



Before: Judge Joelle Adda

Registry: New York

Registrar: Isaac Endeley

SILVA ROIG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Víctor Rodríguez

Counsel for Respondent:

Bettina Gerber, LPAS/UNOG

Introduction

1. The Applicant, a former staff member in the Department of Management Strategy, Policy and Compliance (“DMSPC”), contests the decisions (a) to dismiss her from service pursuant to staff rules 10.1(a) and 10.2(a)(ix) for fraud, and (b) to separate her from service with compensation in lieu of notice but without termination indemnity in accordance with staff rule 10.2(a)(viii) for misuse of authority. The latter sanction was, however, subsumed in the first decision to dismiss the Applicant from service.
2. The Respondent contends that the application is without merit.
3. With reference to the reasons set out below, the application is rejected.

Facts

4. In the parties’ jointly-signed statement in response to Order No. 065 (NY/2023) dated 31 July 2023, they provided a chronology of agreed facts. In relevant parts, this list of agreed facts reads as follows:

Background on the Applicant’s employment with the United Nations and her position within [United Nations Staff Union, “UNSU”] and [United Nations Athletics Club, “UNAC”]

[...]

... From 1 April 2017 to 4 May 2019, the Applicant served as the Second Vice President of UNSU, while she was on full time release from her regular work duties as an Administrative Assistant ... At the same time, she also served as Vice President and Co-Treasurer of UNAC.

[...]

... The Applicant could deposit and withdraw funds from the UNAC bank account, together with the other two co-signees, the UNAC President, [MA, name redacted for privacy reasons], and [BS, name redacted for privacy reasons]. The Applicant had no withdrawal rights over the UNSU account.

... In 2017 and 2018, the Applicant, as she did for Staff Days between 2001 and 2007, participated in the preparation of “Staff Day”, an annual event hosted at the United Nations Headquarters, which since 1953 aims at celebrating and commemorating staff members with various entertainment and sports activities.

Staff Day 2017

... In April 2017, the Applicant took the position as Second Vice President of UNSU while she was also the Vice President of UNAC and was doing parallel activities for both institutions. It is in this dual capacity that the Applicant wanted UNAC to participate, as a club, in Staff Day 2017 and she had discussions with the United Nations Federal Credit Union [“UNFCU”] about a donation that could cover expenses dealing with the purchase of T-shirts, cones barriers, and trophies for UNAC activities in the context of Staff Day 2017.

... In preparation of Staff Day 2017, a bank account was set up for the specific purpose of Staff Day 2017. Also, in preparation of Staff Day 2017, the Applicant solicited and was granted a donation of US\$ 3,800 from UNFCU for sporting activities for Staff Day 2017.

... On 12 August 2017, the Applicant asked a UNFCU representative to deposit this sum on the UNAC bank account.

... On 18 August 2017, UNFCU deposited US\$ 3,800 in the UNAC account.
... The Applicant did not inform the UNSU Treasurers of the donation (see comments under Disputed Facts).

... On 30 August 2017, the Applicant cashed out check no. 272 at the amount of US\$ 3,800 from the UNAC account.

... On 8 September 2017, Staff Day 2017 was celebrated at the United Nations headquarters.

... In November 2017, the Applicant asked [BS] to produce invoices or receipts for the payments to referees, whereupon [BS] produced Staff Day contracts and receipts signed by the respective referees, which resulted to be false.

... On 14 November 2017, [BS] sent a blank “Staff day Sports Contract to [the Applicant]”, to which the Applicant responded that this was good enough and asked him to make three to complete the amount of US\$980. [BS] confirmed having forged signatures for the false contracts.

Staff Day 2018

... In June 2018, a Staff Day Committee for Staff Day 2018 was established, and the Applicant was designated as the liaison. The Committee consisted of five members: (i) the Applicant, with responsibility for coordinating all sub-committees and soliciting prizes and donations; (ii) [KD, name redacted for privacy reasons], Chairperson, with responsibility for managing receipts of expenditures; (iii) [MR, name redacted for privacy reasons], Chair of the Raffle sub-committee; (iv) [BS], Chair of the Sports sub-committee; and (v) [MA, name redacted for privacy reasons], Chairperson of the Entertainment/Talent Show subcommittee. [IB, name redacted for privacy reasons], Treasurer, and [RL, name redacted for privacy reasons], Assistant Treasurer, were not part of the Committee but were entrusted with the financial management/control of Staff Day. Contrary to Staff Day 2017, the Staff Day Committee did not use a separate account for Staff Day but the UNSU’s main bank account.

... On 25 June 2018, the Applicant solicited a donation from UNFCU for Staff Day 2018.

... On 12 July 2018, the UNSU President sent a letter to the ambassadors of the Permanent Missions, informing them about the programme of Staff Day 2018 and the planned raffle. In the letter to the Permanent Mission of [name of Member State redacted] (hereinafter, the “Permanent Mission”), the UNSU President invited discussions on a donation or sponsorship similar to the one of the previous year and indicated that the Applicant should be contacted for any questions, providing her official email address and phone number.

... On 13 August 2018, the Applicant asked UNFCU that US\$ 2,000 be deposited into the UNSU bank account and that US\$ 3,000 be deposited into the UNAC bank account.

... On 16 August 2018, UNFCU deposited the respective amounts in the relevant accounts.

... On 23 August 2018, the Applicant withdrew US\$ 600 from the UNAC account.

... On 29 August 2018, the Chairperson responded to the Assistant Treasurer’s enquiry on the total sum of money donated by UNFCU for Staff Day 2018, indicating that US\$ 2,000 had been deposited into the UNSU account. The Applicant was copied in this email. She did not reply to inform that an additional sum of US\$ 3,000 was deposited into the UNAC bank account [reference to the disputed facts omitted].

... On 30 August 2018, the Applicant purchased t-shirts and trophies for, respectively, US\$ 4,905 and US\$ 1,436.28.

... On 30 August 2018, the Permanent Mission of [name of Member State redacted] contacted the Applicant. [BS] and the Applicant had a meeting early September with the Permanent Mission’s Ambassador, where the Ambassador confirmed the Permanent Mission’s willingness to make a donation and requested that this donation be used only to fund the Sports Programme, and no other items.

... After that meeting, the Ambassador asked for an email with all the details of sports equipment needed and indicating the account where the funds should be deposited. The Ambassador requested that the Mission of [name of Member State redacted] be properly recognized for their contribution.

... On 4 September 2018, the Applicant sent an email from her personal email account to the Assistant of the Permanent Mission Ambassador, stating that the breakdown for the costs of sports would amount to US\$ 15,000 and that the funds should be transferred to the UNAC bank account.

... Also on 4 September 2018, [MR], Chair of the Raffle sub-committee for Staff Day 2018, sent an email to the Staff Day Committee, requesting to be informed of any developments with Permanent Mission donations. [MR] requested the Staff Day Committee members to inform her if there had been or if there are any further follow-ups with Permanent Missions regarding donations.

... On 6 September 2018, the [name of Member State redacted] Permanent Mission wired US\$ 15,000 to the UNAC bank account. The money only arrived in the UNAC account on 10 September 2018.

... The Applicant did not report this donation to the Treasurers or [MR] at the time. [MA], [KD] and [BS] stated that the Applicant had informed them that the Permanent Mission was making a donation during a meeting on an unspecified date, but that they were not informed of the amount or the method of payment. The UNAC account's co-signatories were not informed that the sum would be deposited into the UNAC account.

... On 7 September 2018, Staff Day 2018 took place. The Staff Day Programme began from 7:30 a.m. to 11:30 p.m. with a full day of events including: coffee time, a memorial ceremony, Parade of Nations, statements by the Secretary-General and President of the Staff Union, Staff talent show, sports tournaments, jazz programme, a grand ball, raffle drawing and happy hour.

... On 10 September 2018, [MR] sent an email to *inter alia* the Applicant and [KD], stating that she had heard that the Permanent Mission had donated for Staff Day and asking for details.

... On 10 September 2018, the Applicant withdrew US\$ 14,000 from the UNAC bank account and deposited US\$ 7,000 into the UNSU bank account.

... On 12 September 2018, [KD] circulated a draft response to [MR], indicating that “[a] donation of \$7,000.00 was received in support of sports and placed in the Staff Union account”.

... On 12 September 2018, the Applicant withdrew a total of US\$ 3,400 from the UNAC account.

... Also on 12 September 2018, the Applicant deposited US\$ 5,000 into the UNSU bank account.

... In the evening of 12 September 2018, [KD] responded to [MR], indicating that a donation of US\$ 12,000 had been received and placed in the UNSU account. [KD] indicated having received this information from the Applicant on the phone. Prior to circulating this response, the Applicant had been asked to review and provide comments on the draft.

... On 12 October 2018, following a request by [RL], Assistant Treasurer, UNSU, the Permanent Mission sent a letter and bank statement, showing that US\$ 15,000 had been transferred to the UNAC account on 6 September 2018. The beneficiary email address was indicated as [the Applicant's private email address] and the Beneficiary Information was indicated as “Donation to the Staff Day Raffle for the Celebration of the United Nations Staff Day taking place Sept 7TH, 2018”.

[...]

Consideration

The limited judicial review in disciplinary cases

5. Under the jurisprudence of the Appeals Tribunal, in conducting a judicial review of a disciplinary case, the Dispute Tribunal is required to examine (a) whether the facts on which the disciplinary measure is based have been established; (b) whether the established facts amount to misconduct; (c) whether the sanction is proportionate to the offence; and (d) whether the staff member's due process rights were respected. When termination is a possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable (see para. 51 of *Karkara* 2021-UNAT-1172, and similarly in, for instance, *Modey-Ebi* 2021-UNAT-1177, para. 34, *Khamis* 2021-UNAT-1178, para. 80, *Wakid* 2022-UNAT-1194, para. 58, *Nsabimana* 2022-UNAT-1254, para. 62, and *Bamba* 2022-UNAT-1259, para. 37). The Appeals Tribunal has further explained that clear and convincing proof "requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable" (see para. 30 of *Molari* 2011-UNAT-164). In this regard, "the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred" (see para. 32 of *Turkey* 2019-UNAT-955).

Whether the facts on which the disciplinary measure is based have been established

6. As demonstrated by the agreed facts, the parties concur on the occurrence of events in almost all relevant aspects. As the Appeals Tribunal stated in *Ogorodnikov* 2015-UNAT-549, "[s]ince the parties have agreed to and identified the facts in their Joint Statement, ... it is not open to [the Dispute Tribunal] to conduct its own evaluation and then to substitute its view for that of the parties". As such, the Tribunal is therefore not competent to further examine the facts already agreed by the parties in the present case, and where differences occur, these are addressed where relevant in the following sections.

Whether the established facts amount to misconduct

7. The dispute between the parties primarily concerns whether, in the given circumstances, the Applicant's handling of the relevant contributions to the 2017 and 2018 Staff Days amounted to misconduct for, as held by the Administration, fraud and misuse of authority.

8. In this regard, the Tribunal notes that, in the 11 January 2022 letter, the Administration decided to abandon the charges against the Applicant for having breached her "fiduciary obligations as a co-signatory to UNAC's bank account in mismanaging funds and failing to keep records of UNAC's bank account" as these allegations "did not constitute official [United Nations] functions". Although the Applicant has not challenged that her acts in connection with the 2017 and 2018 Staff Days were undertaken as part of her official functions as a United Nations staff member, for the sake of completeness, the Tribunal observes that, with reference to the agreed facts, the Staff Day is an official, and not a private, United Nations event, which is held at its New York Headquarters every year. Even if the Applicant's participation in organizing the event was voluntary, her acts in connection with the 2017 and 2018 Staff Days are therefore to be considered part of her official functions.

The legal definitions of fraud and misuse of authority

9. In the Applicant's closing statement, she challenges "the legal value" of the Information Circular on the Anti-Fraud and Anti-Corruption Framework of the United Nations Secretariat (ST/IC/2016/25) from which the definition of fraud on which the misconduct finding thereon is based in accordance with the 11 January 2022 letter. In this Information Circular, the notion of "fraud" is defined as "any act or omission whereby an individual or entity knowingly misrepresents or conceals a material fact in order to obtain an undue benefit or advantage for himself, herself, itself or a third party, or to cause another to act to his or her detriment" (see para 5).

10. In the application, the Applicant further submits that (emphasis omitted and referring to "Encyclopedia Britannica" for quotations):

... However, the above definition used by the Respondent should be understood as containing the three constitutive elements of the legal notion of fraud which are cumulative, i.e., the intention to defraud, causing prejudice to another party and obtain a personal gain.

.... An essential element in fraud is the intention to use the funds collected not only for a purpose other than which it was intended, but to use the funds for personal gain to their advantage, causing prejudice to another party.

... Thus, “fraud, in law, is the deliberate misrepresentation of fact for the purpose of depriving someone of a valuable possession. Although fraud is sometimes a ‘crime’ in itself, more often it is an element of crimes such as obtaining money by false pretense or by impersonation.”

... “European legal codes and their derivatives often broadly define fraud to include not only intentional misrepresentations of fact, clearly designed to trick another into parting with valuable property, but also misunderstandings arising out of normal business transactions. Thus, any omission or concealment that is injurious to another or that allows a person to take unconscionable advantage of another may ‘constitute’ criminal fraud. In Anglo-American legal systems, this latter type of fraud may be treated as deceit, subject to action in civil rather than criminal law.”

11. The Respondent contends that the definition of fraud included in ST/IC/2016/25 “does not require a cumulative establishment of the constitutive elements”. He further notes that “this Information Circular is applicable and notes that the same definition was also adopted by the [United Nations] High Level Committee on Management (HLCM) at its Thirty-Third Session in March 2017”, although he provides no evidence of this decision.

12. Regarding ST/IC/2016/25, the Tribunal notes that the Appeals Tribunal has consistently held that Information Circulars, like other guidelines, lack legal authority and therefore have no binding, but only persuasive, effect (see, for instance, *Villamorán* 2011/UNDT/126, *Charles* 2013-UNAT-286, and *Asariotis* 2015-UNAT-496). At the same time, while “circulars may be lower in the contractual hierarchy to the staff regulations and directives, they are of equal standing as legal instruments potentially introducing or establishing implied terms of the contract” (see *Abusondous* 2018-UNAT-812, para. 11, quoting *Husseini* 2016-UNAT-701, para. 15).

13. Rather, the Tribunal observes that under the doctrine of *stare decisis*, the Tribunal is bound by the jurisprudence of the Appeals Tribunal (see, for instance, *Igbinedion* 2014-UNAT-410).

14. In *Asghar* 2020-UNAT-982, para. 36, the Appeals Tribunal defined fraud as “the unlawful making, with the intent to defraud or deceive, of a misrepresentation which causes actual prejudice, or which is potentially prejudicial, to another”. It further specified in para. 35

that fraud consists of three cumulative elements, namely (emphasis added): “the making of a misrepresentation, the intent to deceive *and* prejudice” (if not cumulative, the Appeals Tribunal would have stated “or” instead of “and”).

15. Unlike the Applicant’s definition, but in line with the definition of ST/IC/2016/25, as a third prerequisite element, none of the other definitions, however, limit the notion of fraud to obtaining “a personal gain”. Rather, even if not explicitly spelled out in *Asghar*, an unlawful financial or other advantage can, if at all, also be attributed to someone else: a person, an entity, or another type of third party.

16. Further, the Tribunal notes that the Appeals Tribunal does not, as otherwise submitted by the Applicant, limit the definition of fraud to situations where the perpetrator deceives another physical or legal person for her/his “personal gain”. Instead, the third element is that of actual or (potential?) prejudice to “another” pursuant to *Asghar*, presumably thereby referring to a physical or legal person. In this regard, the Tribunal notes that the Appeals Tribunal has affirmed the general principle of interpretation on “where the law does not distinguish, neither should we distinguish” (in Latin: *ubi lex non distinguit, nec nos distinguere debemus*; see, *Faust* 2016-UNAT-695, para. 34). The Tribunal is, in principle, therefore not allowed to introduce the alleged perpetrator’s own benefit as a third obligatory element.

17. That fraud does not include such third element also finds support in the definition of the Administrative Tribunal of International Labour Organization: “Fraud entails an intention to obtain financial advantage by deception” (see para. 10 of Judgment No. 4491, *In re L.-B. v. EPO*). In line herewith, Black Law Dictionary, 2nd Edition (online version: <https://thelawdictionary.org/fraud/>), defines fraud as follows:

Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. *Maher v. Hibernia Ins. Co.*, 67 N. Y. 292; *Alexander v. Church*, 53 Conn. 501, 4 Atl. 103; *Studer v. Bleistein*. 115 N.Y. 31G, 22 X. E. 243, 7 L. R. A. 702; *Moore v. Crawford*, 130 U. S. 122, 9 Sup. Ct. 447, 32 L. Ed. 878; *Fechheimer v. Baum* (C. C.) 37 Fed. 167; *U. S. v. Beach* (D. C.) 71 Fed. 160; *Gardner v. Ileartt*, 3 Denio (N. Y.) 232; *Monroe Mercantile Co. v. Arnold*, 108 Ga. 449, 34 S. E. 176. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the

contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Civil Code La. art. 1S47. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. 1 Story, Eq. Jur.

18. With regard to the definition of misuse of authority, in the 11 January 2022 letter, the ASG/HR refers to staff regulation 1.2 (basic rights and obligations of staff), which, in relevant part, provides as follows:

...

(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;

...

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

...

19. The Applicant has not objected to this statutory definition.

Did the Applicant commit misconduct through fraud and misuse of office as held in the 11 January 2022 letter?

20. The Administration, in the 11 January 2022 letter, presents the misconduct findings for fraud and misuse of authority against the Applicant under the following three separate headings (a) “[t]he donation of the Permanent Mission of [name of Member State redacted] to Staff Day 2018—fraud and misuse of authority”, (b) “[t]he UNFCU’s donation for Staff Day 2018—Fraud and misuse of authority”, and (c) “[t]he UNFCU’s donation for Staff Day 2017—Misuse of authority”.

21. The Applicant, in her closing statement, however, presents all her submissions under the same heading, namely: “Applicant’s action”. These may be summarised as follows:

- a. The Applicant “was member of UNAC since 1994 and as such she requested donations helping the functioning of UNAC from several entities, among them UNFCU”. UNFCU was “familiar to the UNAC” and “had knowledge of the use of UNAC account and participat[ion] in sport activities of the [United Nations] Staff Days”;
- b. In April 2017, the Applicant “took the position as Second Vice President of UNSU while she was also the Vice President of UNAC and was doing parallel activities for both institutions”. It is “in this dual capacity that the Applicant wanted UNAC to participate, as a club, in [United Nations] Staff Days, which restarted after ten years of interruption”. When she “requested a donation for UNAC from UNFCU, it was done as Vice President and member of UNAC”. It was “not done ‘on behalf of UNSU’ as the Respondent often insisted and UNFCU never put into question these donations”.
- c. The Applicant therefore “did ‘not inform the UNSU Treasurers’ of the donation as UNAC never informed UNSU or other entities of the donations received by the Club, UNAC did not have to report to UNSU what UNFCU was doing for the UNAC”.
- d. During “the Staff Days, there were a variety of entities participating in the Staff Day that financed most of their own participation with their own funds, nothing to do with UNSU funds and accounts”.
- e. Concerning the “purchase dated 30 August 2018 of t-shirts and trophies and the US\$ 3,000 from the [UNFCU] donation deposited into the UNAC account, there is a confusion on what was done for UNAC and what was done for UNSU”. The purchase for USD 4,905 and USD 1,436.28, respectively, was “not in relation with the US\$ 3,000 but is represented among the amounts destined for [the Member State] donation”. The Applicant “never ever used any of these funds for personal benefit”.
- f. Regarding the USD15,000 donation from the Permanent Mission, “the Applicant tried to call the Treasurer of Staff Day but she did not answer or call her back”.
- g. Accordingly, as “the Applicant needed to act quickly”, on 5 September 2018, she “spoke with the Chairperson of the Staff Day Committee, [KD], and with the Sports coordinator of Staff Day, [BS], regarding the situation and the best way seemed to be to

deposit the money in the UNAC account”. The aim was to “use right away some of their donation to recognize the [Member State] Mission, to cover for more referees and the rest to give to the Union”. The “will of the Mission of [the Member State] for their donation was to cover sport activities only [reference to footnote omitted] and the Ambassador requested that the Mission of [the Member State] be properly recognized for their contribution”.

h. On the same date (5 September 2018), given the lack of material time, the Applicant, nevertheless, “wrote to the Permanent Mission of [Member State] to decline the donation, as she was unable to find a way to recognize the [M]ission”. The Applicant did “not intend to agree to accept the donation unless the Permanent Mission of [the Member State] could be properly recognized as they had requested, and it was impossible to do it”.

i. In the afternoon on that same date (5 September 2018), “the Assistant of the Ambassador of [the Member State] called the Applicant to inform her that the Ambassador still wanted to proceed with the donation and the Applicant acted the best she could in such short time to have a banner with the [Member State] logo”.

j. On 6 September 2018, the Permanent Mission of the Member State “wired US\$ 15,000 to the UNAC bank account but it only arrived in the account of the Athletics Club on 10 September 2018”. It was “not available the same day it was wired”.

k. All “the funds were used according with the purpose of the [Member State’s] donation for the sports activities during the Staff Day or submitted to the UNSU accounts”. Given “the situation and the ... short time she handled the matter the best she could”. In afterthought, she “could have acted differently, for instance to split the donation with a smaller part to be transferred to UNAC to pay for the banners, informing the Treasurers accordingly, and the remainder to be transferred to UNSU or to report the full donation and informed UNSU Treasurers that she kept the remainder to cover her own expenses”. Whereas afterwards different possibilities would seem to have been possible, “at the very moment, given the political circumstances, [the] negative attitude of the Treasurers and the short time, she did the best she could”.

22. The Applicant further focuses on an alleged “toxic political context inside UNSU”, and her submissions may be summarised as follows:

a. In relation with MR (name redacted for privacy reasons), the Applicant and MR “had a hostile and contentious relationship and were not on speaking terms [reference to footnote omitted] which belongs to the political context within UNSU”. The Staff Day Committee members confirmed to MR that the Applicant “was in charge of soliciting donations from Permanent Missions as she was the designated Liaison and only authorized person to communicate with Permanent Missions regarding donations”.

b. On 10 September 2018, “on the same day that [MR] sent an email to *inter alia* the Applicant and [KD], stating that she had heard that [the Member State’s] Permanent Mission had donated for the Staff Day and asking for details, a serious incident took place”. MR, “Chair of the Raffle sub-committee for Staff Day 2018, invaded the Applicant’s office at the UNSU to take her files related to Staff Day 2018”. MR “trespassed into the Applicant’s office and attempted to take her belongings without her permission”. The Applicant filed a “report with [United Nations] security regarding the incident of the files in her office but no action was taken, security affirming that it was a Union affair”.

c. The person “who initiated all this case against the Applicant was [MR]. Further, it is “necessary to keep in mind that the Treasurers of the UNSU as well as the Chairperson of the Raffle Committee, [MR], were a major part of the political chaos occurring in the Staff Council at that time when [MR] passed a vote of no confidence against the President of the Staff Union”.

d. Consequently, the “political context is essential to understand this case”.

23. At the outset, the Tribunal notes that the present case concerns the Applicant’s handling of the various donations from the Member State and UNFCU, which, in the 11 January 2022 letter, was found to amount to fraud and misuse of authority, respectively, and therefore also two separate misconduct findings. No reference was made in the 11 January 2022 letter to the alleged toxic environment within UNSU, which in and by itself, is therefore a different matter and, as

such, not relevant to the question of the propriety of the misconduct findings, as also submitted by the Respondent.

24. Specifically regarding whether a finding of fraud amounts to misconduct, the Tribunal notes that in *Asghar*, the Appeals Tribunal held that a “finding of fraud against a staff member of the Organization is a serious matter” and that such “a finding will have grave implications for the staff member’s reputation, standing and future employment prospects”.

25. In the following sections, as the judicial review only concerns the two misconduct findings made in the 11 January 2022 letter, the Tribunal will separately review each one of them on their own terms as presented by the Administration:

“The donation of the Permanent Mission of [name of Member State redacted] to Staff Day 2018—fraud and misuse of authority”.

26. The Administration based its misconduct findings concerning the Applicant’s handling of the USD15,000 donation of a Member State to Staff Day 2018 on the Applicant committing four specific alleged offences. These were the Applicant’s “[f]ailure to report the Permanent Mission’s donation, “[f]unneling the donation to the UNAC account”, “[u]nder-reporting the amount of the donation”, and “[r]etaining part of the donation for [her] own benefit”.

27. The Tribunal notes that the only aspect that the Applicant essentially contests is the question of whether she kept USD3,000 of the Member State’s donation for her “own benefit” (she also refers to the reply, where the Respondent additionally notes that the Applicant’s actions were undertaken “with the purpose of obtaining an undue financial benefit” or a “private gain”). In this regard, the Applicant submits that the Respondent did not discharge its burden of proof, which in a case like the one of the Applicant is clear and convincing evidence.

28. Under the definition of fraud as set out above, the Tribunal, however, observes that the question of the Applicant’s own benefit is not a required element to establish a finding of fraud. Rather, if found that by a misrepresentation, she intentionally deceived the 2017 and 2018 Staff Days and this actually or potentially caused prejudice to the 2017 and 2018 Staff Days, this is adequate.

29. The Tribunal notes that the parties agree that the only purpose of the USD15,000 donation from the Member State was to fund the Sports Programme of the 2018 Staff Day. No other activities were therefore to be financed by this donation, which meant that UNAC was therefore not intended to receive any part of the donation other than possibly through the Sports Programme. Also, the parties agree that the donation was to be deposited in UNSU's main bank account. Finally, the parties agree that the Applicant had no role in administrating the Sports Programme, including by dispensing its money. Instead, BS was the chair of "the Sports sub-committee", KD was responsible for "managing receipts of expenditure", IB was the "Treasurer" of the 2018 Staff Day, and RL was the "Assistant Treasurer".

30. Also, the Tribunal notes that on 7 June 2018, UNSU's Treasurer emailed the other Staff Committee members in preparation of the 2018 Staff Day to set "down the ground rules for the financial management of Staff Day 2018", which were that:

- a. "There will be no Staff Day account, and all residual funds [are to be] transferred back to the UNSU reserves account";
- b. "Disbursements and payments will be made by the Treasurer, or the Assistant Treasurer in his absence";
- c. "No advance payment will be made in form of cash to anyone";
- d. "Any request for an advance must be documented by proper verifiable invoicing and pre-approved before any refund is disbursed. Anyone who makes direct pre-financing without consulting the Treasurer or Assistant Treasurer will be at his/her own risk of not being refunded";
- e. "Procurement processes must be followed at all times";
- f. "Referees and event organizers' payments must be made based on a proper contractual agreements and payments shall be made by checks with established dual signatories".

31. This information follows from the investigation report of 24 September 2019 of the Office of Internal Oversight Services (“OIOS”) and has not been contested by the Applicant.

32. Whereas the Applicant’s failure to report to UNSU about the donation and funnelling it to UNAC’s bank account, albeit incorrect, might not show any intent to deceive UNSU by misrepresentation in and by itself, her subsequent under-reporting of the donation amount and her failure to transfer the entire amount (USD15,000) to UNSU do. Where the two first occurrences could simply stem from negligence (the Applicant might possibly not have understood the consequences of wrongfully mingling the finances of the different entities), the two latter instances were direct and straightforward deliberate attempts aimed at deceiving the 2018 Staff Day Committee. Also, the Applicant has provided no reasonable and justifiable explanation why (a) she only reported USD12,000 were donated by the Member State and (b) only transferred USD12,000 and not USD15,000 to UNSU.

33. In the application, the Applicant submits that she kept the remaining USD3,000 in the UNAC bank account for “urgent expenses related to the sports competition, such as referees, and to [recognize the Member State’s Permanent] Mission”, and according to the agreed facts, she spent USD1,617.18 for a banner to recognize the donation of the Permanent Mission and, although unclear how much, also paid some referees. None of these actions, however, fell within her tasks or functions in connection with the Staff Day Committee for Staff Day 2018.

34. The Tribunal further notes that, albeit not proof of fraud or misuse of office, the Applicant has not convincingly explained (a) why she only reported about the Member State’s donation to UNSU after MR inquired into the matter, and (b) why, after having cashed USD14,000 from UNAC’s bank account, she did not re-transfer the USD12,000 into the UNSU bank account in one deposit but instead did so in two separate transfers of USD7,000 and USD5,000 on different dates and from different locations.

35. At the end, the outcome was that, as a result of the Applicant’s deliberate actions and omissions, UNSU was not able to access and use USD3,000 of the Member State’s donation to the 2018 Staff Day’s Sports Programme.

36. Concerning the fraud allegation, the Tribunal therefore finds that, in the given circumstances, the Administration acted within the scope of its authority when finding that the

Applicant had committed fraud. Accordingly, as per *Asghar*: (a) the Applicant misrepresented the amount of the donation of the Member State to the Staff Day Committee for Staff Day 2018, (b) she intentionally deceived its Sports Programme regarding the full amount of the donation, and (c) this caused prejudice to this Sports Programme in that it never received all the relevant money. Considering the seriousness of the offence of fraud pursuant to *Asghar*, the Tribunal further finds that the Administration acted within its scope of authority when finding that the Applicant's fraudulent actions amounted to misconduct.

37. As to the allegation on misuse of office, the Tribunal finds that the Administration acted within the scope of its authority when determining that the Applicant had misused her office on the Staff Day Committee for the 2018 Staff Day in accordance with staff regulation 1.2(b) and (g). As the liaison person for donations to 2018 Staff Day and contrary to the financial ground rules, the Applicant facilitated the transfer of USD15,000 from a Permanent Mission into UNAC's bank account instead of UNSU's bank account, and then subsequently failed to re-transfer the entire amount but only USD12,000 to UNSU. USD3,000 was therefore kept out of range of UNSU and instead remained with the UNAC bank account over which, unlike the UNSU bank account, the Applicant had drawing rights. Taking into account the gravity of the breach of trust, the Tribunal finds that when concluding that the Applicant's misuse of office constituted misconduct, the Administration acted within its scope of authority.

“The UNFCU's donation for Staff Day 2018—Fraud and misuse of authority”

38. The Tribunal observes that it follows from the agreed facts that as the liaison person for donations to the 2018 Staff Day, the Applicant solicited a donation from UNFCU, which then donated USD5,000 to the event. This donation was therefore intended to fund activities of the 2018 Staff Day and not to UNAC. According to the financial ground rules, the Applicant requested UNFCU to transfer USD2,000 to the UNSU's bank account, but contrary thereto, asked for the remaining USD3,000 to be deposited into UNAC's bank account. UNFCU followed the Applicant's requests, who subsequently never re-transferred the money from UNAC to UNSU.

39. Similar considerations as those stated in the above regarding the Member State's donation apply here. Accordingly, by failing to transfer the USD3,000 donation from UNFCU to UNSU from the UNAC bank account, the Administration acted within the scope of its

authority in the 11 January 2022 when finding that the Applicant had committed fraud and misused her office, respectively. The Tribunal notes that no specific findings were, however, made in the 11 January 2022 letter on whether these offences also, in and by themselves, constituted misconduct, but from the context, this is assumed to be the case.

“The UNFCU’s donation for Staff Day 2017—Misuse of authority”

40. The Applicant, in essence, submits that the USD3,800 donation made by UNFCU for the 2017 Staff Day was made to UNAC and not UNSU.

41. The Tribunal notes that from the email exchange between the Applicant and UNFCU from 27 July to 12 August 2017 (as summarised in the 24 September 2019 investigation report), however, it follows that the Applicant’s solicitation for funding concerned general sport activities at the Staff Day and not just those of UNAC (specific reference is, for instance, made to basketball, while UNAC is concerned with “physical exercise, jogging, running and racing (long or short distance)”, see the 24 September 2019 investigation report). This information is confirmed by the agreed facts in which the parties state that the UNFCU donation was “for sporting activities for Staff Day 2017” and not just the specific activities of UNAC.

42. The Tribunal therefore finds that, in the 11 January 2022 letter, the Administration acted within its scope of authority when finding that the Applicant had misused her authority as Second Vice President of UNSU and liaison to solicit a donation from UNFCU for UNSU and instructing UNFCU to deposit that donation in UNAC’s bank account. Also, in this instance, in the 11 January 2022 letter, the Administration, however, failed to specifically qualify this offence as misconduct, but this is presumed from the circumstances.

Whether the sanctions are proportionate to the offence

43. In the 11 January 2022 letter, the Administration issued two sanctions against the Applicant: (a) for fraud, she was dismissed according to staff rules 10.1(a) and 10.2(a)(ix), and (b) for misuse of authority, she was separated from service with compensation in lieu of notice, but without termination indemnity, in accordance with staff rule 10.2(a)(viii). The latter disciplinary sanction was, however, subsumed in the decision to dismiss her from service.

44. The Applicant submits, in general, that the case against her “consists in a deep misunderstanding in a context of political fight, bullying and harassment inside the UNSU, which resulted in a double professional death penalty”, which “has no precedent in the Practice of the Secretary-General in disciplinary matters”. She further contends that the two sanctions are unproportionate to the Applicant’s “acts”, which “may have been done in a hurry, her management of the situation [was] untidy, [and] precipitated by the circumstances given the short time, with the success of the United Nations Staff Days only in view, inside a toxic political situation”.

45. The Appeals Tribunal has generally held that the Administration enjoys a “broad discretion in disciplinary matters; a discretion with which [the Appeals Tribunal] will not lightly interfere” (see *Ladu* 2019-UNAT-956, para. 40).

46. This discretion, however, is not unfettered. As the Appeals Tribunal stated in its seminal judgment in *Sanwidi* 2010-UNAT-084, at para. 40, “when judging the validity of the exercise of discretionary authority, ... the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate”. This means that the Tribunal “can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse”. The Appeals Tribunal, however, underlined that “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” (see *Sanwidi*, para. 40). In this regard, “the Dispute Tribunal is not conducting a ‘merit-based review, but a judicial review’” explaining that a “[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker’s decision” (see *Sanwidi*, para. 42).

47. Specifically regarding the imposition of a disciplinary sanction, the Tribunal notes that the Appeals Tribunal has held that the “matter of the degree of the sanction is usually reserved for the Administration, which has discretion to impose the measure that it considers adequate in the circumstances of the case and for the actions and conduct of the staff member involved” (see, para. 45 of *Appellant* 2022-UNAT-1216). Also, whereas the “principle of proportionality requires that a disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct”, the Administration has “discretion to impose a

disciplinary measure that it considers adequate to the circumstances of a case, and the Tribunal should not interfere with administrative discretion unless it is tainted by irrationality or is arbitrary” (see, para. 26 of *Specker* 2022-UNAT-1298).

48. The “ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline”, and the “most important factors to be taken into account in assessing proportionality of a sanction include the seriousness of the offence, then length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency” (see, paras. 70 and 72 of *AAD* 2022-UNAT-1267).

49. Accordingly, when “the sanction of termination is chosen by the Administration”, the “requirement of proportionality asks whether termination is the appropriate and necessary sanction for the proven misconduct or whether some other alternative sanction will be more suitable in the circumstances”. “The question to be answered in the final analysis is whether the staff member’s conduct has led to the employment relationship (based on mutual trust and confidence) being seriously damaged so as to render its continuation intolerable”. (See, paras. 47-48 of *Appellant*).

50. In the present case, it is not clear why the Administration decided to impose two sanctions against the Applicant, where the latter was subsumed by the first. In any event, the Tribunal notes that the relevant legal framework does not preclude the Administration from imposing more than one disciplinary sanction against a staff member culpable of misconduct, also if one sanction is subsumed by the other.

51. As for the severity of the sanctions, in the Respondent’s closing statement, he “recalls that the Applicant’s conduct was not an isolated event because of ‘acting in a hurry’ [referring to the Applicant’s closing statement] but occurred on repeated occasions”. The Respondent submitted that “the sanction of dismissal ‘corresponds with the logical loss of trust suffered by the Administration as a consequence of the Appellant’s misconduct’” (referring to the Appeals Tribunal in *Konteh* 2013-UNAT-334). The Respondent further explains that “misconduct involving intentional and deceptive conduct, particularly for personal gain, merit the most severe sanctions such as separation from service or dismissal”. Such measures “have been found proportionate in cases of fraudulent conduct as ‘fraud undermines the very integrity of the

Organization’ [referring to *Jaber et al 2016-UNAT-634*] and destroys the relationship of trust irrevocably between the staff member and the Organization”.

52. The Tribunal finds that it was reasonable for the Administration to entirely lose its trust in the Applicant. Handling donor money from Member States or other entities is a very important responsibility that requires staff members, who are entrusted with this money, to be truthful, transparent, and cautious, including by diligently following established procedures. When volunteering to solicit donations for the 2017 and 2018 Staff Days, the Applicant should have understood this, in particular after the Treasurer’s issuance of the clear and unambiguous financial ground rules for the 2018 Staff Day. Also, the Applicant did not just make a simple mistake, but misused her office in three different instances and committed fraud twice.

53. On the other hand, the Tribunal does not find that the Respondent has demonstrated with clear and convincing evidence that the Applicant was motivated by her own monetary gains. The fact that she had withdrawal rights over UNAC’s bank account does not, in and by itself, amount to a personal financial advantage unless, with the required evidentiary standard, the Respondent can show that the Applicant actually withdrew money for her own benefit. The Respondent, however, has not done this. Whatever motivation the Applicant may have had, which indeed puzzles the Tribunal tremendously, it does not change its finding that she defrauded the 2018 Staff Day for some donations and misused her office in connection with both the 2017 and 2018 Staff Days.

54. Otherwise, the Tribunal finds that the Administration acted within its scope of discretion when, in the 11 January 2022 letter, stating the Applicant’s “long history of volunteering for the UNSU” as mitigating circumstance. Also, it was reasonable to indicate that the “both internal and external ramifications” of the Applicant’s conduct constituted aggravating circumstances. These ramifications were described as follows, “Externally, [the Applicant’s] conduct in relation to the Permanent Mission’s donation had the result that OIOS was obliged to contact the Permanent Mission about its donation to Staff Day, potentially damaging the Organization’s reputation with a Member State. [The Applicant’s] conduct similarly had the potential to damage the Organization’s reputation with the UNFCU. Internally, [the Applicant’s] conduct had the effect of reducing the confidence staff at large have in the UNSU”.

55. Consequently, in terms of proportionality and with reference to the Appeals Tribunal's cited jurisprudence, the Tribunal finds that the Administration did not exceed its authority when issuing the disciplinary sanctions against the Applicant. Even if the Administration failed to demonstrate that the Applicant indeed intended to benefit herself and not just UNAC, the Tribunal finds that whereas these sanctions may appear harsh and severe, they were not irrational, arbitrary, or otherwise excessive compared to the nature and gravity of the offences, the Applicant's role and fiduciary duties, and the potential impact on the Organization's reputation and external relations.

Conclusion

56. The application is rejected.

(Signed)

Judge Joelle Adda

Dated this 22nd day of December 2023

Entered in the Register on this 22nd day of December 2023

(Signed)

Isaac Endeley, Registrar, New York