



Before: Judge Sean Wallace

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MUNYWOKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Jacob van de Velden, DAS/ALD/OHR, UN Secretariat

Andrea Ernst, DAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant is a former HIV/AIDS Officer and Chief of Section working with the United Nations Mission in South Sudan (“UNMISS”). He filed an application with the United Nations Dispute Tribunal in Nairobi on 12 March 2023 to contest the decision to impose on him the disciplinary measure of dismissal from service in accordance with staff rule 10.2(a)(ix)
2. The Respondent filed a reply on 17 May 2023 and requests the Tribunal to reject the application.
3. The Tribunal held a case management discussion (“CMD”) on 12 July 2023. On the need for oral evidence, the parties agreed that the evidence on the record was sufficient and that, therefore, there was no need to hold a hearing. Thus, the parties waived a hearing and submitted the case on the record already presented.
4. By Order No. 117 (NBI/2023) issued on 13 July 2023, the parties were directed that, if they so wished, to file their closing submissions by 26 July 2023. The Applicant filed his closing submissions on 26 July 2023. The Respondent did not file any additional submissions.

Facts

5. On 31 December 2018, the Investigations Division of the Office of Internal Oversight Services (“ID/OIOS”) received from the Conduct and Discipline Team (“CDT”) of UNMISS, a report of possible misconduct implicating Ms. Futhie Ngcamphalala, an Administrative Assistant in the UNMISS HIV/AIDS Unit. Specifically, it was reported that, on 11 October 2018, Ms. Ngcamphalala, whilst absent from the mission, submitted a Low Value Acquisition (“LVA”) for USD7,650, to procure outside catering for a training event in a Protection of Civilian Site (“PoS”) in Juba on 6-8 November 2018 (later changed to 12-14 November 2018), which did not take place.
6. It was further reported that on 10 December 2018, Ms. Ngcamphalala

submitted another LVA, for USD4,050, for catering at a training event on the same PoS, on 23-25 January 2019, which also did not take place. Based on the two LVA submissions, UNMISS paid a total amount of USD11,700 to the selected vendor, Virgin Hotel, Juba, South Sudan, for both events for services that reportedly were not provided.

7. The Applicant was the immediate supervisor of Ms. Ngcamphalala and was her First and Second Reporting Officer¹. It is under this framework that the Applicant authorized the LVAs and certified that the services were rendered.²

8. Upon receipt of the report, the OIOS conducted formal investigations. On 11 October 2019, the OIOS interviewed the Applicant as a witness. On 28 October 2020, the OIOS interviewed the Applicant as a subject.

9. Following the interview, the OIOS provided the Applicant with a copy of the transcript of the subject interview. On 6 November 2020, the Applicant submitted to OIOS a written statement and supporting documents.³

10. On 27 May 2021, the OIOS transmitted its investigation report to the Assistant Secretary-General, Office of Human Resources (“ASG/OHR”) for appropriate action.⁴

11. By a letter dated 10 May 2022, the Director, Administrative Law Division, Office of Human Resources (“ALD/OHR”) issued formal allegations of misconduct against the Applicant.⁵ The Applicant was allowed a period of one month to provide comments to the charges.⁶

12. The Applicant submitted his comments on 17 July 2022.⁷

13. In a letter dated 21 February 2023, the ASG/OHR, informed the Applicant that,

¹ Reply, annex 1 (investigation report), para. 12.

² *Ibid.*, paras. 1-4.

³ *Ibid.*, para. 12; and annex Doc 806.

⁴ Reply, annex 2.

⁵ *Ibid.*, annex 3.

⁶ *Ibid.*

⁷ *Ibid.*, annex 4.

based on the available evidence, the Under Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”) had decided to impose on him the disciplinary measure of dismissal.⁸ Further, the USG/DMSPC decided that the amount of up to USD106,570.00 would be recovered from the Applicant, in accordance with staff rule 10.2(b)(ii).

