the Applicant’s requests in the Order issued after the CMD.

4. During the CMD, Counsel for the Respondent orally introduced a Motion for leave to submit new “similar fact evidence”. On the Tribunal’s directions the written Motion was filed on 30 September 2022. After receiving the Applicant’s response to the Motion, the Tribunal dismissed it on 10 October 2022 by Order No. 148 (NBI/2022).

5. Thereafter, on 14 October 2022, the Respondent filed a submission explaining that despite efforts made he could not confirm the appearance of Mr. JO for the hearing. As a result, the hearing proceeded on 19 October 2022 with only the Applicant’s testimony under cross-examination by Counsel for the Respondent and re-examination by his own Counsel. The parties filed closing submissions on 25 October 2022.

¹ Application, section V.

Facts

6. On 20 December 2018, the Inspector General’s Office (“IGO”) received misconduct allegations against the Applicant. The allegations were that the Applicant abused his official position to influence a decision in respect of a damaged official UNHCR vehicle – a Toyota Camry that had suffered water damage.² The damage occurred when the then UNHCR Representative Kenya, drove on a flooded road on 8 May 2016. The vehicle was towed to Toyota Kenya by Mr. JO.³

7. Upon receipt of the information, the IGO conducted formal investigations commencing in January 2019.⁴ In October 2020, a new allegation of breach of confidentiality related to the IGO investigation was brought to the attention of the IGO. Since the new allegation was closely connected to the initial allegations, it was added to the ongoing case instead of opening a separate investigation.⁵

8. On 9 April 2021, the IGO provided the Applicant with a copy of the draft investigation report for review and comments⁶ which he provided on 20 April 2021.⁷

9. On 28 June 2021, the IGO transmitted its investigation report to the UNHCR Division of Human Resources (“DHR”).⁸

10. By a letter dated 27 August 2021, the Director, DHR (“DDHR”), UNHCR, charged the Applicant with misconduct.⁹ The Applicant was allowed a period of one month to provide comments to the charges.¹⁰

11. The Applicant submitted his comments on 30 September 2021.¹¹

12. On 10 November 2021, the Applicant notified the DDHR of his intention not

² Reply, annex 1 (investigation report), para. 1.

³ *Ibid*, annex 002, p.6.

⁴ *Ibid*.

⁵ *Ibid.*, para. 4.

⁶ *Ibid*, para. 16.

⁷ *Ibid*.

⁸ Reply, annex 5.

⁹ *Ibid*.

¹⁰ *Ibid*.

¹¹ Reply, annex 6.

to extend his employment relationship with the UNHCR beyond the expiry of his fixed-term appointment on 31 December 2021.¹²

13. In a letter dated 21 December 2021, the DDHR, informed the Applicant that based on the available evidence, including his statements, there was sufficient evidence to establish that his actions constituted misconduct and as a result the contested disciplinary measure was imposed on him.¹³ The Applicant was sanctioned for: (i) proactively misleading UNHCR's Global Fleet Management ("GFM") regarding the extent of the damage to the UNHCR vehicle, Toyota Camry 62UN5K ("vehicle") by indicating in the Vehicle Accident Report (GS-46) that the damage was extensive, and that Toyota Kenya had recommended replacement of the engine, in circumstances where he knew that Toyota Kenya had not undertaken a damage assessment and no such recommendation had been made; (ii) using a falsified Toyota Kenya damage report to obtain a tax reduction from the Kenya Revenue Authority ("KRA"), in respect of this vehicle; and (iii) breaching confidentiality related to the IGO investigation in his own case.¹⁴

Standard of review and burden of proof.

14. The Appeals 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.¹⁵

15. 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

¹² Reply, annex 8.

¹³ Application, annex entitled "sanction letter".

¹⁴ *Ibid.*

¹⁵ *Sanwidi* 2010-UNAT-084; *Santos* 2014-UNAT-415, para. 30.

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”.¹⁶

16. 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”.¹⁷

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

Whether the facts on which the disciplinary measure was based were established by clear and convincing evidence.

