



**Before:** Judge Eleanor Donaldson-Honeywell

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

NDERITU

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

George Otieno Ochich

**Counsel for the Respondent:**

Chenayi Mutuma, UNHCR

## **Introduction**

1. The Applicant is a Senior Supply Assistant working with the United Nations High Commission for Refugees (“UNHCR”).

## **Procedural History**

2. On 14 January 2022, the Applicant filed an application with the United Nations Dispute Tribunal in Nairobi challenging the High Commissioner’s decision to impose on him the disciplinary measure of loss of one step in grade in accordance with staff rule 10.2(a)(ii).

3. The Respondent filed his reply to the application on 16 February 2022. He took the position that there is no merit to the application and that it should be dismissed in its entirety.

4. On 6 September 2022, the “Tribunal issued Order No. 125 (NBI/2022) inviting the parties to a case management discussion (“CMD”).

5. The Tribunal held a CMD with the parties on 20 September 2022.

6. The Applicant filed his closing submissions on 4 October 2022.

7. The Respondent filed closing submissions on 11 October 2022.

8. The Applicant filed a rejoinder to these submissions on 18 October 2022.

## **Facts**

9. The Applicant joined UNHCR on 1 January 2011 as a Senior Supply Assistant at the G-5 level in Nairobi, Kenya.

10. On 7 June 2019, the UNHCR Inspector General’s Office (“IGO”) received information that one TTN who is the Applicant’s brother, co-owned a truck that was leased by UNHCR’s suppliers to deliver goods for the Organization. The crux of the allegation was that the Applicant had provided vendors with information that led to them winning their bids to supply goods and using the Applicant’s brother’s

truck for delivery of those goods. The Applicant never disclosed his relationship with the truck owner to UNHCR.

11. In February 2020, the IGO began investigating these allegations.

12. The Applicant was interviewed on 9 and 10 July 2020.

13. During the course of the investigation, the IGO was informed that the Applicant spoke of the investigation to another UNHCR staff member on at least two occasions. This led to the Applicant being also charged with breaching the confidentiality of the investigative process in an ongoing investigation.

14. The Applicant was interviewed by the IGO on this last count on 23 October 2020.

15. On 16 November 2020, the Applicant received the IGO's draft findings. He provided his comments on the draft on 30 November 2020.

16. The Investigation Report was finalised on 7 December 2020.

17. Six months later, on 10 June 2021, the Applicant was notified of the allegations of misconduct against him.

18. The Applicant responded to these allegations on 10 July 2021.

19. On 5 October 2021, the High Commissioner concluded that the Applicant's conduct was inconsistent with his basic obligations as a United Nations staff member. The Applicant was found to have breached his obligations under United Nations staff regulations 1.2(b) and (m); paragraphs 25 and 26 of UNHCR's Administrative Instruction on Conducting Investigations (UNHCR/AI/2019/15) and Principle 2 of UNHCR's Code of Conduct.

20. By way of disciplinary measure, the Applicant lost one step in grade *per* staff rule 10.2(a)(ii).

## Considerations

### *Standard of review; burden and standard of proof*

21. 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”.<sup>1</sup> Thus, in a disciplinary case such as this one the Dispute Tribunal considers the evidence adduced and the procedures utilized by the Administration during the investigation. The consideration of procedures utilized in the investigation includes whether due process was afforded to the Applicant.<sup>2</sup>

22. In each disciplinary case, the Tribunal is to examine 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”<sup>3</sup>. In so doing the Dispute Tribunal determines if the disciplinary decision is legal, rational, procedurally correct, and proportionate. The Tribunal can also consider whether relevant matters have been ignored and irrelevant matters considered and examine whether the decision is absurd or perverse.<sup>4</sup>

23. The submissions of the parties in this case raise critical points as to which side bore the burden of proving whether misconduct took place and the standard required to meet that burden. However, the Appeals Tribunal’s jurisprudence is clear that the presumption of innocence is to be respected and “the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.”<sup>5</sup>

24. Shortly after being established, the Appeals Tribunal determined in 2010 that the standard to be met by the Administration in discharging the burden of proof in disciplinary cases at the United Nations is not the same as the beyond a reasonable doubt standard that applies in criminal proceedings. Instead, in the type of disciplinary case where termination might be the result, the proof that will be

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<sup>1</sup> *Sanwidi* 2010-UNAT-084., para. 42.