Applicant’s involvement in the misconduct

14. In the sanction letter, it is stated that it was sufficiently established that:

From 3 July 2017 and 10 December 2018, [Applicant] signed, and thereby indicated your approval, or Ms. [Futhie] Ngcamphalala did so on your behalf, of LVA-requests and related SCR’s [Service Certification Reports] for a total value of US\$ 106,570.00 in favour of Virgin Trading for the purported procurement of conference services for HIV/AIDS Unit events and goods for the HIV/AIDS Unit in the period of 12 July 2017 and 25 January 2019. One or more of these LVA-requests were supported by false documentation and the purported services and goods were never provided. Virgin Trading was therefore unduly paid and this resulted in a financial loss to the Organization of US\$ 106,570.00; and/or

From 18 September 2019 until 6 December 2020, you interfered with a duly authorized OIOS investigation by putting pressure on Ms. [Mary] Moraa [a witness] to provide false information to OIOS about the purported HIV/AIDS Unit events, specifically the purported HIV/AIDS Unit events on 12-14 November 2018 and 23-25 January 2019, which never happened. To this end, following [his] interview by OIOS on 11 October 2019, you called Ms. Moraa to instruct her on what to say during her witness interview by OIOS scheduled for 21 October 2019. Further, on 2 September 2020, you pressured Ms. Moraa to provide false information to OIOS investigators in response to possible questions on whether there had been a request to and authorization from Ms. Moraa’s section chief to support the purported HIV/AIDS Unit events. Ms. Moraa had no knowledge of or involvement in those events. Finally, on 7 September 2020, you attempted to dissuade Ms. Moraa from telling the truth after she received an invitation for a subject interview from OIOS and she informed [Applicant] she wanted to tell OIOS the truth.

⁸ *Ibid.*, annex 5.

Standard of review and burden of proof.

15. 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 can examine whether the decision is absurd or perverse.⁹

16. 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”.¹⁰

17. 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, whether the staff member’s due process rights were guaranteed during the entire proceeding and whether the sanction is proportionate to the offence”.¹¹

18. The Administration bears the burden of establishing that the misconduct has occurred,¹² and the misconduct must be established by clear and convincing evidence.¹³ This has been interpreted to mean that the truth of the facts asserted is highly probable.¹⁴

⁹ *Sanwidi* 2010-UNAT-084; *Santos* 2014-UNAT-415, para. 30.

¹⁰ *Sanwidi op. cit.*, para. 42.

¹¹ *Mahdi* 2010-UNAT-018, para. 27; *Haniya* 2010-UNAT-024, para. 31; *Sanwidiop. cit.*, para. 43; *Masri* 2010-UNAT-098, para. 30; *Portillo Moya* 2015-UNAT-523, paras. 17 and 19-21; *Ibrahim* 2017-UNAT-776, para. 48; see also *Mbaigolmem* 2018-UNAT-890, paras. 15 and 16.

¹² *Diabagate* 2014-UNAT-403.

¹³ *Molari* 2011-UNAT-164.

¹⁴ *Appellant* 2013-UNAT-302.

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

- (i) *Signing, approving or authorizing LVA requests and related SCRs for a total value of USD106,570 for services that were never rendered.*

Applicant's submissions

19. The Applicant submits that he did not engage in fraud. He only acknowledges that he may have failed in certain respects to meet his supervisory obligations to the requisite standard. He contends that his failing lies in not taking proper measures to verify the documents and assurances presented to him by his supervisees, particularly Ms. Ngcamphalala. This failure was an act of inadvertence.¹⁵

20. The Applicant further avers that he was dragged into this procurement fraud due to his position; being the Chief of Section (Chief HIV/AIDS) and by default in approving LVAs, Procurement Orders (“POs”) and signing SCRs. He elaborates that procurement is purely administrative in nature and the United Nations employs and deploys competent staff members in respective fields who should shoulder their responsibilities. In his case, the HIV/AIDS Unit Administrative Assistant and the Team Assistant handled quotations and POs directly. Therefore, his signing of the LVAs, POs and the SCRs with regard to the questionable events were among many to which he appended his signature with full trust of his staff.¹⁶

21. The Applicant further seeks to exonerate himself by relying on the alleged admission of Ms. Ngcamphalala. The Applicant posts that Ms. Ngcamphalala being the Unit’s Focal Point on administration, requisitions, LVAs, POs and report writing, she admits full responsibility of fraud.¹⁷ He maintains that Ms. Ngcamphalala expressed her responsibility for the fraud out of her own volition and with an apology.

¹⁵ Reply, annex 4, p. 1.

¹⁶ *Ibid.*, p. 3.

¹⁷ Application, annex 6, Exhibit 6; Applicant’s response to Order No. 097 (NBI/2023), p. 4; Reply, annex 4, p. 3.

Respondent's submissions

22. The Respondent's position is that the Applicant admitted his implication in the procurement fraud and the facts are also established by clear and convincing evidence.

23. These facts are established by: (a) 14 LVA-requests that the Applicant signed or that were signed on his behalf indicating his approval thereof; (b) the 14 SCRs that the Applicant signed or that were signed on his behalf, following which payment to Virgin Trading was made by the Organization; (c) witness testimonies which clearly show that the 14 LVA-requests were supported by false documentation and that the services and goods for which the LVA-requests were submitted and associated SCRs signed were never provided; (d) documentary evidence and witness testimony, that none of the purported events for which the 14 LVAs and SCRs were signed ever took place; and (e) documentary evidence and witness testimony, that the LVA-requests approved by the Applicant involved elements indicative of fraud.¹⁸

24. The Respondent further submits that the Applicant no longer disputes the facts. To this end, the Respondent seeks to rely on the document signed by the Applicant on 20 June 2022 during confidential discussions with the Office of Staff Legal Assistance ("OSLA").¹⁹ In this document, the Applicant states "I admit the allegations."²⁰

25. Contrary to the Applicant's contention that Ms. Ngcamphalala took full responsibility of the misconduct, the Respondent contends that Ms. Ngcamphalala did not take full responsibility. Rather, she confirms the Applicant's involvement in fraud. She indicates that the Applicant was fully aware of the LVA requests and signed the associated POs and SCRs and was copied on related correspondence.²¹

26. In view of the above, the Respondent maintains that the Applicant admitted his implication in the procurement fraud and the facts are also established by clear and

¹⁸ *Ibid.*, para. 12.

¹⁹ Application, annex 5 (Letter of undertaking).

²⁰ *Ibid.*, para. 2.

²¹ Reply, para. 15; application, exhibit 6, point. 4.

convincing evidence.

Considerations

27. The underlying facts in this case are not disputed by the parties. The Applicant does not dispute that, over the course of 18 months while he was Chief of the HIV/AIDS Unit, his Unit submitted LVA requests and related SCRs for purported procurement of conference services for events and goods that did not take place and/or were not provided. (Most relate to alleged training events, although some are for procurements of lab coats and banners from the same vendor, a hotel.) This judgment will focus mainly on the events, but it is clear that evidence also supports the allegations relating to procurements. The Applicant also does not dispute that the total value of these submissions was USD106,570. Finally, he does not dispute that these requests were either signed by him personally, or were signed by his Assistant, Ms. Ngcamphalala, on his behalf.

28. The Applicant's argument is that, while Ms. Ngcamphalala committed fraud in submitting these requests, he did not. He argues that he was merely negligent in failing to detect and correct Ms. Ngcamphalala's fraud.

29. The record is replete with evidence showing the fraudulent scheme, and the Tribunal notes that Ms. Ngcamphalala did not contest her dismissal for this misconduct. Since the Applicant also does not contest the fraud, merely his participation in it, the Tribunal will only focus on evidence relating to the Applicant's involvement.

30. That said, the Tribunal finds clear and convincing evidence of Applicant's involvement in this fraud, and the subsequent attempt to cover it up by inducing a witness to lie to the investigators.

31. First, it is important to note the nature of the fraudulent submissions. These were not requests for legitimate services provided at an inflated price or in an excess volume; they were for services allegedly provided in connection to events that never happened (or thousands of lab coats allegedly purchased from a hotel that never were

provided).

32. It is possible that a supervisor negligently may approve payment requests for catered meals at USD7 each rather than USD5 each, or for 50 catered meals when only 30 people attended an event. However, it is inconceivable that a supervisor would approve meals for an event that did not take place. Surely the supervisor would ask questions about the event: How did the event go? How many people attended? Who were the speakers? How was the presentation received? (Or where are the thousands of lab coats we ordered?) Failure to conduct such basic inquiries would amount to at least gross negligence, and indeed could reflect knowledge of the fraud itself.

33. Second, the relationship between the Applicant and Ms. Ngcamphalala is an important fact in this case. As noted above, the Applicant was the supervisor of Ms. Ngcamphalala and her First and Second Reporting Officer. Beyond that, from 2012 they were in a romantic relationship, they were married in 2015, and had a child together on 23 June 2018.

34. The Applicant denies both the relationship and the marriage, and he attributes the child to a single sexual encounter. However, his denial is contradicted by witnesses, documents, photographs, and Ms. Ngcamphalala's social media.

35. The Tribunal views the Applicant's false denial of his close relationship with Ms. Ngcamphalala as an effort by the Applicant to distance himself from Ms. Ngcamphalala and her fraud. The Tribunal also finds that his denial reflects on his overall credibility. *Falsus in uno, falsus in omnibus*. Thus, the Tribunal finds that the Applicant was directly involved in the fraud.

36. Moreover, the documents that the Applicant provided support his knowledge of the fraud. The HIV/AIDS Unit Activity and Workplans for the relevant period do not mention the events at issue. The Monthly Reports, Training Reports, and Unit Annual Report describe one of the alleged events as having 200 attendees on the first day, 3000 attendees on the second day, and 280 attendees on the third day. Surely one would remember an event with 3000 people in attendance. And interestingly, the

Applicant certified on the SCR that “food arrived on time, was enough for all participants...” It is beyond belief that food arranged for 200 would be “enough for all [3000] participants”.

37. Furthermore, copies of the Monthly Reports were obtained directly from the office to which the Applicant’s HIV/AIDS Unit reported (HC/RC). These copies were identical to those provided by the Applicant, except that they do not include any mention of the events at issue. The Tribunal concludes that the Applicant doctored his copies of the reports and provided these doctored reports to investigators to support his claim.

38. Among the reports that the Applicant provided is a Training Report regarding one of the events in January 2019. That report listed 100 participants without any contact details. Investigators were able to contact two of the alleged participants, but both denied being at the event in question. In fact, one said he last attended an HIV/AIDS Unit training in 2012. The other said that he had participated in an HIV/AIDS training event in April 2013, but he moved from South Sudan to Uganda as a refugee in 2016. He never returned to South Sudan and so could not have attended the 2019 event. Furthermore, many of the participants listed on the Training Report provided by the Applicant duplicated names of participants in the April 2013 event.

(ii) Interfering with a duly authorised OIOS investigation, by putting pressure on Ms. Moraa to provide false information to OIOS about the purported events on 12-14 November 2018 and 23-25 January 2019.

Applicant’s submissions

39. The Applicant denies having interfered with the OIOS investigations or having put pressure on Ms. Moraa to lie to the OIOS investigators. He submits that Ms. Moraa was invited for 18 November 2018 and 19 January 2019 PoS events by Ms. Ngcamphalala. Further, there is strong evidence by WhatsApp chats and audio records between Ms. Ngcamphalala and Ms. Moraa pertaining to the invitation of Ms. Moraa to support Ms. Ngcamphalala in the 18 November 2018 and 19 January 2019 training

events. In addition, Ms. Moraa confessed to OIOS that she was invited by Ms. Ngcamphalala.²²

40. The Applicant challenges Ms. Moraa's evidence where she implicates him. He argues that Ms. Moraa's evidence is inconsistent and hence unacceptable. Ms. Moraa lied to the OIOS in contravention of para. 6.18(b) of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) and this makes her evidence illegal.²³

Respondent's submissions

41. The Respondent submits that the Applicant's interference with the OIOS investigation into his misconduct is established by the following evidence:

42. WhatsApp communications between the Applicant and Ms. Moraa, documenting the Applicant's interference with the OIOS investigation into his misconduct²⁴ and the witness testimony and admissions of Ms. Moraa that: (i) the Applicant had put pressure on her to lie to the OIOS investigators about the two purported events in November 2018 and January 2019, *i.e.*, that she had assisted Ms. Ngcamphalala in the purported events, whereas Ms. Moraa had no knowledge or involvement in the events whatsoever;²⁵ (ii) she lied at his request about the two purported events in November 2018 and January 2019 to the OIOS investigators during her first interview on 21 October 2019; and (iii) she had not been involved in and knew nothing about these events.²⁶

43. The Respondent asserts that the Applicant in his application does not deny his WhatsApp messages, which clearly and convincingly show his interference in the OIOS investigation.

²² Applicant's submissions in response to Order No. 097 (NBI/2023), filed on 9 June 2023.

²³ *Ibid.*

²⁴ Reply, annex 3, Doc. 730.

²⁵ *Ibid.*, Doc. 110.

²⁶ *Ibid.*, Doc. 678.

Considerations

44. Ms. Moraa was listed in the reports as one of the trainers at the suspect events. The evidence shows that initially Ms. Moraa told an OIOS investigator that she had participated in the training events. However, when confronted with documentation that she was elsewhere at the time of the events, Ms. Moraa equivocated and made excuses.

45. Later, Ms. Moraa contacted OIOS to discuss the matter further. In a subsequent interview, she admitted that she had provided false information to OIOS and in fact had never participated in any HIV/AIDS Unit training event.

46. She stated that Ms. Ngcamphalala and the Applicant had asked her to give false information about the training events to investigators. Specifically, she said that the Applicant had asked her “to support her brother” and to say that she had been involved in the training.

47. Further, the Applicant told her that she was only a witness and no longer working for the United Nations so she could not get into trouble. Ms. Moraa said that the Applicant said he would support her if she applied for other United Nations jobs.

48. Ms. Moraa also provided screenshots of WhatsApp conversations that she had with both Ms. Ngcamphalala and the Applicant during the investigation which corroborate her new statements. In those WhatsApp conversations, the Applicant first asked Ms. Moraa if Ms. Ngcamphalala could name her as a trainer at the subject events. Later he said that, if asked, she should say that she had been given permission to assist in HIV/AIDS Unit training events.

49. After her initial interview, Ms. Moraa told the Applicant on WhatsApp of the evidence OIOS confronted her with and suggested telling OIOS the truth. The Applicant dissuaded her from doing so.

50. The Tribunal finds that Ms. Moraa had no motivation to lie about the Applicant’s efforts to have her testify falsely. Moreover, the WhatsApp messages

support her story of these efforts.

51. The fact that the Applicant's efforts to influence Ms. Moraa dovetailed with similar efforts of Ms. Ngcamphalala is additional evidence that he and she were working in concert to cover up the fraudulent scheme. The Tribunal notes that it is universally recognized that efforts to create false testimony may be considered as consciousness of guilt.

52. In conclusion, the Tribunal finds that the evidence is both clear and convincing that the Applicant was involved in the misconduct of fraud and witness tampering to cover up the fraud.

Whether the established facts qualify as misconduct.

Applicant's submissions

53. The Applicant contends that his actions do not qualify as serious misconduct. He states that his actions can be categorised as negligence of duty due to his failure to closely supervise his administrative staff.²⁷

Respondent's submissions

54. The Respondent submits that the Applicant's acts were in violation of staff regulations 1.2(b) and 1.2(q) and staff rule 1.2(c). He failed to uphold the highest standards of integrity required under staff regulation 1.2(b) by participating in the procurement fraud and by his interference in the related OIOS investigation. The latter action of the Applicant was further in violation of the more specific integrity-related staff rule 1.2.(c).

55. The Applicant's acts were further in violation of staff regulation 1.2(g), financial rule 101.2 and financial regulation 5.12 of ST/SGB/2013/4 (Financial Regulations and Rules of the United Nations). His conduct indicated a failure to exercise reasonable care when utilizing the Organization's assets and to uphold the

²⁷ Applicant's response to Order No. 097 (NBI/2023), p. 5.

general principles governing the exercise of procurement functions (*i.e.*, best value for money, fairness, integrity and transparency, effective international competition and the interest of the United Nations).

Considerations

56. The Applicant's argument that he is not guilty of misconduct is premised on his claim that he was not involved in the fraud and cover up. The Applicant concedes that fraud and interfering with an OIOS investigation by seeking to obtain false testimony would qualify as serious misconduct if he were to have done so.

57. For the reasons stated above, the Tribunal finds there to be clear and convincing evidence that the Applicant was involved in the fraudulent scheme and in the attempt to interfere with the investigation into that scheme by inducing a witness to lie to investigators.

58. Thus, it is clear that the established facts qualify as serious misconduct.

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

59. The Applicant avers that he was not accorded a fair process.²⁸ He submits that OIOS did not prepare him as a subject. He was only invited for an interview as a witness, thus contravening paragraphs 6.10 (b) and 7.1 of ST/AI/2017/1. In addition, the Applicant states that he did not complete his interview as a subject because he collapsed during the interview process and was admitted in the hospital. When he was discharged from the hospital, he requested to complete his interview, but the OIOS did not accord him the opportunity.²⁹

60. The Respondent submits that the Applicant's procedural fairness rights were respected. The Applicant was interviewed and was provided with an audio-recording of his witness interview and a transcript of his subject interview. The Applicant was

²⁸ *Ibid.*, p. 6.

²⁹ Application, section VIII, point. i.

provided all supporting documentation, and was informed of the allegations against him, his right to seek the assistance of counsel, and he was provided the opportunity to comment on the allegations. The Applicant's comments on the allegations were duly considered.

61. The Applicant's assertion of a "gross conflict of interest" of the OIOS investigators is entirely unsubstantiated and unfounded. His assertion that "OIOS did not prepare him as a subject," is similarly unsubstantiated. It is also unfounded. On 11 October 2019, OIOS interviewed the Applicant as a witness. On 28 October 2020, OIOS interviewed the Applicant as a subject. Before each interview the Applicant received a pre-interview information sheet and was fully informed by OIOS that he was being interviewed as a subject during his second interview.

Considerations

62. The Applicant submits a repetitive laundry list of complaints about the investigation, that might come under the heading of "due process" violations. They will be organized broadly and examined here.

63. First, he complains that "OIOS did not prepare me as a subject...but as a witness [and] did not give me a chance to complete my interview as a subject after I was discharged from Level II hospital following my collapse during the interview process." Factually, this is correct, but is not a complete recitation of the facts.

64. At the time of his initial interview, the Applicant was treated as a witness because the only alleged suspect was Ms. Ngcamphalala. As the investigation progressed, and more evidence pointed towards the Applicant's involvement, he was re-interviewed as a suspect.

65. During that second interview, the Applicant appeared to have a medical episode, and the interview was halted. The Applicant was taken to the UNMISS clinic and "reported to be in good health." Later, the Applicant sent OIOS numerous written documents. Ultimately, OIOS said that there was no further need to interview him.