(i) *Misleading GFM regarding the extent of the damage to the vehicle.*

Applicant’s submissions

18. The Applicant denies that he misled GFM. He submits that there is no way he could have done so due to the relevant policies. The Administration and GFM colleagues were involved in the entire process, with other more senior colleagues playing substantive roles. The colleague who was driving the vehicle on the night it got damaged, the then Representative, failed to provide the incident report. The Applicant was tasked by the Assistant Representative in charge of Administration to go to the Representative’s office, obtain the relevant narration from him on what happened and then prepare the draft incident report. It was the then Representative’s narration of events, not, the Applicant’s. The then Representative subsequently prepared the GS-46

¹⁶ *Sanwidi op. cit.*, para. 42.

¹⁷ *Mahdi* 2010-UNAT-018, para. 27; *Haniya* 2010-UNAT-024, para. 31; *Sanwidi op. cit.*, , 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.

¹⁸ *Diabagate* 2014-UNAT-403.

¹⁹ *Molari* 2011-UNAT-164.

²⁰ *Appellant* 2013-UNAT-302.

report himself and signed it.²¹

19. The Applicant further submits that the Administration did not respond to Toyota Kenya on whether to undertake a damage assessment to determine the need for engine replacement or engine overhaul. The Applicant only raised a procurement order specifically requesting for a damage assessment; but the Administration failed to act and provide final instructions to Toyota Kenya. Therefore, the Administration's inaction, cannot be used against him. This was the Administration's function, not a Supply function. The budget holder decides what to do with their assets within the UNHCR's regulatory and policy framework governing management of vehicles (the policy).²² The Applicant contends that the IGO lied and misled the DHRM whom he contends did not read the policy. The Applicant maintains that at his junior level, he could not significantly influence the decision whether or not to auction a vehicle. Such a decision had to be made by the Assistant Representative in charge of Administration or by the Senior Administrator/Finance Officer.²³

20. The Applicant underscores that the two reports he drafted did not recommend any singular remedy to address the engine damage. Instead, he highlights that the last paragraph left the decision to GFM by stating:

Subsequently, UNHCR Kenya is seeking your guidance on whether we should proceed with repairs on this car... alternatively guide us on whether the car should be disposed/replaced.²⁴

21. The evidence of interviews with a GFM Associate finance Officer Ms K.C is relied on by the Applicant in submitting that it was not his recommendation but GFMs own policies that resulted in the decision not to overhaul the engine.²⁵

²¹ Reply, annex 6, para. 9.

²² *Ibid.*, para. 12.

²³ *Ibid.*, para. 13.

²⁴ Applicant's closing submissions, para. 11.

²⁵ Trial bundle, p. 440 (Interview of Ms. KC) - wrongly cited by the Applicant in closing submissions as p.1404 of the Trial Bundle.

Respondent's submissions

22. The Respondent's position is that the evidence is compelling that the information in the Applicant's incident report dated 13 June 2016 and the GS-46 report dated 2 October 2016, namely, that Toyota technicians had assessed the engine damage and recommended the engine replacement, is false. The Respondent asserts that the content of both these documents was drafted by the Applicant. That content is incorrect according to the Respondent. On the day of the incident, Mr. JO who towed the vehicle to Toyota only asked for a quotation for an overhaul. The prospect of having an engine replacement in lieu of an overhaul arose subsequently without any proven request for same made by UNHCR.

23. Toyota Kenya's sole findings about the vehicle as contained in their emails of 25 and 28 May 2016, were that the engine had to be *overhauled* or *stripped*.²⁶ A down payment was required for stripping which was a necessary step before issuing a further quote for repairs. The General Manager for Operations at Toyota Kenya, confirmed to the IGO that the engine had not been dismantled and that no detailed diagnosis of the damage had been made. The Technical Supervisor at Toyota Kenya, similarly, told the IGO that the engine had not been dismantled in 2016 when the car was in the Toyota workshop. Furthermore, Toyota Kenya only invoiced UNHCR for towing the vehicle and for removing the engine, not for dismantling the engine or assessing the damage. There was never any damage assessment or recommendation for engine replacement from Toyota Kenya.

24. The Respondent maintains that the Applicant himself wrote the two reports and submitted as supporting documentation the engine replacement quotation from Toyota Kenya that led to GFM's decision to sell the vehicle. The information he transmitted to GFM that Toyota Kenya had carefully inspected the engine and recommended its replacement was false. The Applicant has not provided a credible explanation for his actions. Finally, the fact that the Applicant purchased the vehicle at auction and had it repaired for a fraction of the cost referred to in his reports to GFM portrays his

²⁶Reply, annex 1 (Investigation report, annex 003, at p. 99).

fraudulent intent from the outset. Accordingly, there is clear and convincing evidence to support the conclusion that the Applicant knowingly misrepresented to GFM that Toyota Kenya had assessed the damage to the engine and recommended its replacement, in order to influence their decision to sell the car, which he subsequently bought at auction at a reduced price.

25. In closing submissions, Counsel for the Respondent submitted that the Applicant's admissions, implausible statements and repeated failure to respond to key questions during the hearing support a finding that the allegations of misconduct are established by clear and convincing evidence.²⁷

Considerations

26. The UNHCR's regulatory and policy framework governing management of vehicles is set out in UNHCR/OG/2015/9 ("The Policy").²⁸ It distinguishes between incidents and accidents such that the water damage event that damaged the vehicle in this case would be an incident. All incidents are required to be reported to GFM as soon as possible. Then, within 72 hours of the event, a list of information must be provided including the vehicle details and location of the incident. The policy does not support the Applicant's contention that the driver is responsible for the incident report, rather it is the Transport Manager's responsibility.

27. On the record, there was a delay in the submission of the incident report as it was prepared by the Applicant and sent on 13 June 2016. This was around a month after the vehicle in question sustained water damage on 8 May 2016. In that report, the Applicant stated that the vehicle was towed to the Toyota dealer where:

After careful inspection by their technicians, their workshop has recommended replacement of the engine. Alternatively, strip it for overhaul which can be rather tricky because once the engine is stripped it would never perform as an original engine." [Emphasis added].

²⁷ Respondent's closing submissions filed on 25 October 2022.

²⁸ Reply, annex 1 (Investigations report, annex 033 at 2.6.7).

28. It is clear from the chronology of documents that would have been available to the Applicant when he prepared the incident report that there were no such findings, as highlighted above, made by Toyota Kenya. The only supporting document attached to the Incident Report is a Quotation by Toyota Kenya indicating what an engine replacement would cost. Nothing in that document or any other on record at that time provides the basis for the recommendation in the Incident Report attributed to Toyota by the Applicant.

29. It was reasonable for the DDHR to conclude that the statement attributed to Toyota in those circumstances was a fabrication of the Applicant's own making. Accordingly, at the outset there is merit to the Respondent's case that there was clear and convincing evidence based on which to determine that the Applicant misled GFM in that part of the Incident Report which he drafted.

30. After the incident report is submitted, the following actionable item under the Policy is for GFM to respond with a notification of detailed instructions on the next steps to be taken. This response by GFM must include a list of *the exact documentation* to be requested from the field office.

31. The record of the investigation reflects that on 17 June 2016 GFM took this next step. They acknowledged receipt of the incident report with its attached quotation and requested that a GS-46 report be submitted with documents in support. The exact documentation required was listed as including "An estimate of Repair from a Body Shop."²⁹ From this correspondence it should have been clear to the Applicant that an estimate of repair to justify engine replacement was required.

32. GFM sent two follow up emails³⁰ requesting the GS-46 report and supporting documents which were listed again by GFM in these emails. In the first reminder dated 19 July 2016, GFM made an additional request, namely for a detailed explanation if any of the requested information is not submitted or unavailable. From this correspondence the Applicant would have been aware of the need for the specified

²⁹ Reply, annex 6, at p. 169.

³⁰ Trial Bundle, pages 1402 and 263 (emails of 19 July 2016 and 2 August 2016).

documentation to prove what repairs if any would be required.

33. The Applicant was evasive under cross-examination as to whether he drafted the content of the GS-46 report signed by the then Representative, the driver of the vehicle. He continued not to admit to his role in drafting the Form even when confronted with his prior admission to it during his interview which formed part of the investigation. The Applicant's evasive stance undermined his credibility, and the Tribunal finds that he did prepare the content of the Form.

34. Despite the fact that up to August 2016 there was no basis from any inspection by Toyota or any other body shop as to what would be required to repair the vehicle, the Applicant admits that the content of the GS-46 report, eventually completed on 2 October 2016, was a "copy paste" of his original incident report. The Tribunal notes that no repair estimate from a Body Shop was attached. Instead, in a manner which could only have been intended to mislead, the same engine replacement quotation submitted with the earlier incident report was attached once more.

35. An email trail between Toyota Kenya and UNHCR from May 2016 and continuing makes clear that up to 7 August 2016 there³¹ was no resolution of a pending question as to whether a less expensive overhaul and repair of the engine would suffice as advocated for by Mr. JO or engine replacement was necessary. Eventually, the vehicle was towed away from Toyota and back to UNHCR without any resolution by way of full inspection, of the question whether engine replacement was necessary. Thus, although the Applicant was not copied in those emails, the fact that they exist makes clear that Toyota had not recommended engine replacement up to August 2016. The Applicant has not shown that he was privy to any Toyota email or document from August 2016 to the time when he drafted the GS-46 report that provided the basis for stating that Toyota either inspected the vehicle or recommended engine replacement.

36. The Applicant's responses under cross-examination further supported that he was fully aware that the quotation attached to the GS-46 report was not a technical

³¹Reply, annex 1 (Investigations report, annex 003).

report or damage assessment. This awareness is clear from the fact that the Applicant himself requested a proper technical report and obtained one from Toyota for his own use to attempt to obtain reduced tax obligations when he bought the vehicle after it was written off. The Applicant's awareness of the difference between a quotation and an estimate of damage/repairs is also accepted as clearly and convincingly proven based on the Applicant's admitted qualifications as an engineer and his experience as a Senior Supply Associate.

37. There was no basis for the Applicant's inclusion of recommendations for engine replacement in the two reports submitted to GFM. Based on the Policy, the next step after receipt of the reports was for GFM to recommend approval for repair of the vehicle be granted or rejected. If repair is not approved, UNHCR must follow GFM's instructions and decisions on repair, write off or disposal are the responsibility of the Asset and Fleet Management Section.

38. The fact that GFM may have carelessly failed to properly scrutinize the reports and notice the deficiency in the recommended engine replacement not being supported by an estimate before making a decision on disposal of the vehicle, does not mitigate the fact that the Applicant misled GFM.

39. The Applicant knew the recommendation he provided was false in the sense that it did not come from Toyota Kenya and in that there was no expert assessment to justify engine replacement. He was fully aware of the vehicle's history, yet within two months of the UNHCR's decision to write off the vehicle on the basis of his recommendation that engine replacement was too costly, the Applicant purchased the written off vehicle at auction. He has not to date replaced the engine at the cost of KES1,598,357.76 put forward in the incident report. Instead, the figure of USD1,000 was spent on repairs.³²

40. The Tribunal takes note that, when asked explicitly and repeatedly during the hearing whether he genuinely believed that the engine needed replacement or whether

³² Reply, annex 1, para. 75.

he had ever replaced it, he did not answer the first question and was evasive regarding the second. There is merit to the Respondent's submission that this is telling of the Applicant's state of mind. That state of mind, the Tribunal finds to be one of full awareness on the part of the Applicant in intending to mislead GFM into writing off the vehicle so he could profit from same.

41. The Applicant's reliance on statements made by Ms. KC in her interview long after he made the false statements about a Toyota inspection in his drafts for the reports is not probative. Although Ms. KC opined that overhaul is not cost-effective for engines with water damage, there is no proof of any inspection of the vehicle based on which such an assessment was made before the Applicant referred to the need for engine replacement in the reports.