<sup>2</sup> *Applicant* 2013-UNAT-302, para 29; *Cabrera* 2012-UNAT-215, para 47.

<sup>3</sup> *Sanwidi* 2010-UNAT-084, para. 43.

<sup>4</sup> *Sanwidi* 2010-UNAT-084; *Santos* 2014-UNAT-415, para. 30.

<sup>5</sup> *Diabagate* 2014-UNAT-403 at para 35; *Hallal* 2012-UNAT-2007 at para 28.

sufficient is clear and convincing evidence.<sup>6</sup> The Appeals Tribunal has also applied this standard where the outcome of the disciplinary process was two years of demotion.<sup>7</sup>

25. In all other cases, including the instant case, the Respondent bears the burden of showing that there was a preponderance of evidence to establish the alleged misconduct.<sup>8</sup>

***Whether the facts on which the disciplinary measure was based were established on the preponderance of the evidence***

*Failure to disclose a possible conflict of interest.*

26. The Applicant was informed that his dismissal was based, firstly, on findings that he failed to disclose a possible conflict of interest in the procurement of transportation services to UNHCR. This possible conflict of interest was in relation to his role in securing and managing the UNHCR supply chain relating to the provision and transportation of humanitarian goods. Specifically, it was found that he failed to disclose that his brother, TTN, was one of two owners of a truck with the registration number KCG XXX that was often subcontracted by UNHCR suppliers.

27. There is no dispute that TTN and the Applicant are brothers. The Applicant incorrectly contends that the decision letter focused disproportionately on this sibling relationship which is a non-issue. This is incorrect; there was no undue focus. There is only one sentence in the said letter, that addresses the sibling relationship. It is at line one of paragraph 5 where the Applicant's admission of the relationship is noted.<sup>9</sup> Likewise, the Applicant has not denied the Respondent's finding that Truck KCG XXX was on several occasions used by Allied and other UNHCR suppliers to fulfil UNHCR transport contracts.

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<sup>6</sup> *Molari* 2011-UNAT-164, paras 1, 29 and 30.

<sup>7</sup> *Applicant* 2013-UNAT-381, paras. 41-44.

<sup>8</sup> *Suleiman* 2020-UNAT-1006; *Nadasan* 2019-UNAT-917, para. 38; *Siddiqi* 2019-UNAT-913, para. 28.

<sup>9</sup> Annex 2 to the application.

28. The main fact in issue is whether UNHCR based its decision on sufficient evidence that the Applicant knew that his brother was a co-owner of the truck. Further, that based on such knowledge a conflict of interest arose which he should have disclosed. In this regard, the evidence that would have been available to the decision maker on ownership of the truck, and the Applicant's knowledge of it, is to be assessed by the Tribunal in reviewing whether the finding of non-disclosure of a conflict of interest was justified.

29. The crux of the Applicant's case is that he could not have had any conflict of interest to disclose without actual knowledge of his brother's ownership of the truck. He contends that he had no such knowledge and that the Respondent, by relying on *inter alia* conjecture from circumstantial evidence, has failed to prove that he had actual knowledge. As underscored by the Applicant in submissions, there is no documentary evidence on the record to show that the Applicant knew his brother owned the truck.