66. At the CMD, the Applicant said he saw no need for further witnesses or testimony. The Applicant was specifically asked, in light of his claim that he was not given a chance to complete his interview as a subject, if there was any other information that he thought appropriate to provide the Tribunal that was not in the record because of the aborted interview. The Applicant said he had no additional information to present. Thus, the Tribunal deems this argument waived and/or without merit.

67. Next the Applicant alleges a “Gross Conflict of Interest presented by OIOS investigators.” He explains this claim as follows:

I have presented how Patrick, Alma and Betty connived to stage the misconduct allegation against me and further how the OIOS frequently visited the three in my office in Tongping camp for reports among others. For the OIOS or ODSRSG RC/HC to request Patrick to send them various Unit report activities while Patrick was a key player in compiling report of the instigated case obviously presents an authenticated grave Conflict of Interest. The OIC – Dr. Mashako (M&E Officer) was not contacted for the reports and hence an intentional and fixing move. There was no demonstrated impartiality in the OIOS investigation when it turned internal (Alma, Betty and Patrick).

68. Collecting evidence such as reports from the complaining witnesses does not amount to a conflict of interest, nor does the failure to ask for those same reports from a different individual. Most telling, however, is that the Applicant does not claim that any of the reports obtained from the initial complainants (Patrick, Alma and Betty) were inauthentic. He also did not offer to the Tribunal any additional reports (including those from Dr. Mashako) that he thought were relevant. Thus, this allegation is also without merit.

69. The Applicant also complains that the case was “pre-determined”. As evidence of this he points to an email that he received from Ms. Martha Helena Lopez (ASG/OHRM) on 29 April 2022 imposing the disciplinary sanction.

70. The Respondent says that was an error and that the letter related to a different person (with a similar name) and a different case. The Respondent submits an email sent to the Applicant eight minutes later which says “You just received an email ... It was sent to you in error, please disregard and delete the email and its content.”

71. It does appear to be true that the 29 April letter related to a different person, “Mr. Michael Mubya Munywoki”, and not the Applicant, “Dr. Michael Daniel Munywoki.” It also appears that this letter is related to “a disciplinary measure post-separation” which clearly could not apply to the Applicant, since he had not been separated. (The letter itself is not in the record, just the referring email.)

72. The Tribunal concludes that the 29 April 2022 email was sent to the Applicant in error and related to a different case. Thus, the Tribunal finds no “pre-determination” and no due process violation in this case.

73. The Applicant also asks why OHRM did not accept his offer of settlement for a lesser sanction. As explained at the CMD, the Tribunal will not consider any references to settlement discussions that were unsuccessful.

Whether the sanction is proportionate to the offence.

The Applicant’s submissions

74. The Applicant submits that the sanction imposed on him was too harsh. Considering the evidence he provided to the Administration, his long service of 20 years, a track of good record, this being his first offence, his position, age and to have been holding a continuing appointment, the sanction of dismissal was irrational, harsh and unwarranted.

75. Regarding the financial recovery measure, the Applicant submits “I have my right to object paying for any recovery funds in respect of Ms. Ngcamphalala. The Respondent failed justify why I am obliged to make an illegal payment”.

The Respondent’s submissions

76. The Respondent’s position is that the Organization rationally exercised its discretion. The disciplinary measure imposed fell within the reasonable range of proportionate options available for each of the Applicant’s acts of serious misconduct. Indeed, by each of his acts of misconduct, the Applicant acted in complete disregard of the highest standards of integrity expected of United Nations staff members under

staff regulation 1.2(b). In this case, there was a string of dishonest conduct by the Applicant spanning years, and then ultimately an attempt to cover it up by his interference with the investigation into his misconduct. His dismissal was entirely appropriate, also considering his senior position as Chief of the HIV/AIDS Unit, which aggravated his misconduct.

77. The Respondent contradicts the Applicant's averment that his dismissal is "*too harsh*" in light of his 20 years of service with the Organization and his clean disciplinary record since this was his "*first offence*". His long service was duly considered as a mitigating circumstance. However, this could not alter the appropriate sanction in view of the nature and gravity of his misconduct. Relying on *Saleh*³⁰, the Respondent argues that in instances of dishonesty, the severity of the misconduct tends to outweigh other mitigating considerations such as length of service, a clean disciplinary record, difficult personal circumstances, expressions of remorse and the like.

Financial recovery measure

78. The Respondent states that, considering their respective roles, the Applicant and Ms. Ngcamphalala, were both responsible, jointly and severally, for the Organization's financial loss of USD106,570.00. The financial recovery by the Organization will ensure that the financial loss of the Organization is fully recovered.

Considerations

79. It is obvious to the Tribunal that defrauding the United Nations of over USD100,000 is a very serious offense. Indeed, in recognition of that serious nature, the Organization has instituted a zero-tolerance policy for fraud involving staff members.

80. It is an even more serious offense to interfere with an investigation into that fraud by inducing a witness to provide false testimony. Such behavior goes to the very heart of the internal justice system and calls into question the integrity of the staff

³⁰ *Saleh* 2022-UNAT-1239, para. 33.

member. For this reason, dismissal may be appropriate.

81. The Applicant points to various facts that he says should be considered in mitigation. He claims that:

[d]ismissal is too harsh considering my adduced evidence, 20 years' service with the UN, track of good records put during my tenure of duty, being ...my first offense, my position, age, Continuing Appointment, etc.

82. The Tribunal will examine each of these factors. First, as to the “adduced evidence”, the Tribunal views this to mean evidence that the Applicant produced in his effort to persuade that he was not involved in the fraud or cover up. As noted above, the Tribunal finds the evidence of his guilt to be clear and convincing. Thus, the “adduced evidence” is not a valid mitigating factor.

83. Similarly, the Applicant argues that he “did admit to my conduct. I am remorseful for my negligence.” This too is not a valid mitigating factor in this case. It would be mitigation if he had admitted the full extent of his conduct, but he did not.

84. Regarding the Applicant’s 20 years of United Nations service, his position, continuing appointment, and track record, the USG/DMSPC expressly noted that “your length of service to the Organization, which was considered as a mitigating circumstance.” However, the USG/DMSPC went on to correctly observe that “your position as Chief of the HIV/AIDS Unit...[was] considered as an aggravating factor. The Tribunal finds that this is an appropriate application of the facts to the sanction.

85. Twenty years of service is a mitigating factor. However, the Applicant’s position as Unit Chief enabled him to commit the proven fraud. He further used his position to try to persuade a subordinate to lie on his behalf. That is an aggravating factor.

86. Finally, the Applicant points to his age and health conditions as mitigation as well. This is appropriate and should be considered. However, in weighing the Applicant’s age and declining health against the gravity of his offense (a lengthy

pattern of fraud, the large sum involved, his attempt to suborn perjury, and the violation of his position of trust), and with due consideration to the Organization's stated zero-tolerance policy for staff fraud, the Tribunal finds that dismissal is an appropriate and proportional sanction.

87. The Applicant also contests his being "subjected to pay fraud deductions for Ms. Ngcamphalala". The Tribunal understands this to mean that Applicant is to reimburse the Organization for the losses suffered as a result of the fraud, jointly and severally with Ms. Ngcamphalala.

88. Rule 101.2 of ST/SGB/2013/4 expressly provides that a "staff member who contravenes the [Financial Regulations and Rules including procurement] may be held personally accountable and financially liable for his or her actions."

89. Since the Applicant and Ms. Ngcamphalala jointly committed this fraud, it is just that they should jointly be responsible for reimbursing the losses sustained as a result. Of course, the Applicant will receive credit for any portion that Ms. Ngcamphalala pays.

90. In sum, the sanction imposed was proportionate to the gravity of the offense.

JUDGMENT

91. In light of the Tribunal's conclusions, the application is dismissed.

(Signed)

Sean Wallace

Dated this 31st day of July 2023

Entered in the Register on this 31st day of July 2023

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi