



**Before:** Judge Margaret Tibulya

**Registry:** Geneva

**Registrar:** René M. Vargas M.

O'BRIEN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

George G. Irving

**Counsel for Respondent:**

Elizabeth Gall, BMS/OLS, UNDP

## **Introduction**

1. The Applicant, a former Regional Technical Advisor, Bureau for Policy and Programme Support (“BPPS”), United Nations Development Programme (“UNDP”), Regional Hub, Istanbul, contests the decision to impose on him the disciplinary sanction of separation from service with compensation in lieu of notice and without termination indemnity.

2. For the reasons set below, the Tribunal decides to reject the application.

## **Facts**

3. By letter dated 26 October 2021, the Assistant Secretary-General (“ASG”), Assistant Administrator and Director (“AAD”), Bureau for Management Services (“BMS”), UNDP, informed the Applicant that he was being charged with four instances of misconduct, namely: (i) improper use of his UNDP-issued laptop to access websites containing pornography and other sexually explicit material, and advertised escort services; (ii) engaging in unauthorized outside activities; (iii) engaging in potential conflicts of interest; and (iv) knowingly making a false statement and providing a false document to investigators of the Office of Audit and Investigations (“OAI”). The Applicant was asked to provide comments on the charges.

4. By email dated 10 December 2021, the Applicant provided his comments on the charges.

5. During the review of the Applicant’s comments, OAI discovered an error in its forensic examination of the Applicant’s UNDP-issued laptop, re-extracted data using additional forensic tools, and prepared a supplementary forensic report dated 25 January 2022.

6. By letter dated 10 February 2022, the ASG, AAD, BMS, UNDP, informed the Applicant that the updated evidence was sufficient to maintain the first charge of improper use of his UNDP-issued laptop (“the updated charge letter”).

7. By emails dated 17 and 23 February 2022, the Applicant provided comments on the updated charge letter.
8. On 25 March 2022, the Associate Administrator, UNDP, imposed on the Applicant the disciplinary sanction in para. 1 above.
9. On 21 June 2022, the Applicant filed an application against the contested decision.
10. On 22 July 2022, the Respondent filed his reply.
11. By notification dated 7 June 2023, the Tribunal invited the parties to attend a Case Management Discussion (“CMD”) on 14 June 2023, and instructed the Applicant to file his rejoinder, if any, by 14 June 2023.
12. On 8 June 2023, the Applicant requested an extension of time until 21 June 2023 to file his rejoinder, which was granted by notification of the following day.
13. On 14 June 2023, the parties attended a CMD, held virtually via Microsoft Teams.
14. On 21 June 2023, the Applicant filed his rejoinder.
15. By Order No. 63 (GVA/2023) of 22 June 2023, the Tribunal scheduled a hearing on the merits.
16. On 29 June 2023, the Applicant filed three witness’ statements.
17. On 7 July 2023, the parties and three witnesses attended a hearing, held virtually via Microsoft Teams.
18. By Order No. 74 (GVA/2023) of 10 July 2023, the Tribunal instructed the parties to file their respective closing submission, which they did on 28 July 2023.

## Consideration

19. The Applicant is alleged to have engaged in four instances of serious misconduct, which led to the imposition of the disciplinary sanction of separation from service with compensation in lieu of notice and without termination indemnity. Specifically, the Applicant was found to have violated Staff Rules and Regulations, as well as the Standards of Conduct of International Civil Servants, by:

- a. Improperly using his UNDP-issued laptop to access websites containing pornography and other sexually explicit material and advertised escort services;
- b. Engaging in four instances of unauthorized outside activities;
- c. Giving rise to multiple instances of potential conflicts of interest; and
- d. Knowingly making a false statement and providing a false document to OAI investigators.

20. The established jurisprudence of the Appeals Tribunal is that when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing evidence requires more than a preponderance of evidence but less than proof beyond a reasonable doubt. It means that the truth of the facts asserted is highly probable (*Molari* 2011-UNAT-164, para. 2).

21. It is also established that, in imposing a disciplinary sanction, decision-makers enjoy a wide discretionary area of judgment, and that due deference should be shown to their discretion (*Cheikh Thiare* 2021-UNAT-1167, para. 33). In *Cheikh Thiare*, the Appeals Tribunal further added:

[T]he Administration is the best suited actor to select an adequate sanction able to fulfil the following general requirements, which include *inter alia* that the sanction imposed is within the limits stated by the respective norms, and second, the sanction must be sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance. That is why the tribunals will only interfere and rescind or modify a sanction

imposed by the Administration 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.

22. 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, nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General. The role of the Dispute 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 (*Molari*, para. 1).

23. Having examined the evidence on record, the Tribunal identifies the following issues for determination:

- a. Whether the facts of each alleged instance of misconduct have been established by clear and convincing evidence;
- b. Whether the established facts legally amount to misconduct;
- c. Whether the disciplinary measure applied is proportionate to the offence; and
- d. Whether the Applicant's due process rights were respected.

*Whether the facts have been established by clear and convincing evidence*

Improper use of a UNDP-issued laptop

24. The Respondent maintains that for 31 days, between 30 January and 29 March 2018, the Applicant used his UNDP-issued laptop to visit over 1,200 websites containing pornography and other sexually explicit material and advertised escort services. The browsing history data from the Chrome browser covered only 90 days.

25. Further, the Respondent asserts that the updated forensic analysis of the internet browsing history extracted from the Applicant's UNDP-issued laptop demonstrates that:

- a. There were 665 individual visits to the website [www.xvideos.com](http://www.xvideos.com), which advertises itself as “the best free porn site”;
- b. Nineteen visits to the website [www.xvideos.com](http://www.xvideos.com) arose from the user manually typing the website address;
- c. 120 manually typed searches in English on the website, including “porn in World War 2”, “rape”, “Jews Love Black Cock” and “stormy Daniels”;
- d. Visits were also made to other pornographic websites; and
- e. A significant number of these websites were accessed on 30 January, 8, 13, 16, and 20 February, and 7, 15, 17, and 22 March 2018 during core working hours at Istanbul, the Applicant's duty station at the time.

26. It is not suggested that the Applicant was physically present at the Istanbul offices of UNDP at these times.

27. The internet browsing history also included 91 individual visits to the website [www.cracker.com](http://www.cracker.com), which advertises escort services worldwide, as well as visits to more than 20 other websites relating to escort services.

28. Finally, there were 22 manually typed searches in the Applicant's UNDP-issued laptop Chrome browser using the word “escort”, and the words “meggie escort bratislava” and “vienna escort melani” on the website [www.google.com](http://www.google.com).

29. In his defence, the Applicant asserts that:

- a. All of the above allegations are false and retaliatory due to the fact that the Applicant is a recognized whistleblower;

- b. OAI held his UNDP-issued laptop in its possession for approximately four years and he was unable to undertake his own forensic analysis;
- c. Other people used his UNDP-issued laptop from time to time, namely his girlfriend at the time and her younger brother;
- d. Accessing pornographic websites in a private context is not offensive to any third party; and
- e. The punishment is disproportionate to the wrongdoing and totally inconsistent with other cases of improper material found on the computers of staff members.

30. In the Tribunal's view, the assertion that the investigation of the above allegations was retaliatory can only be sustained upon a judicial determination that the allegations are false. The fact that the Applicant has ever been involved in a protected activity and is therefore a whistleblower for purposes of that activity is not a shield against legitimate investigations into alleged misconduct in another context. The answer to the question of whether this investigation was retaliatory will therefore depend on the result of this judicial review process.

31. The Tribunal notes the Applicant's claim that he was unable to undertake his own forensic analysis because his UNDP-issued laptop was with OAI for four years. It is understood that by this claim, the Applicant seeks to challenge the correctness of the forensic report. The Applicant's claim is without merit.

32. Firstly, there is no evidence that he ever requested for the hard drive of his UNDP-issued laptop to undertake or commission his own forensic analysis.

33. Secondly, the Applicant's outright denial that he visited the websites in issue contradicts his testimony that he may have accessed them in his spare time. Importantly, by that admission, the Applicant affirms the integrity of the forensic evidence.

34. The Tribunal notes the internal contradictions in the Applicant's explanations, which render them unworthy of credit. As an example, his assertion that his girlfriend and her brother used the UNDP-issued laptop from time to time, by which he seeks to advance the possibility that they could have been the ones who accessed the websites, contradicts his position that his girlfriend was not fluent in English. The overwhelming majority of the over 1,200 website addresses, and all the 179 manually typed searches were in English.

35. Yet another contradiction is the Applicant producing a written statement dated 26 November 2019, in fluent English, purportedly signed by his girlfriend a year earlier stating that she occasionally used his UNDP-issued laptop. Additionally, the fact that the author's name is written differently in the introduction and signature of the letter puts its authenticity in doubt.

36. Furthermore, when OAI investigators informed the Applicant that they wished to interview his girlfriend, he informed them that she was in the hospital, but later produced a copy of his apparent text message exchange with her three weeks earlier in which she states, "I will say I was looking porno (sic)". On the same day, he informed OAI that his girlfriend had passed away.

37. The above sequence of events appears to be an attempt at concealing the truth and renders the assertion that the Applicant's girlfriend and brother used his UNDP-issued laptop and, by implication, may have been responsible for viewing pornographic websites and escort websites, questionable.

38. There is abundant evidence that on 30 January, 8, 13, 16, and 20 February, and 7, 15, 17, and 22 March 2018, the Applicant accessed pornographic sites during core working hours, i.e., between 10 a.m. and 4 p.m. This negates the assertion that he accessed the pornographic websites in a private context.

39. Finally, the Applicant admitted that he may have occasionally used the UNDP-issued laptop to visit the aforementioned websites in his free time. This is evidenced by the fact that the browsing history shows almost simultaneous access to pornographic website and the Applicant's personal email. This fact renders the

Applicant's assertion that someone else might have used the UNDP-issued laptop even less credible.

40. The Tribunal finds that the allegation that the Applicant improperly used his UNDP-issued laptop to access websites that contained pornography and other sexually explicit material and advertised escort services, has been established by clear and convincing evidence.

#### Unauthorized outside activities

41. The Respondent maintains that the Applicant engaged in four separate instances of unauthorized outside activities, namely by (i) being the Director and majority shareholder of Carbon Market Solutions Limited ("CMS"); (ii) participating in a commercial venture to establish a EUR2,000,000 solar energy project in Ukraine; (iii) incorporating New Sun Solar Limited ("NSS") through CMS; and (iv) participating in the successful bid of CMS to carry out a carbon assessment for the Ports Authority in Rarotonga, Cook Islands.

#### *Legal framework*

42. The Tribunal recalls the applicable legal framework and will consider the issues relating to each of the four activities separately.

#### **Staff Regulation 1.2 Outside employment and activities**

(o) Staff members shall not engage in any outside occupation or employment, whether remunerated or not, without the approval of the Secretary-General;

(p) The Secretary-General may authorize staff members to engage in an outside occupation or employment, whether remunerated or not, if:

(i) The outside occupation or employment does not conflict with the staff member's official functions or the status of an international civil servant;

(ii) The outside occupation or employment is not against the interest of the United Nations; and

- (iii) The outside occupation or employment is permitted by local law at the duty station or where the occupation or employment occurs;

**Staff Rule 1.2**  
**Outside employment and activities**

(s) Staff members shall not engage in any outside occupation or employment, whether remunerated or not, without the approval of the Secretary-General.

(t) Staff members shall not, except in the normal course of official duties or with the prior approval of the Secretary-General, engage in any outside activities that relate to the purpose, activities or interests of the United Nations. Outside activities include but are not limited to:

- (i) Issuing statements to the press, radio or other agencies of public information;
- (ii) Accepting speaking engagements;
- (iii) Taking part in film, theatre, radio or television productions;
- (iv) Submitting articles, books or other material for publication, or for any electronic dissemination.

Approval may be granted in accordance with staff regulation 1.2 (p).

*The activities under CMS*

43. The Respondent argues that the Applicant held a majority shareholding in CMS since joining the Organization and that, in 2016, became its sole Director after the resignation of the former Managing Director.

44. In his defence, the Applicant maintains that, when he joined the Organization, he properly declared his shares in CMS in an email exchange dated 15 July 2009 with a Human Resources Advisor (“HR Advisor”), and that he resigned from the position of Managing Director by letter of 31 July 2009. In this letter, the Applicant stated:

I wish to inform you that I am resigning from Carbon Market Solutions Ltd as of 31 August 2009 to take up a 12[- month] contract with the UNDP in Bratislava, Slovakia.

Effective from 1<sup>st</sup> September 2009, it is agreed that you will be the new Managing Director of Carbon Market Solutions Ltd.

45. The Applicant's testimony that he disclosed the information to Human Resources at the time of joining the Organization is corroborated by the sworn testimony of the former Head of Energy, UNDP, who testified that the Applicant verbally disclosed to him that:

...

[the Applicant] was an investor and owned shares in a New Zealand based company whose prime activity was investment in forestry in New Zealand. [The Applicant] also told me that he had resigned from this company in August 2009 prior to joining UNDP.

...

At the time [the Applicant] shared this information with me, I told him that he should check the UNDP rules on "Financial Issues including Investments" to see if it is required for him to fill out financial disclosure forms.

46. In this connection, the Applicant provided an email dated 15 July 2009 that he sent to an HR Advisor, in which he stated:

...

[The former Head of Energy, UNDP] also explained after we discussed the matter that it is his understanding after speaking to Human Resources that I do not need to go to the Ethics Office to declare my company, Carbon Market Solutions Ltd, because financial disclosure only applies to positions of D-1 or above. I have resigned from the company and am no longer employed by the company or earning any salary from the company.

47. The Applicant relies on the above exchange to argue that he had indeed declared his company, CMS, to the Organization prior to joining and that, since he had resigned from it as an employee, the remaining involvement as "non-Executive Director" should only be considered as a passive investment rather than an outside activity. He further argues that he acted in good faith and in accordance with advice given to him by the Organization itself.

48. Having examined the evidence on record, the Tribunal agrees with the Respondent that since the role of a Director is to manage the business of a company, directorship constitutes employment. Based on this alone, the Applicant's admission that upon joining UNDP he remained the majority shareholder in the company, and the fact that he became its sole Director in 2016, after the resignation of the former Managing Director, is a concession that he engaged in outside activities.

49. The claim that the Applicant maintained involvement in the company on the alleged advice of an HR Advisor is irrelevant. The Applicant does not deny that he undertook training courses in ethics and is therefore presumed to have been aware of the legal requirements and processes pertinent to this issue. His reliance on an alleged approval and advice from an HR Advisor regarding staff regulations and rules concerning outside activities was therefore misplaced.

50. In addition, it follows from the Applicant's own evidence that what he discussed with the HR Advisor and the then Head of Energy, UNDP, was limited to a possible need to provide financial disclosure of his company under the UNDP rules on "Financial Issues including Investment". The issue under question, though, is whether the Applicant needed to request authorization to engage in outside activities, which is required under the Staff Regulations and Rules, and thus a completely separate issue.

51. The Applicant equally does not dispute the fact that, pursuant to the applicable Rules and Regulations, any approval of outside activities was to be sought from the Director, Office of Human Resources ("OHR"), under the delegated authority of the Secretary-General, and upon a recommendation from the UNDP Ethics Office. Neither does he explain disobeying the rule that requires staff members involved in outside activities to seek yearly permission to carry out such external functions.

52. Indeed, there is no reasonable justification for the Applicant to rely exclusively on a limited exchange with an HR Advisor about financial disclosure, and not on the Staff Regulations and Rules concerning engagement on outside activities.

53. Notwithstanding, even if the advice from July 2009 were correct, at the very least, the Applicant should have sought additional advice in 2016 when his standing in CMS changed and he became its sole Director, thus rendering void his former resignation. However, he did not.

54. Incontrovertible evidence is that the Applicant did not even declare the full extent of his shareholding in the company. Any advice he received based on incomplete information cannot be blamed on the Organization, and the argument that the Organization was negligent in not informing him that he had to obtain permission to continue engaging with CMS as a non-Executive Director therefore lacks merit.

55. In conclusion, the finding that the Applicant as a Director in the company was an employee overrides all arguments, including that all the investment and trading activities of the company were carried out in New Zealand, and that the company merely invested in forestry and carbon credits, a passive investment and not an outside activity.

56. Based on the foregoing, the Tribunal finds that the Applicant engaged in unauthorized outside activities in relation to his company CMS.

*The activities in a commercial venture to establish a EUR2,000,000 solar energy project in Ukraine*

57. To claim that the Applicant engaged in unauthorized outside activities in connection with a solar energy project in Ukraine, the Respondent seeks to rely *inter alia* on two documents:

- a. A Letter of Intent between the Applicant and his partners that recorded their intention to establish an “international company” by 30 June 2018 under the name of New Sun Solar Holdings LLC. This new company would own

one or more Ukrainian-registered companies with the aim of developing “solar PV sites in Ukraine”; and

b. An Investment Agreement dated 16 October 2017 between the Applicant and his partners relating to an investment in a solar energy project in Ukraine using Sigra Group AS as the local investment vehicle. The total investment costs for the first stage of the project were projected to be EUR2,000,000, with the cost of the first phase of the project, i.e., EUR50,000, to be financed by “partner equity”.

58. In the Tribunal’s view, the content of these two documents does not support the allegation that the Applicant “participated in a commercial venture to establish a [EUR2,000,000] solar energy project in Ukraine”. A partially executed Letter of Intent and a partially executed Investment Agreement, both of which do not bear the Applicant’s signature, do not evidence participation in a commercial venture. They only evidence a thought process in that direction.

59. The Applicant indeed testified that he never took the investment through because the company failed to raise the money. He also explained that he would have sought permission had it not been the case.

60. The Applicant’s admission that lawyers prepared the aforementioned documents, and that he was only involved in raising funds, which failed, does not support the suggestion that he participated in a commercial venture. On the contrary, it supports the position that the investment was not made.

61. Based on the foregoing, the Tribunal finds that the allegation that the Applicant participated in a commercial venture to establish a EUR2,000,000 solar energy project in Ukraine has not been established by clear and convincing evidence.

*The activities under NSS*

62. This allegation is established by clear and convincing evidence for the following reasons.

63. The Applicant does not deny that he incorporated NSS in New Zealand on 21 January 2019 and that he held an interest in the company through its ultimate holding company, CMS. He also does not deny that he was one of the two Directors of said company. On this count alone, and recalling the Tribunal's position that directorship in a company constitutes employment, there is basis for concluding that the Applicant engaged in an unauthorized outside activity in relation to NSS.

64. Moreover, by the Applicant's admission that the company had planned to invest in solar energy in Ukraine but eventually only invested in shares of a publicly listed solar company in the United States, the Applicant contradicts his assertion that NSS was dormant and did not have any employees or revenues.

65. The Applicant does not deny that he filed an updated Particulars of Shareholding with the New Zealand Companies Register on 18 July 2019, and that on 12 June 2020, he filed an Annual Return for the company. Those activities, the Applicant executed as a Director of the company, support the allegation as laid.

66. Based on the above, the Tribunal finds that it is established by clear and convincing evidence that the Applicant engaged in unauthorized outside activities in relation to his actions under NSS.

*The participation in the successful bid of CMS to carry out a carbon assessment for the Ports Authority in Rarotonga, Cook Islands*

67. Regarding this fourth instance of alleged unauthorized outside activity, it is not disputed by the Applicant that, as a company Director, he signed the 28 March 2018 and 30 August 2018 proposals of CMS to the Ports Authority to carry out a carbon assessment. The revised proposals named him as a member of the CMS team to carry out said assessment. This proposal included the Applicant's biography, which referred to his experience with UNDP.

68. The Applicant admits that around 23 January 2019, he visited Rarotonga and discussed the draft report of CMS with the Chief Executive Officer ("CEO") of the Ports Authority.

69. His categorization of the decision to visit Rarotonga as an error of judgment does not negate a finding that he participated in the successful bid of CMS to carry out a carbon assessment for the Ports Authority, and in the subsequent carbon assessment.

70. Based on the above, the Tribunal finds that there is clear and convincing evidence that the Applicant engaged in unauthorized outside activities through the participation of CMS in a carbon assessment for the Ports Authority.

#### Potential conflicts of interest

71. The Respondent maintains that the Applicant's unauthorized outside activities gave rise to multiple potential conflicts of interest in breach of his obligations to disclose such conflicts under staff regulation 1.2(m), staff rule 1.2(p), and the Standards of Conduct for the International Civil Service issued by the International Civil Service Commission ("ICSC"), which provide:

#### **Regulation 1.2**

##### **Conflict of interest**

(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 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;

#### **Rule 1.2**

##### **Conflict of interest**

(q) A staff member whose 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 shall disclose any such actual or possible interest to the head of office and, except as otherwise authorized by the Secretary-General, formally excuse himself or herself from participating with regard to any involvement in that matter which might give rise to a conflict of interest situation.

### **Standards of Conduct for the International Civil Service - ICSC**

23. Conflicts of interest may occur when an international civil servant's personal interests interfere with the performance of his/her official duties or call into question the qualities of integrity, independence and impartiality required the status of an international civil servant. Conflicts of interest include circumstances in which international civil servants, directly or indirectly, may benefit improperly, or allow a third party to benefit improperly, from their association with their organization. Conflicts of interest can arise from an international civil servant's personal or familial dealings with third parties, individuals, beneficiaries, or other institutions. If a conflict of interest or possible conflict of interest does arise, the conflict shall be disclosed, addressed and resolved in the best interest of the organization. Questions entailing a conflict of interest can be very sensitive and need to be treated with care.

72. The Applicant, however, advances *inter alia* that his activities did not give rise to potential conflicts of interest, namely because:

- a. CMS and NSS are incorporated in New Zealand, where the UNDP does not have an office;
- b. NSS constitutes an investment in a publicly listed company in the United States, and not an outside activity;
- c. He fully disclosed his past involvement with CMS prior to joining UNDP and took reasonable steps to recuse himself from any possible conflict of interest by resigning from a management role in the company;
- d. The carbon assessment assignment in Ports Authority had nothing to do with either UNDP, the Global Environment Facility ("GEF") or the Green Climate Fund ("GCF"); and
- e. CMS is a company with investments in forestry and carbon credits in New Zealand that have nothing to do with the business of UNDP.

73. Pursuant to the 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.

74. In the Tribunal's view, there is an overlap between the Applicant's UNDP portfolio and his outside activities.

75. This is illustrated by the fact that, on the one hand, he was a Regional Technical Advisor at UNDP working in the field of climate change mitigation. In this role, the Applicant secured funding for projects from GEF and GCF, and supported the implementation of related projects through various implementation partners. The Applicant's portfolio of projects on climate change mitigation primarily involved the energy sector and included projects relating to emissions, trading, and sustainable energy.

76. On the other hand, the business of CMS included trading carbon credits in New Zealand and internationally, advisory services including carbon assessments and carbon offsetting for companies in New Zealand, and private investments in projects with returns from carbon credits, which fall under climate change mitigation.

77. The Applicant's dual roles of Director/majority shareholder in CMS and of Regional Technical Advisor performing functions on climate change mitigation in UNDP, could reasonably be perceived as problematic by a neutral observer in that the Applicant might have used his office for personal or third parties' gain. The Applicant's participation in the successful bid of CMS for the carbon assessment for the Ports Authority, during which his biography and role at UNDP were displayed, is a graphic illustration of such conflict.

78. The fact that the company's commercial activities are in the climate change mitigation field, which fell under the Applicant's portfolio, overrides all the Applicant's arguments listed in para. 72 above, including that CMS and NSS are incorporated in New Zealand, where UNDP does not have an office.

79. The Tribunal finds the allegation that the Applicant engaged in potential conflicts of interest established by clear and convincing evidence.

Making false statements and providing a false document to OAI investigators

80. The Respondent claims that during the Applicant's second OAI interview on 30 June 2020, he repeatedly falsely denied that he was involved in carrying out the carbon assessment for the Ports Authority, or that he had met the CEO of the Ports Authority in this respect. He further argues that the Applicant did not disclose to OAI investigators that he had travelled to Rarotonga and presented the draft report to the Ports Authority on or about 23 January 2019.

81. The Applicant does not deny the responses attributed to him during the investigation but maintains that they related to a different question. He explained that he did not tell OAI investigators that he travelled to Rarotonga because "this was not the question that they asked [him]. They did not ask [him] if [he] travelled to Rarotonga on holiday. They asked [him] if [he] spoke to [the CEO of the Ports Authority] in the context of carrying out the work".

82. The Applicant, however, contradicted the above explanation when in his oral evidence at the hearing, he stated that the question he was asked was; "have you met Mr. [T] before?" and not "did you go to Rarotonga to meet Mr. [T]?"

83. The Applicant's explanations are themselves contradictory and therefore not credible. In the Tribunal's view, since his statement that in November 2018 he did not travel to Rarotonga with the CMS team conveys a clear message, i.e., that he did not travel to Rarotonga in November 2018, his explanation that he was responding to a different question is irrelevant.

84. The Applicant does not contest that he did not reveal to the investigators that he met the CEO of the Ports Authority in the context of the carbon assessment. That he met him is supported by the statement of the CEO of the Ports Authority that "[the Applicant] visited around 23 January 2019 to present and discuss the draft report." The CEO of the Ports Authority had no reason to lie and his evidence is therefore credible.

85. Concerning the allegation that the Applicant provided a false document to investigators, the Applicant does not dispute the evidence that when requested by the investigators to provide them with the revised proposal of CMS, he indicated to them that the document attached to his email of 3 July 2020 was the final version of the proposal submitted to the Ports Authority. That version, however, had no reference to the Applicant.

86. In fact, the CEO of the Ports Authority provided the investigators with the final proposal submitted by CMS, which had the Applicant as contact and bore his signature. This was indeed a different document from the one presented by the Applicant to OAI investigators. The Applicant does not dispute that he signed the Ports Authority's version.

87. Based on the foregoing, the Tribunal finds that it is established by clear and convincing evidence that the Applicant knowingly made false statements and misled OAI investigators with respect to the proposal of CMS to the Ports Authority.

*Whether the established facts constitute misconduct*

88. Staff rule 10.1(a) defines misconduct as the “failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant”.

89. Paragraph 25 of the UNDP Legal Framework provides examples of misconduct, which include “misuse or mishandling of official property, assets, equipment or files, including electronic files or data”.

Improper use of a UNDP-issued laptop

90. Staff Regulation 1.2(q) provides that staff members shall use the property and assets of the Organization only for official purposes and shall exercise reasonable care when utilizing such property and assets.

91. Paragraphs 7 and 9 of the UNDP ICT Policy provide as follows:

7. Authorized users shall be permitted limited personal use of ICT resources, provided that such use:
  - a) Is consistent with the highest standards of conduct for international civil servants and complies with the restrictions expressed in para on Prohibited Activities below.
  - b) Is consistent with the interests of the Organization and the maintenance of its reputation.
  - c) Involves minimal additional expense to UNDP
  - d) Takes place during personal time or, if during working hours, does not impinge on such working hours
  - e) Is consistent with the ability of the user or other users to perform official functions
  - f) Is consistent with the continuous operation of UNDP and the functioning of ICT resources

**Prohibited Activities**

9. The ICT Environment must be used in a responsible manner. The use, transmission, distribution, or storage of any material in violation of UN Staff Regulations or Rules or UNDP policies and procedures is prohibited. Information sent, received, or retrieved through the ICT Environment, including electronic mail, data, documents, programs, voicemail, images or other forms of communication, may not contain content that may reasonably be considered threatening, harassing, or offensive to any individual, or which is in violation of the UNDP Policy on Workplace Harassment and Abuse of Authority. Such content includes, but is not limited to, sexually explicit or pornographic comments or images, threat of use of force, or any comments that might reasonably be considered offensive in terms, inter alia, of race, colour, religious belief, gender, sexual orientation, age, national origin, disability, or political beliefs.

92. The Applicant's improper use of the UNDP-issued laptop to access websites that contained pornography and other sexually explicit material and advertised escort services violated staff regulations 1.2(b) and (q) and, consequently, constitutes misconduct under the aforementioned rules.

Unauthorized outside activities

93. The Applicant's controlling interest in, and position of Director of CMS, constitutes outside activities. The Applicant's failure to obtain approval to engage in those activities breached his obligations under staff regulation 1.2(o) and (p) and staff rule 1.2(s) and (t).

94. The Applicant's controlling interest in, and position of Director in NSS constituted outside activities. His failure to obtain approval before incorporating the company and conducting activities on its behalf constituted a breach of his obligations under staff regulation 1.2(o) and (p) and staff rule 1.2(s) and (t).

95. The Applicant's participation in the successful bid of CMS for carbon assessment for the Ports Authority constituted an outside activity. His failure to seek prior approval before engaging in it was a breach of his obligations under staff regulation 1.2(p).

96. The various breaches of rules and regulations above constitute serious misconduct.

Potential conflicts of interest

97. The Applicant's engagement in unauthorized outside activities gave rise to potential conflicts of interest, in violation of para. 23 of the Standards of Conduct for the International Civil Service, staff rule 1.2(q), and staff regulation 1.2(m).

98. Accordingly, such engagement also constitutes misconduct under the applicable rules.

Making false statements and providing a false document to OAI

99. The Tribunal has found that the Applicant knowingly made false statements to OAI investigators and provided a false document to mislead them. By this, he failed in his duty to fully cooperate with a duly authorized investigation and to release a document under his control as requested, in violation of staff rule 1.2(c) and staff regulation 1.2(r).

100. The Applicant also breached the required standard of integrity under staff regulation 1.2(b), in particular the requirements of probity, honesty, and truthfulness in all matters relating to his work and status.

101. He therefore also engaged in misconduct in this respect.

*Whether the disciplinary measure was proportionate to the offence*

102. The Applicant relies on the Appeals Tribunal decision in *Samandarov* 2018-UNAT-859 to argue that the decision to separate him from service was disproportionate to the alleged wrongdoing. Further, he advances that the disciplinary sanction did not take into account mitigating factors, such as the fact that he was a recognized whistleblower; that the investigation into him appears retaliatory for his role in denouncing high-level UNDP officials for serious misconduct; the fact that he declared the investment in CMS when he first joined the UNDP; and that the Organization did not raise any questions about it for over 10 years.

103. The Tribunal is cognizant of the Appeals Tribunal jurisprudence in *Samandarov*, which provides:

23. 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.

104. It is also cognizant of the jurisprudence in *Balint Szvetko* 2023-UNAT-1311, para. 47, that

[i]n assessing whether the administration has imposed a proportionate sanction, the UNDT is obliged to determine if the responsible functionary applied his or her mind to the relevant considerations of proportionality and excluded irrelevant factors. If a functionality tasked with a duty to act proportionately were to relegate a factor of obvious and paramount importance to one of insignificance and give another factor a weight far in excess of its true value, this would amount to a failure to apply the mind to the objective factual substratum upon which a proportional decision

should rest. The assessment of proportionality by its very nature is a factual inquiry requiring the UNDT to review and balance all the competing considerations to determine whether less drastic and more suitable means might better have accomplished the necessary disciplinary objective.

105. First of all, the fact that the Applicant declared his ownership and investment in CMS, which he was legally obliged to do, is not a mitigating factor.

106. Secondly, there is no nexus between the Applicant's claims of retaliation, relating to the first investigation into him and the investigation that culminated in the instant proceedings. His assertion that the disciplinary measure imposed is retaliatory is therefore negated by the Tribunal's finding that the facts upon which it was based were proved by clear and convincing evidence.

107. The Applicant's assertion that his admissions of misconduct, apologies, and expressions of remorse are mitigating factors is without merit since he did not admit any of the charges. In fact, he mostly denies that he engaged in any wrongdoing.

108. It is recognized that the Secretary-General has the discretion to impose an adequate disciplinary measure having regard to the nature of the misconduct, the objective of punishment and deterrence, and other relevant considerations.

109. It is determined that the sanction in this case is justifiably imposed in keeping with established jurisprudence. The misconduct in which the Applicant was involved is very serious. He was a relatively senior professional staff member at the P-4 level, with managerial responsibilities, and was therefore expected to act as a role model. He engaged in four separate forms of misconduct, including one instance of dishonesty. These aggravating factors outweigh any mitigation that could be available to the Applicant.

110. Importantly, the disciplinary measure is in line with established jurisprudence and past Tribunal practice. The Appeals Tribunal has recognized that serious cases of unauthorized outside activities, conflicts of interest, and dishonesty warrant termination of appointment. (*Thiare* 2021-UNAT-1167, paras. 19, 35, 36, 37, 39, and 45; *Ganbold* 2019-UNAT-976, paras. 1, 36, and 59; *Jenbere* 2019-UNAT-935,

paras. 19, 30, 31, and 34; *Al Saleh* 2018-UNAT-888, paras. 4 and 11; *Rajan* 2017-UNAT-781, paras. 42, 45, 47, and 49; *Jaffa* 2015-UNAT-545, paras. 4, 6, 7, 13, 18, 22, and 23; *Akello* 2013-UNAT-336, paras. 22, 23, and 44.

111. Based on the above, the Tribunal finds that the disciplinary measure imposed on the Applicant was proportionate to the misconduct.

*Whether the Applicant's due process rights were respected.*

112. The Applicant does not dispute the fact that he was informed of the allegations in writing, interviewed as a subject, provided with the draft investigation report, and invited by OAI to provide comments and countervailing evidence, which were duly taken into consideration.

113. He also does not contest the fact he was provided with the Charge Letter setting out the charges of misconduct and informing him of his right to seek the assistance of counsel during the disciplinary process. He was provided with the supporting documentation and was given the opportunity to comment on the allegations and provide countervailing evidence, and his comments were duly considered.

114. Consequently, the Tribunal finds that the Applicant's due process rights were respected throughout the investigation and disciplinary process.

*Remedies*

115. In light of the Tribunal's above findings, all the Applicant's prayers to it are not tenable.

**Conclusion**

116. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

*(Signed)*

Judge Margaret Tibulya

Dated this 2<sup>nd</sup> day of October 2023

Case No. UNDT/GVA/2022/021

Judgment No. UNDT/2023/110

Entered in the Register on this 2<sup>nd</sup> day of October 2023

*(Signed)*

René M. Vargas M., Registrar, Geneva