30. A closer examination of the record showed the Applicant's submissions as to knowledge to be untrue. There *is* in fact documentary evidence which proves the Applicant's knowledge on ownership of the truck<sup>10</sup>:

- a. A 23 August 2017 email revealing the Applicant's input into the procurement process for a truck to transport solar lamps from Nairobi to Addis Ababa, which was awarded to a transport supplier using his brother's truck;
- b. Correspondence pertaining to the truck between the Applicant and his brother in April, May and November 2017, including a query on the said transport from Nairobi to Addis Ababa<sup>11</sup>, and
- c. An email dated 26 November 2017 establishing that the solar lamps

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<sup>10</sup> Annex 12 of the IR (Annex R-1 (G) of the Reply) – IGO Forensic review of the Applicant's UNHCR email account summarized at paras 32 and 72 to 73 of the investigation report. Exhibit 7 – Exchanges T. Nderitu – Transport – “RE Amended Req. for Solar Lantern Ethiopia BT0078 – 10ft truck”, Email dated 25 August 2017 from Applicant to UNHCR supply colleagues.

<sup>11</sup> *Ibid.*

referred to earlier on were transported in the Applicant's brother's truck.

31. These documents provided clear and convincing evidence of the Applicant's knowledge of his brother's involvement with the use of the truck by contracted UNHCR suppliers. Knowledge of such involvement is not factually the same as knowledge of ownership. However, there is merit to the Respondent's submission that the Applicant's knowledge of this involvement of his brother with the truck, in rendering services to UNHCR contracted suppliers, provides sufficient basis for a finding, on the preponderance of the evidence, that the Applicant also had actual knowledge of the ownership of the truck.

32. It was reasonable for the decision maker to conclude, on the preponderance of this evidence that the Applicant was acting with full knowledge that his brother owned the truck. Even if he did not know the ownership details of the truck at the outset, the communication with his brother would have put him on notice from as early as May 2017 that his brother may be the owner.

33. The Applicant's case is that he does not get along with his brother. He averred in the *addendum* to his 9-10 July interview<sup>12</sup> that the mention of his brother's name traumatizes him. This was the impact he says he felt when "it emerged during the interviews that my brother could have secretly tendered the truck KCG XXX into the UNHCR system and kept it a secret from me all that period." It follows logically that when in 2017, the Applicant knew of his brother's involvement as mentioned above and was in communication with him he would have checked on or paid attention to the ownership of the vehicle.

34. An inquiry into the truck ownership would lead to the official records indicating the Applicant's brother's part ownership. This would be of concern even if, as alleged by the Applicant and a Manager of Allied, there was an agreement for sale of the truck by the Applicant's brother to a son of an Allied Director<sup>13</sup>.

35. There is no merit to the Applicant's submission that the administrative

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<sup>12</sup> Annex 3 to the application.

<sup>13</sup> Annex R-1 to the reply at para. 51.

decision failed to take into account relevant evidence pointing to ownership of the truck by Allied. The contention that in Kenya actual ownership of vehicles is not only determined based on official records of the relevant authorities, was a bald assertion by the Applicant, not supported by any evidence.

36. The Tribunal finds that there was a heavy preponderance of evidence that the Applicant had the required knowledge to be aware of his duty to disclose his brother's ownership of the truck. The Tribunal's determination is that there was ample justification for the decision maker's plausible conclusion that the Applicant breached his obligation to disclose an actual, or possible, conflict of interest. Although only evidence on a balance of probabilities was required, the evidence presented surpassed that standard and was clear and convincing.

*Breached the confidentiality of an official IGO investigation*

37. The second charge against the Applicant arises from information given by a colleague, Ms. RK, that he contacted her both before and after his IGO interview. In the latter call she says the Applicant told her that he had the interview with the IGO and that the IGO might approach her as he had mentioned her as having access to certain documents. She told the investigator that the Applicant

talked of a truck ... that he says you were interested in finding its ownership. He told me that he does not own the truck and had also told the same to our former supervisor, IM, who is no longer with the organization. [the Applicant] further said that the truck was purchased by Allied from an individual, but since the original owner had not paid off a bank loan taken to purchase the truck, the logbook remained in his names and not Allied.<sup>14</sup>

38. The Applicant's challenge to the finding that he breached the integrity of the investigation by communicating with Ms. RK is that there was no basis for acceptance of her word against his that such communication occurred. In commenting on the Draft Investigation Report, the Applicant told the investigator that he believed Ms. RK's allegation that he spoke with her needed to be verified "to establish, for example, the phone number that I called her from and the date of

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<sup>14</sup> Annex R/1A to the reply at para 78 and annex R/1J Email dated 27 July 2020.



the phone call.”<sup>15</sup>

39. However, as clearly explained in the reply, there was sufficient evidence of a comparative lack of credibility on the Applicant’s part for the decision maker to have found Ms. RK’s testimony more cogent and credible. The deficiencies in the Applicant’s credibility are evident from the fact that early on in the investigation, he failed to even admit to the sibling relationship between himself and his brother. This was so despite being presented with documents showing *inter alia* that he gave his name as an employment referee and interacted with him on social media.

40. Furthermore, the Applicant’s contentions concerning the motive for Ms. RK to fabricate a story against him were bare assertions without any substantiation.

41. The Tribunal finds that although the evidence was not as strong as for the failure to disclose a conflict of interest, there was a preponderance of evidence that the Applicant breached the confidentiality of the IGO investigation.

***Whether the established facts qualify as misconduct.***

42. The provisions of the regulatory framework relied on by the decision maker in the findings of misconduct are as follows:

*The failure to disclose a conflict of interest*

Staff Regulation 1.2 (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;

Staff Regulation 1.2 (m)

A conflict of interest occurs when, by act or omission, a staff member’s **personal interests interfere with** the performance of his or her official duties and responsibilities or with **the integrity, independence and impartiality required by the staff member’s status as an international civil servant**. When an actual or

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<sup>15</sup> Annex 4 to the application at pages 1-2 of the Applicant’s comments dated 30 November 2020.

**possible conflict of interest** does arise, **the conflict shall be disclosed** by staff members to their head of office, mitigated by the Organization and resolved in favour of the interests of the Organization. [Emphasis added]

*The Breach of Confidentiality of the Investigation*

UNHCR/AI/2019/15 UNHCR Administrative Instruction on Conducting Investigations provides<sup>16</sup>

**28 Investigation participants, including the subject** and witnesses, **must not interfere with an investigation** by withholding, destroying or tampering with evidence, or **by influencing**, coaching, intimidating or retaliating against **anyone associated with an investigation. They must respect the confidential nature of an investigation.** A breach of these obligations may amount to misconduct and may result in an investigation and the institution of disciplinary proceedings. [Emphasis added]

43. Having established that the Applicant knew, or ought to have reasonably known, of his brother's part ownership of and involvement with the operations of Truck KCG XXX, and which was often used by UNHCR suppliers to fulfil UNHCR contracts, there was sound basis for the finding that non-disclosure constituted misconduct. The ownership and involvement of a sibling in the provision of contracted services for the UNHCR would reasonably be considered as a matter of personal interest to the Applicant.

44. The fact or possibility of such personal interest could impact negatively on the perception of integrity, independence and impartiality required of the Applicant as an international civil servant. Accordingly, the Applicant's duty was to disclose the actual or possible conflict of interest. The failure to do so amounts to misconduct as it breaches the disclosure requirements set out in the regulatory framework.

45. There was minimal focus in the case for the Respondent on establishing the basis for a finding that the Applicant's breach of confidentiality of the investigation amounted to misconduct. The correct provisions are not cited in the Decision Letter

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<sup>16</sup> Annex R/4 to the reply.

and the Respondent did not address this aspect of the case as fully as the non-disclosure allegation.

46. However, on a review of the relevant provision, the Applicant's discussion with Ms. RK, relayed after his interview specific aspects of the matters being investigated, namely the ownership of Truck KCG XXX, would amount to the alleged misconduct of breaching confidentiality.