42. The point made by the Applicant that he merely sought guidance and did not mislead GFM in the reports is without merit. It is clear from a reading of the reports that the guidance requested is to be premised on the information provided by the Applicant. The information included by the Applicant falsely alluded to an inspection conducted by Toyota Kenya leading to a conclusion that overhaul would be tricky and that engine replacement is recommended. Thus, he intended that any guidance sought would be skewed based on the information provided.

43. The Respondent has established by clear and convincing evidence that the DDHR's finding that the Applicant misled GFM regarding the extent of the damage to the vehicle was based on clear and convincing evidence.

(ii) *Using a falsified Toyota Kenya damage report to obtain a tax reduction from KRA.*

Applicant's submissions

44. The Applicant asserts that UNHCR gave a duty estimate for the auction which did not represent the correct duty value. He admits that after his efforts to get a revised estimate from the UNHCR he obtained a damage report dated 15 May 2017 from Toyota. However, he maintains that he did not use a falsified Toyota Kenya damage

report to secure tax reduction and nor did he obtain a tax reduction from KRA, in respect to the vehicle in question. KRA based the duty assessment on their own physical inspection of the vehicle, but not on any other documents.³³

Respondent's submissions

45. The Respondent submits that it is not disputed that the Applicant was initially required to pay KES1,446,498 in duty for the vehicle. It is also not disputed that the Applicant sent the letter dated 2 May 2017 to KRA asking for a re-evaluation. It is similarly undisputed that the Applicant submitted to KRA the damage report dated 15 May 2017 and the email dated 30 May 2017 with two engine pictures. Finally, it is not disputed that, following these efforts, the Applicant paid KES447,400 in duty – one third the initially required sum. The Applicant first misrepresented to KRA that the engine had been dismantled and sold as scrap. The Applicant then obtained a false damage report from his connections at Toyota Kenya and submitted it to KRA. The Applicant submitted to KRA a picture of a damaged engine and falsely presented it as the picture of the UNHCR vehicle's engine.³⁴

Considerations

46. The Applicant confirmed during the hearing that he had written the 2 May 2017³⁵ letter and sent it to KRA, and he testified that its content was true. In the letter, the Applicant introduced himself as a UNHCR staff member and requested a reduction in the duties he had to pay. However, as correctly summarised by Counsel for the Respondent in closing submissions, at least three key facts stated by the Applicant in support of his request were false. The false aspects of the letter included that the engine had been dismantled as scrap, that he had to buy a new engine and that the cost to repair the vehicle would be KES1,446,498.00.³⁶

47. After sending this letter, the Applicant sought to bolster his request to the KRA

³³ Reply, annex 6, para. 46.

³⁴ Reply, paras. 61- 69.

³⁵ Reply, annex 1 (Investigation report, annex 033).

³⁶ *Ibid.*

by obtaining a damage report from Toyota Kenya. That report falsely gave the impression that the vehicle was inspected by Toyota Kenya. The investigation includes interviews from three Toyota Kenya employees including the report author, the General Manager Operations and the Chairman confirming that the report was false.

48. There is nothing in the 5 June 2017 KRA letter granting the Applicant tax reductions to indicate that the false information in the request and report used by the Applicant was not received. The letter merely indicates that the KRA conducted a physical inspection following which extra depreciation of 30% was granted.

49. There was clear and convincing evidence before the Respondent that the Applicant used the false report to obtain tax reduction from the KRA.

(iii) Breach of confidentiality with respect to the IGO investigation.

Applicant's submissions

50. The Applicant admits that he discussed the information relating to the investigation with other colleagues, but he did so inadvertently. The Applicant states that he was undergoing a lot of emotional stress and anxiety at the time, both at personal and work levels. He sincerely apologises.

51. The Applicant equally faults the IGO which also improperly shared information about the investigation. He, therefore, contends that it would be unfair to hold him accountable for sharing some information and not hold IGO colleagues equally accountable for the same breach.³⁷

Respondent's submissions

52. The Respondent echoes the fact that the Applicant does not contest that he breached the confidentiality of the investigation by disclosing to other staff members that he was under investigation by the IGO. The Applicant admitted at paras. 60 and 61 of his response to the allegations of misconduct that he had told Mr. PM, Assistant

³⁷ Reply, annex 6, para. 54.

Supply Officer, and Ms. JK, Supply Associate, that he was under investigation. They both testified that the Applicant had told them that the IGO was investigating him regarding his purchase of the vehicle. Ms. PW, Senior Programme Associate, also testified to the IGO that she heard the Applicant loudly talking in the corridor about being investigated. Similarly, Ms. AW, Supply Associate, testified to the IGO that, on 7 October 2020, the Applicant accused her of reporting him to the IGO.

53. On the Applicant's contention that IGO should also be held accountable for breaching the confidentiality principle, the Respondent submits that the Applicant's submissions are unsupported and have no bearing on his misconduct. The allegations of breach of confidentiality are established on clear and convincing evidence.

Considerations

54. The allegation of breach of confidentiality having been admitted by the Applicant was proven by clear and convincing evidence.

Whether the established facts qualify as misconduct.

Applicant's submissions

55. The Applicant contends that his actions do not qualify as misconduct.³⁸ There is no contest in his application to the fact that if the alleged actions had been proven they would amount to misconduct.

Respondent's submissions

56. The Respondent's position is that by knowingly misrepresenting to GFM that Toyota Kenya had assessed the damage to the engine and recommended its replacement, in order to influence their decision to sell the vehicle, which he subsequently bought in auction, the Applicant engaged in fraud.

57. Further, that the Applicant's personal interest to purchase the vehicle interfered

³⁸ Application, section IX, para. 3.

with the discharge of his official functions, the Applicant engaged in a conflict of interest, which he did not disclose. By the same token, the Applicant misused his office and the knowledge gained from his official functions for a private gain i.e., to purchase the vehicle at a reduced price. Accordingly, the Applicant's conduct was in breach of his basic obligations under staff regulations 1.2(b), (e), (f), (g) and (m) and staff rule 1.2(q).

58. The Respondent also avers that by misrepresenting information to KRA in his letter dated 2 May 2017 and his email dated 30 July 2017, by soliciting a falsified damage report from his connections at Toyota Kenya, which misrepresented Toyota's assessment of the damage and their recommendation, and by submitting the falsified report to KRA to obtain a personal financial benefit consisting of paying less tax, the Applicant engaged in fraud. In addition, the Applicant's misrepresentation to KRA could constitute a criminal offence under local law i.e. section 203 of the East African Community Customs Management Act ("EACCM"), 2004 (Revised Edition 2009). The Applicant's conduct was thus in breach of his basic obligations under staff regulations 1.2(b) and (f) and staff rule 1.2(b).

59. The Applicant's disclosure to multiple staff members that he was the subject of an IGO investigation constitutes a breach of his obligation to exercise utmost discretion in accordance with staff regulation 1.2 and the Applicant's obligations under para. 38 of UNHCR/AI/2019/15 (Administrative Instruction on Conducting Investigations at UNHCR). Therefore, the Applicant's actions amount to misconduct and warrant a disciplinary measure.

Considerations

60. UNHCR Inter-Office Memorandum No. 044/2013 – FOM 044/2013 Strategic Framework for the Prevention of Fraud and Corruption (the "Strategic Framework") defines fraud at paragraph 8.3 as:

Any act or omission, including misrepresentation or concealment of a material fact, that knowingly or intentionally misleads, or attempts to mislead, a party to obtain a benefit, whether directly or indirectly,

whether for oneself or for a third party. Fraud could involve misappropriation of cash (such as fraudulent claims/disbursements) or other assets (such as fraudulent shipments, falsifying inventory records), or fraudulent statements (purposefully misreporting or omitting information) [...] Fraudulent acts constitute serious acts of misconduct, and include the following examples:

(a) Forging of documents, preparing false entries in UNHCR systems or making false statements to obtain a financial or other benefit to which a person is not entitled.

It is clear from the foregoing that the Applicant's proven actions in misleading GFM regarding the extent of vehicle damage without disclosing as a conflict of interest his interest in purchasing it and in using a falsified Toyota Kenya damage report to obtain tax reduction qualify as misconduct. Additionally, the Applicant's admitted breach of confidentiality of the investigation process amounts to misconduct as prohibited by para 38 of UNHCR/AI/2019/15.

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

61. In his application, the Applicant contends that there were procedural errors amounting to breaches of due process and which should render the disciplinary process null and void.³⁹ In particular, the Applicant submits that he was not provided with the final investigation report before it was submitted to the DDHR. Counsel elaborated on this point in closing submissions by asserting that the Applicant was only allowed to review the draft investigation report once. He was denied a second and final review before it was submitted, contrary to promises made to him in the Subject Notice of Investigation document dated 16 September 2019 at para 16.

62. Additionally, he contends that the investigator was biased in overlooking other irregularities and relying on information from a witness with ill motive. The Applicant contends the investigation was based on the tainted evidence of driver/mechanic JO

³⁹ Application, section IX, para. 2.

which he says was provided pursuant to improper motives⁴⁰.

63. In closing submissions, Counsel for the Applicant made two additional allegations of due process failings. Firstly, he claims that during the Tribunal's CMD on 29 September 2022, Counsel for the Respondent said he was alleged to have "solicited a falsified damage report." This was not the correct nature of the charge which was one of "using a falsified Toyota Kenya damage report." He was charged with an allegation, which was not included in the notice of investigation. Thus, the Applicant contends the Respondent is conveniently and un-procedurally conjuring up an allegation. Secondly, he now also avers that he was placed on Annual Leave with Pay ("ALWP") for a period over two years which is contrary to staff rule 10.4 which prescribes a three-month limit to ALWP. Counsel for the Applicant cites Kenyan judicial system judgments as authority for submitting that in the Applicant's case justice delayed was justice denied.

64. The Respondent submits that the investigation and disciplinary process fully complied with the requirements set out in the applicable texts, including UNHCR/AI/2019/15 and UNHCR/AI/2018/18 (Misconduct and the Disciplinary Process). The IGO informed the Applicant in a timely manner and to an adequate extent of the allegations against him. The IGO duly updated this information as new allegations came to light and the scope of the investigation expanded. The Applicant was aware that he was the subject of an investigation prior to his interviews. The interviews were duly recorded and shared with the Applicant for his comments and signature. The IGO gave the Applicant the opportunity to provide his comments on the draft investigation report. He was fully notified of the charges levied against him in a detailed manner, including the rules that he was charged with breaching, and he was informed of his right to be assisted by counsel as soon as this right legally arose.

65. Regarding the Applicant's concern that he was not provided with a final investigation report, the Respondent argues that the subject of an investigation does not

⁴⁰ Application, annexes 11-22, Reply, annex 6, paras. 59 ,68-77.

have a right to see the finalized investigation report before it is submitted to the DDHR. In accordance with paragraph 90 of UNHCR/AI/2019/15, the subject may only provide comments on the *draft* findings of the investigation.

66. Finally, the Respondent denies that the source of information for initiation of the investigation was Mr. JO as alleged. In any event, the concerns raised by the Applicant about bias by Mr. JO and other persons, were considered during the investigation as he was given adequate time and opportunity to comment and provide countervailing information.

Considerations

67. At the outset, the Tribunal dismisses the new allegations of lack of due process raised for the first time after the Tribunal's hearing of the matter. The new points are not properly raised as they were not included in the initial application. Additionally, one of the points concerns the Respondent's decision making regarding the length of time the Applicant remained on ALWP. Challenges to ALWP seek review of administrative decisions as opposed to disciplinary decisions. Management evaluation is a prerequisite to access to the Tribunal to challenge non-disciplinary decisions⁴¹.

68. It would be inconsistent with procedural fairness to permit the Applicant to raise new contentions which the Respondent had no opportunity to consider before implementing the sanction. The Tribunal primarily dismisses these two points on that basis.

69. Further, even if the new points are properly raised, they are without merit. Firstly, the comments made by Counsel for the Respondent during the CMD do not amount to evidence. Thus, although Counsel misspoke in stating the nature of one of the allegations against the Applicant, that does not change the facts regarding the specific wording of the allegations in the 21 December 2021 dismissal letter.

70. Secondly, the issue of the length of the ALWP is not receivable. Having not

⁴¹ *Babiker* 2016-UNAT-672, para. 31.

been properly raised, the Respondent had no opportunity to provide evidence as to whether the ALWP was duly extended for periods beyond three months. As to the length of the investigation, there is no applicable Dispute Tribunal's or Appeals Tribunal's authority cited by the Applicant to indicate the length of time within which an investigation must be completed so as to be in keeping with due process.

71. The two new points raised in the closing submissions are not persuasive in establishing that due process was breached.

72. The complaints about lack of due process that were included in the initial application are also without merit. Regarding the alleged bias of Mr. JO, even if he had an ill motive against the Applicant, that fact would not exonerate the Applicant from wrongly attributing to Toyota Kenya recommendations for engine replacement.

73. Finally, the regulatory framework does not obligate the Respondent to provide the Applicant with the final investigation report before submitting it to the DDHR. The subject may only provide comments on the *draft* findings of the investigation.⁴² There is no provision in the regulatory framework based on which the Applicant is entitled to two reviews of the draft investigation findings. The 16 September 2019 Subject Notice of Investigation relied on by the Applicant to prove such entitlement is an email. It informs the Applicant of the due process he can expect in the investigation, as follows:

You (as the Subject) will be given a fair and **reasonable opportunity to explain or justify the conduct being examined and to present evidence on your behalf**. You will **normally** be provided such an opportunity at two different stages before the completion of the investigation. First, you will be informed of the full nature of the allegations during **your interview** and afforded the opportunity to respond and to provide countervailing evidence. Subsequently, **you may** be given an opportunity to **review the draft investigation findings** to correct any factual errors or otherwise clarify any information as well as provide supporting evidence. [Emphasis added].

74. There is no indication in the above email that the Applicant will be entitled to review a draft of the investigation findings in two stages. The email informed the

⁴² Reply, annex 12, para 90 (UNHCR/AI/2019/15).

Applicant that his two opportunities to be heard would be at the interview and then afterwards he may receive a copy of the draft investigation report for review and comment. These two opportunities were in fact afforded to the Applicant in this case.⁴³

75. The Applicant has not established that the Respondent failed to afford him due process in the investigation and disciplinary process.

Whether the sanction is proportionate to the offence.

76. The Applicant submits that the sanction is disproportionate and illegal.

77. The Respondent contends that the two allegations of fraud in this case are so serious that each of them would individually warrant separation. Each of the two allegations of fraud damage the substratum of trust in a manner that renders the continuation of the employment relationship intolerable. In this respect, UNHCR applies a zero-tolerance approach to fraud in accordance with section 4 of the Strategic Framework. This means that there is no place for fraud in UNHCR. For these reasons, the sanction of dismissal is not unreasonable, absurd or disproportionate. The Respondent submits that, if it finds the measure harsh, the Tribunal should defer to the High Commissioner's discretion (*Cobarrubias* 2015-UNAT-510 at para. 20).

Considerations

78. In *Samandarov*,⁴⁴ 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.

79. The Organization has a wide degree of discretion in determining the appropriate

⁴³Reply, annex 1 (Investigation report, paras 13 and 16).

⁴⁴*Samandarov* 2018-UNAT-859 (citing *Sanwidi op. cit.*).

disciplinary measure, and the Tribunal will only overturn a measure as disproportionate if it finds it to be excessive or unreasonable.⁴⁵

80. The Tribunal finds merit in the submissions of the Respondent that on the facts of this case the sanction of dismissal is not unreasonable, absurd or disproportionate.

JUDGMENT

81. The application is dismissed.

Signed
Judge Eleanor Donaldson-Honeywell
Dated this 1st day of November 2022

Entered in the Register on this 1st day of November 2022

(Signed)
Abena Kwakye-Berko, Registrar, Nairobi

⁴⁵ *Portillo Moya* 2015-UNAT-523.