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

47. The main point made by the Applicant, in contending that he was not afforded due process, is that the Administration unfairly shifted to him the burden of proving his innocence. On a review of the process that led to the disciplinary sanction the Tribunal finds that the IGO correctly followed the provisions of parts VI and VII of UNHCR/AI/2019/15.

48. They did so by informing the Applicant of the full nature of the allegations and affording the Applicant an opportunity to give his own account of the events on every allegation. He was given the opportunity to provide evidence, to respond to evidence and to review records of his interviews. The Applicant admits that he was interviewed three times during the investigation and invited to submit further information.<sup>17</sup> This does not amount to a shifting of the burden of proof. On the contrary, it is evidence of due process compliance.

49. Furthermore, the IGO and the decision maker paid more than lip service to complying with the due process requirements. The presumption of innocence was honoured. This is evident from the fact that initially, the information being investigated included an allegation that the Applicant worked to secure preferential treatment for Allied, which was a UNHCR supplier using his brother's truck to fulfil contracted services. Considering the interviews with the Applicant and the information he provided, the IGO concluded that there was insufficient evidence and the Director, Division of Human Resources decided not to proceed with that

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<sup>17</sup> Paragraph one of Applicant's closing submission filed on 4 October 2022.

aspect of the matter.<sup>18</sup> Thereafter, the Applicant was only called upon to respond to the two more minor allegations of non-disclosure of conflict of interest and breach of confidentiality of the investigation.

50. The Applicant further alleges there was lack of due process related to the length of time, around two days' notice, he was afforded before each interview. However, the interviews spanned a period of several weeks from July to October. There is nothing in the timeframe *per se* to substantiate a lack of due process.

51. Finally, the Applicant contends that he was unwell when he was interviewed. However, he did not tender any evidence to prove that he was ill and how that may have impacted on his credibility or detracted from the opportunities to give his own account of events.

52. The preponderance of evidence supports that the Applicant's due process rights were respected during the investigation and in deciding on the disciplinary sanction.

***Whether the sanction is proportionate to the offence.***

53. The Organization has a wide degree of discretion in determining the appropriate disciplinary measure. This is a discretion with which the Appeals Tribunal has indicated it will not lightly interfere.<sup>19</sup> Such intervention is only warranted where the sanction imposed is “blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity.”<sup>20</sup>

54. The key aspect of the sanction to be considered in the Tribunal's judicial review process is whether it is proportionate to the offence. The Appeals Tribunal observed in *Samandarov*<sup>21</sup> that

23. With regard to the discretion of the Secretary-General to impose a sanction, ... this discretion is not unfettered, in that there is a duty

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<sup>18</sup> Annex R-2 to the reply – the 8 June 2021 Letter of Allegations.

<sup>19</sup> *Ladu* 2019-UNAT-956, para. 40.

<sup>20</sup> *Nyawa* 2020-UNAT-1024 at paras. 88 and 89.

<sup>21</sup> 2018-UNAT-859.

to act fairly and reasonably in terms of which the UNDT is permitted to interfere where the sanction is lacking in proportionality. The proportionality principle limits the discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired result.

55. The disciplinary measure of loss of one step in grade pursuant to staff rule 10.2(a)(ii) is the second least severe sanction in a list of nine others, in which dismissal is the most severe. The only disciplinary measure lighter than the one decided on for the Applicant would be a written censure.

56. It is also clear from the decision letter that appropriate factors were considered in deciding on the level of the sanction. The High Commissioner considered mitigating and aggravating circumstances and was of the view that there were no aggravating factors. In considering mitigating factors, the High Commissioner took into account the fact that prior to this investigation, the Applicant had served UNHCR since 1 January 2011, without incident.

57. The Tribunal's finding is that there was no lack of proportionality in the sense of absurdity in the measure decided upon as a sanction for the proven misconduct.

### **Judgment**

58. The application is dismissed.

*(Signed)*

Judge Eleanor Donaldson-Honeywell

Dated this 30<sup>th</sup> day of November 2022

Entered in the Register on this 30<sup>th</sup> day of November 2022

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi