



Before: Judge Sean Wallace

Registry: Nairobi

Registrar: Wanda L. Carter

EGENHOFF

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George Irving

Counsel for Respondent:

Teresa Posse, UNDP

Introduction

1. The staff member who is the subject of these proceedings previously served as the Resident Representative (RR) of the United Nations Development Programme in Guinea-Bissau, at the D-1 level on a fixed-term appointment. He was separated from service for misconduct arising from the misuse of his position and engaging in a conflict of interest.

2. A hearing on the merits took place on 21 October 2024. The Applicant testified, was cross-examined by the Respondent, and re-examined by counsel acting for him.

Consideration

Standard of review and burden of proof

3. The Statute of the Dispute Tribunal, as amended on 22 December 2023, provides that in reviewing disciplinary cases:

[T]he Dispute Tribunal shall consider the record assembled by the Secretary-General and may admit other evidence to make an assessment on whether the facts on which the disciplinary measure was based have been established by evidence; whether the established facts legally amount to misconduct; whether the applicant's due process rights were observed; and whether the disciplinary measure imposed was proportionate to the offence. (Art. 9.4).

4. The Tribunal's Statute generally reflects the jurisprudence of the United Nations Appeals Tribunal ("UNAT" or "Appeals Tribunal"). See, e.g., *AAC* 2023-UNAT-1370, para. 38; *Miyzed* 2015-UNAT-550, para. 18; *Nyawa* 2020-UNAT-1024.

5. In particular, the Tribunal's Statute essentially codified the Appeals Tribunal ruling that:

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also

examine whether the decision is absurd or perverse. (*Sanwidi*, 2010-UNAT-084, para. 40)

6. The Appeals Tribunal has 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”. *Id.* In this regard, “the Tribunal is not conducting a merit-based review, but a judicial review” explaining that a “judicial review is more concerned with examining how the decision-maker reached the impugned decision, and not the merits of the decision-maker’s decision.” *Id.*

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

7. In disciplinary cases “when termination is a possible outcome”, the evidentiary standard, as set by the Appeals Tribunal, is that the Administration must establish the alleged misconduct by “clear and convincing evidence”, which means that “the truth of the facts asserted is highly probable.” (*Negussie* 2020-UNAT-1033, para. 45). UNAT clarified that clear and convincing evidence can either be “direct evidence of events” or may “be of evidential inferences that can be properly drawn from other direct evidence.” *Id.*

8. In this case, the parties mostly agree on the underlying facts. The disagreement arises from the conclusions drawn from those underlying facts. In particular, the Applicant argues that his actions need to be viewed from the context in which they were made. He was the only witness to testify at the hearing, and his testimony was mainly directed at proffering the context and explaining his actions. The other evidence was contained in the investigation file, including many of the Applicant’s emails, and his response to the misconduct allegations.

9. The sanction letter found sufficient facts to confirm that the Applicant engaged in a conflict of interest in a procurement of services by UNDP Guinea-Bissau from a non-governmental organization, Innovations for Poverty Action (IPA), and that he misused his position by sharing confidential information with an official of IPA.

10. As to the underlying facts, the Applicant does not dispute the following facts set forth in the investigation report, except as noted below:

a. The Applicant was in a romantic relationship with AH, in May 2019, when the Applicant began his United Nations service as the Resident Representative (RR) at UNDP Guinea-Bissau. When the Applicant assumed his duties, he and AH lived together as a couple in Guinea-Bissau, and AH began working as a United Nations Volunteer for the International Organization for Migration (IOM) in Guinea-Bissau that November. AH left IOM to become the IPA Regional Director for Francophone West Africa in June 2020, and the romantic relationship ended. However, the two maintained their friendship and kept in communication.

b. On 1 December 2020, the Applicant sent AH an email with confidential UNDP budget information. It read (as translated from German by OAD):

I looked again:

Still have 3.5 million that I have not yet been used, at least in the dashboard. 1.5 are already reliant from the 5 I saw.

You don't have a Global Fund - so probably less in the health sector, but more than that socio-economic recovery plan and impact analysis.

The biggest donor is GEF, so probably a lot in protected areas plus disaster risk reduction.

2 largest donors: PBF, also something in peacebuilding: Promoting peace and social cohesion means a project, rule of law and democratic institutions (for lab?).

In addition, youth entrepreneurship and harnessing the blue economy potential in coastal areas.

Efficient energy production, certainly also under GEF.

So much from the dashboard. – tj (*sic*)

c. He also sent AH another email that day about possible projects for UN agencies including UNDP. He wrote:

Very interesting for UNDP: formality/informality/financial resilience of households (think of Socio Economic Recovery Plan you have to do: if you could do something about SMEs COVID related).

You don't want labs in SL, but I think you could think about the ministries (Economy, Finance, Public Admin).

d. Two weeks later, the Applicant sent an email introducing AH to his UNDP Guinea-Bissau team. In the email, the Applicant wrote to AM (Senior Economist) and DW (Recovery and Resilience Officer-RRO) of the UNDP Country Office:

I wanted to put you in touch with [AH], the Country Director for SL and Liberia for IPA (Innovations for poverty action). As I discussed with him the need for more evidence in policy decisions in Guinea-Bissau he mentioned the possibility of embedded labs in ministries to enhance data collection and use of evidence (see FAQ on labs and overall IPA approach attached). I am sure you will find it useful to have a conversation of how to go about it in Guinea-Bissau.

e. Later that day, some of the team expressed interest in the AH work. The Applicant wrote to his subordinates:

I think this is a chance to start something small on evidence - in a ministry that makes sense (like Economy, Finance, Public Administration). I was also thinking to still use some of the little resources we have for 2020 (trac) - an embedded lab for 8 months is around 50,000 USD. Please have the conversation and see if it makes sense.

f. The next day, AH replied to the email thread providing information on IPA's embedded evidence labs, acknowledged that IPA did not have an office in Bissau but "we have worked in a number of other countries using our hub in West Africa, so there are certainly some potentials if you wanted us...."

g. On 23 December 2020, the Applicant received an email from one of the UNDP team members informing the Applicant that they had discussed a potential partnership with IPA. That email was not copied to AH, but the

Applicant forwarded it to AH without notifying the other UNDP team members who were recipients of the email.

h. The following day, the Director for the UNDP Regional Bureau for Africa emailed various officials (including the Applicant) to advise that there was money remaining unspent for 2020 and a “moral imperative to do all we can to ensure that we do not lose any of the resources that are destined for populations we serve across Africa.” The Applicant forwarded that email to his country office personnel requesting that they investigate projects on which they could spend these funds, including having IPA create two imbedded evidence labs with IPA. The Senior Economist responded suggesting that UNDP Guinea-Bissau commit to three embedded evidence labs with IPA. Once again, the Applicant forwarded these email exchanges to AH without copying any of the listed UNDP staff.

i. On 29 December 2020, the Acting Head of the Economic Unit for UNDP Guinea-Bissau emailed the Deputy Resident Representative for Operations (DRR-O) and the Senior Economist (with a copy to the Applicant) asking the best way to move forward with IPA. According to the DRR-O “there was a proposal from the Economics Unit or the RR...to contract with IPA. I did not understand very well what the project was about with IPA. The setup was a bit complicated....To be honest, I did not want to be too much involved in this. ...I assume they did not want to do a competitive process because of the time limitations and they only had a few days left in the year.”.

j. Ultimately, the DRR-O suggested a Responsible Party Agreement (RPA). So that same day, the Applicant sent AH the UNDP standard RPA template saying there was no need to rush as the agreement could be completed in January or February.

k. The following day, AH informed the Senior Economist and the Acting Head of the Economic Unit that IPA had recently signed an agreement with the United Nations High Commissioner for Refugees (UNHCR) which stipulated that “other United Nations Agencies, Funds and Programmes may

purchase Services under the same terms, conditions and price”. AH blind copied the Applicant on this and subsequent emails.

l. The Guinea-Bissau agreement with IPA was not consummated by the close of 2020 and further exchanges continued well into 2021. Often, when the Applicant was not copied in these communications, AH would blind-copy him.

m. By August 2021, UNDP and IPA realized that there were legal problems with IPA working on the Guinea-Bissau project because it was not registered in the country. The Applicant emailed AH suggesting particular lawyers that IPA should hire to deal with these compliance matters and suggested language to use in approaching them.

n. In December 2021, the Guinea-Bissau team and IPA were exchanging documents to have a contract approved and internally the UNDP team was doing the same. A new DRR-O had taken over by this time, and she said that IPA’s proposal was “too laconic for a work of this volume. This makes us in a difficult position, but see what you can add to the note to make it stronger.” Further, she later wrote “[w]e need to still work on the note to strengthen our argument...the evaluation sections requires improvement....My main concern is the proposal of IPA which is not a solid document for a work of \$300,000...This is a \$300,000 case and will definitely be reviewed by auditors.”

o. Eventually, the Acting Chief of the Economic Unit wrote that the team had done all that it could and then emailed the Applicant to say there were “two options: 1) Either we have the IPA [Note to File] signed and taken forward by [the DRR-O] (confirmation by tomorrow) 2) We activate our two other contracts in the pipeline”.

p. Within hours, the Applicant wrote “I think we are ready at this point to proceed” and that he and the DRR-O should meet the next morning to “discuss final points and hopefully sign.” The DRR-O wrote to the Applicant that the Acting Head of the Economic Unit “seems confident that you will

push me to take it as is.” The Applicant responded “Let’s put it together tomorrow [21 December 2021].”

q. The following day, the Applicant emailed AH asking him to “improve the proposal a little as soon as possible.” He also sent suggested edits and, in a comment, wrote “if you can add a few paragraphs that you have (i.e. copy paste) then it would be good to make the whole thing look a bit more elaborate. The auditors look at something like that, especially when \$300,000. Thanks.” AH replied that he would “get on it immediately,” and the Applicant told his DRR-O that IPA was working on the proposal.

r. The next day, the Applicant asked AH “do you have something? Can also help.” AH sent the Applicant a modified proposal saying “does that fit?” The Applicant shared the proposal with the DDR-O and she told him “There is a chunky 153k for staff cost. If they can simply work-out a table on man-day/month is required to justify this 153k it would be great.” The Applicant forwarded this to AH with a note “Do you think you can add it? Would be awesome but tell her to send the contract tomorrow. Thanks.”

s. AH sent a final proposal which included a breakdown of the costs and also said that IPA needs “written confirmation from your team that despite the UNHCR framework agreement [upon which UNDP Guinea-Bissau was planning to piggyback] ending in Jan 2022 that you are fine with us proceeding with the activities until the end of next year.” The Applicant forwarded the proposal to the DRR-O and then instructed her a few hours later to “Please proceed with issuing the contract....”

t. By 27 December 2021, all the necessary documents were signed by all the required people, thereby reflecting the contract between UNDP Guinea-Bissau and IPA. AH was listed as IPA’s contact person and the Applicant was named as the “UNDP contact person.”

u. The UNDP Guinea-Bissau Chief Economist told investigators that the Applicant was “very hands on” and that once he introduced the team to AH and IPA, “we took it from there.” He went on to say that “[s]ince it was

suggested from the beginning to explore the partnership with IPA by [the Applicant], we went ahead and we didn't look for other options other than IPA.”

11. In addition to those facts, the Applicant gave testimony at the hearing in this case. He testified that “this project did not originate with me or with IPA or [AH].” According to the Applicant, when he arrived there was an urgent need for data and data analysis to advance the Sustainable Development Goals (SDGs) and support the government's capacity building. “This task required some innovative solutions.”

12. He went on to say that “this was why [he] introduced IPA as a uniquely qualified partner because, and this is important I think, of their ability to embed the capacities in ministries. There is no other organization that does that and since they had implemented similar embedded labs, so-called embedded labs, for evidence for policy and data collection in West Africa and beyond.”

13. This testimony is contradicted by the Applicant's own emails (as described in paras. 10 b, c, and d above), which clearly show that the project actually did originate with him. He had written to AH saying that his office had money to spend and suggesting ideas of how it could be spent on projects with IPA. The Applicant suggested fields in which IPA could propose projects and even suggested the idea of labs. Then when the Applicant introduced AH to his UNDP Guinea-Bissau team, he told the team that he and AH had been discussing the need for more evidence in policy decisions in Guinea-Bissau and that AH had mentioned the possibility of embedded labs in ministries. The email could not be more clear that the project originated with the Applicant, as joined by AH for IPA.

14. According to the Applicant's testimony, “the decision to use a non-competitive selection process originated with the DRR of Operations and was then subsequently supported by the management team which was me, the DRRO and the DRR-P [Deputy Resident Representative for Programs].”

15. This, too, is contradicted by the emails. The Applicant knew that AH brought up the possibility of a “piggyback” on IPA's new contract with UNHCR since AH

blind-copied him on the email he sent to the Guinea-Bissau economic team suggesting this piggy-back arrangement. It is simply wrong to attribute this to the DRR-O.

16. The Applicant also testified that “all my communications were conducted openly, either in person of course or through my UNDP account to maintain transparency.” The emails again contradict this assertion. Numerous communications directly between the Applicant and AH were not copied to the Management Team, and both the Applicant and AH blind-copied each other on communications involving the Management Team. This is not open and transparent communication.

17. The Applicant testified that his past relationship was not a conflict of interest because “my past relationship with [AH] ended well before IPA became involved in this project... At the time of the contract, though, and the period of, you know, discussions about partnering with IPA, he was a friend, an acquaintance... There is no financial or personal interest.”

18. He also said that he disclosed the relationship “at various times with Headquarters” both before going to Guinea-Bissau and afterwards. In Guinea-Bissau, his colleagues there also knew about the relationship because he and AH were living together until June of 2022. The Applicant acknowledged that the DRR- O was unaware of the relationship “because she just arrived some months before this was concluded and at that time I was not in a relationship with [AH]. However, the DRR-Programs and the DRR-Operations before, who made the collective decision to pursue the partnership with IPA were very well aware.”

The Applicant testified that AH filled his need for a sounding board with whom to discuss certain issues and seek advice, since the Applicant was a first time RR and his “network within UNDP was restricted.” According to him none of the information he shared with AH was “explicitly marked as restricted or confidential” and “none of the information shared benefited IPA in partnering with UNDT.” However, he conceded that “some of the information sharing was a lapse of judgment on my side and I truly apologize for that.”

19. When asked to specify the kind of information that he discussed with AH, the Applicant said it was both policy issues and specific UNDP documents. The shared information covered political situations that occurred in the country and procedural issues within the UNDP office.

20. The Applicant agreed that the collaboration between IPA and UNDP was triggered by him. He said that IPA did not have a legal presence in the country. “That is also the problem, how do you get, you know, institutions that do not work in the country to work in the country?”

21. Regarding the Economic Team’s proposal to proceed with other projects instead of IPA, the Applicant testified that the other projects “were not transformative at all in their nature” and that the proposal did not reflect opposition to the IPA project because “everybody wanted to get this...over the finish line.”. Instead, the Applicant saw that proposal was “an indication of the alternative financing ...in order to reach the 100 percent of...allocation for the next year.”

22. The Applicant denied that he “pressured necessarily to go over the line with an IPA project...We didn’t cut corners where it should be cut.” He also said that although there were problems with the IPA proposal, and “we wanted to make this happen because of what I already explained, but if it wasn’t going to go because it was ...not documented well enough, then I wouldn’t have signed it.”

23. Although he told investigators that he “wasn’t involved in the nitty gritty,” the Applicant admitted that he stepped in when the DRR-O and the Economic Unit’s Recovery and Resilience Specialist (RRS) were unable to resolve the documentation problems. The Applicant testified:

We cannot undo what has been done. Of course, when I look back now, I would have... acted more cautiously... The context here is the last days of the year ... making sure in an office that does not respond operationally, nor partially in a programmatic way ... that we advance in, or course in an orderly manner and addressing all the concerns that were raised.

Thus, he asked AH to improve the technical and financial proposals, transmitting to AH the information that his team needed to process the proposal.

24. When asked why he did not copy his team on the correspondence with AH, the Applicant said

That's a good question. I asked myself that. We were working 12-14 hours a day. I had so much on my table and I think I just forgot to copy [DRR/O] on this...I don't know why I didn't CC. It should have been CC'd so that it's all in the open.

25. As to whether he passed on internal documents or discussions to AH, the Applicant said

Maybe I passed one or I don't know how many, in order to make sure that the process would go on ... yeah, I might have shared some of the usual correspondence in order to make sure that we're all on the same page.

26. When asked why he shared a specific internal document with AH, the Applicant said

I don't know what I...at that moment, I thought why it was important. Maybe there wasn't a reason why. You know, I cannot recall that, but overall and I said that I should have been more cautious of course in ... sharing.

27. As for why he would blind copy AH on emails sent to UNDP staff if he was trying to ensure everyone was on the same page, the Applicant first said "I understand the question well," and then did not answer it, saying that the team knew he was in contact with IPA and checking in to see if everything was going to plan. "So I don't know why I didn't copy others in those exchanges. If you say that I forwarded it...that's the reason right then. I don't know."

28. When Respondent's counsel pressed the point, the Applicant admitted that

I don't know why I blind copied him because there's no reason to blind copy. But I think you know there were some mails that I copied him. There were some mails that I blind copied him...I didn't do that to obfuscate or, you know, send him something so that the team does [not] know.

29. However, the Tribunal notes it is common knowledge that the purpose of sending a blind copy is precisely to obfuscate and hide from the other recipients that someone else is receiving a copy.

30. The Applicant said “did I propose IPA as a viable partner? Yes...Hopefully others would have come to the same conclusion.” He went on to testify that

With the process, and I say again, I did have a lapse of judgment in sharing some of the information. The only intention and motivation was to get this work done right and there was...no alternative to this. Nor was I instrumental in this? I was co-instrumental because our office did not work from the ...we always had a collective discussion about things.

31. The Applicant conceded that he did not disclose to the DRR-O that he was involved in a proposed contract with IPA, and that his former romantic partner was the point of contact; but “the Senior management team” knew —because they knew AH personally. The Applicant also did not formally recuse himself from involvement in that project negotiation because “it was obvious that we were not in a relationship anymore, and they knew that we were still acquaintances or friends.”

32. Asked if people might have perceived that he had a possible conflict of interest, the Applicant demurred saying

I cannot speak for other people... I did not intend any perceived, you know, action perceiving that there was a conflict of interest...I cannot answer that question. But looking back at the UNV [UN Volunteer] who actually put that in writing...he’s the only one actually putting that in writing that he sees a conflict of interest there....so I don’t see how people didn’t ever approach me, nor the CRR-P and said “hey, don’t you think, you know, we know that you’re involved, don’t you think you should step back a little bit?”

33. The Applicant admitted that he provided AH an audit report from the UNDP Guinea-Bissau but said that audit reports are public. He also admitted sharing detailed current financial information from the Regional Bureau of Africa (RBA) but could not “recall the reason why [he] did so....This is a kind of information that I shouldn’t have shared.”

34. The Applicant also shared notes of his meeting with the RBA director which have a political background and were about the political development in Guinea-Bissau.

I just wanted probably, I don't recall exactly what the discussion was, but I wanted different opinion on some of these things...None of this information ever, ever, damaged UNDP in any way. So I just want to make sure that this is clear.

35. Additionally, the Applicant agreed that he shared internal information about a recruitment process, including who constituted a panel "but it wasn't marked confidential." He also shared a presentation of senior management performance survey results for the office and a draft strategic plan for the office, again, "for a second opinion". The Applicant shared a document on peacebuilding priorities with AH and marked it "only for your eyes" to indicate that AH "should be prudent with the information." When asked if he thought in other situations that AH could not be prudent, the Applicant said "yes, of course. Looking back, I would say I should have been more prudent, but yes."

36. Regarding other internal documents that he shared with AH, the Applicant said

[T]he internal information that I sent was certainly not aimed at all to provide any favouritism to this case, first of all. Second, I had some lapses, and I did say that in terms of sharing some internal information that never damaged UNDP... Maybe, I don't know, I was providing him some information of how to go about things or something, but it had nothing to do with ...the UNDP procedures as such."

37. However, he did not dispute that, in sharing one such document with AH, the Applicant wrote "don't know if super helpful, but surely some parts."

38. The Applicant described the difference between a competitive bidding procedure and a responsible party agreement. In the latter, "once the regional procurement office opted for the piggybacking, the whole question of competitiveness is out of sight. So you deal actually with a partner... to see if you can get to an agreement."

39. He then explained that he wrote to AH as the IPA focal point to tell him what was needed for the proposal, such as more detail on the costs and the breakdown of expenses. The Applicant then pointed out that the proposal was finally approved.

40. Based on all of this evidence, the Tribunal concludes that clear and convincing evidence exists that the Applicant was involved in a significant part of the procurement process with IPA, for which his former romantic partner and still close friend was the focal point. There is also sufficient evidence that the Applicant shared confidential and internal UNDP information with AH on numerous occasions.

Whether the established facts legally amount to misconduct?

41. UN Staff Regulation 1.2 (m) provides that

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;

42. This Regulation is implemented in staff rule 1.2 (p) which states that

Staff members shall, except as otherwise authorized by the Secretary-General, formally recuse themselves from any involvement in a matter which might give rise to an actual or possible conflict of interest as set out in staff regulation 1.2 (m) and take any other action as may be deemed necessary pending the consideration by the Organization of any mitigation or remediation measures. Staff members shall implement the mitigation or remediation prescribed by the Organization to resolve that conflict-of-interest situation.

43. Moreover, the UNDP Legal Framework for Addressing Non-Compliance with UN Standards of Conduct stipulates in Paragraph 25(i) that misconduct may include:

Failure to disclose an interest or relationship with a third party who might benefit from a decision in which the staff member takes part; [and] favouritism in the award of a contract to a third party.

44. The Applicant argues that these conflict-of-interest provisions do not apply to the facts in his case. Specifically, he claims that “interest” and “relationship” are not defined in the staff rule(s) and emphasizes that his romantic relationship with AH was disclosed to Headquarters before he took the position as Resident Representative; that colleagues in the country office also knew of the romantic relationship, and that the romantic relationship had ended before the conduct in question arose.

45. ST/SGB/2019/9 provides commentary on Staff Regulation 1.2 (m)¹:

2. The definition of “conflict of interest” is complemented by the similar but more comprehensive definition set out in paragraph 23 of the 2013 standards of conduct, as follows: “...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....” (emphasis added)

46. Of particular relevance here is that “conflicts of interest can arise from an international civil servant’s ...dealings with third parties [and] individuals.” It is not necessary that they be in a current romantic relationship with those individuals. Even this “more comprehensive definition” clearly states that the described circumstances are only illustrative and not exhaustive given the prefatory use of the term “include”. These rules and regulations on conflict of interest are obviously broad in order to encompass the myriad of “interests” and “relationships” that could conflict with staff member’s duty to the Organization. The Applicant’s argument is akin to a claim that one is not guilty of murder because he did not use a gun or knife in dispatching the victim, he only used poison to bring about the death. The essence of the offence is the same, regardless of the means used. Similarly, the essence of conflict of interest is the same regardless of the interests or relationships involved.

¹ “The commentary provides guidance on interpreting the Staff Regulations in order to help staff members understand each provision by placing it into context. The Commentary is not part of the Staff Regulations and Rules so is not a legal norm, nor does it have the legal force of a rule. It is, however, an official guide published by the Secretary-General for the use of management and staff on the scope and application of the Staff Regulations and Rules.” *Kamara-Joyner*, 2023-UNAT1400, para. 76 and accompanying footnote.

47. Thus, whether the romantic relationship was ongoing is irrelevant. Even after the romance ended, the Applicant and AH were close friends. Possible conflicts of interest are not limited to romantic partners or family members. Clearly the concept extends to friends, especially close friends such as AH. The goal is to ensure that UN staff members remain solely committed to the interests of the Organization and are not compromised by their own interest(s) or that of their family and friends. The Tribunal finds, under the circumstances, that the Applicant's relationship with AH (whether they were friends or romantic partners at the time of the conduct in question) was sufficiently close for a conflict of interest, and indeed the perception of conflict, to attach.

48. Second, the Applicant's initial disclosure of his relationship was related to the negative view of same sex relationships in Guinea Bissau. At that time, there was no indication that AH would be the focal point for a potential UNDP vendor. Although Country Office staff may have known of the relationship early on, since the Applicant and AH were living together as romantic partners, circumstances subsequently changed. At the time of the procurement process in question, the romantic relationship had ended, AH had moved from Guinea-Bissau and taken up a job with IPA, some country office staff had rotated, and new staff, including the DRR-O, did not know of the friendship.

49. The Applicant's argument that he had no financial interest in IPA, is also irrelevant. Without doubt, if he had a financial interest in IPA there would have been a conflict between his own interests and those of the Organization. However, that is not the only type of conflict that is forbidden. The type of conflict that the Applicant was disciplined for is a conflict between the interests of the Organization and those of his close friend, AH, who clearly had a financial interest in IPA.

50. The Applicant claims that AH "was named as a focal point presumably because of his experience in Guinea Bissau and his role as IPA's Regional Director for Francophone West Africa." The record actually reveals the opposite. AH became the focal point when the Applicant suggested to him possible partnership opportunities between IPA and the Applicant's office, and then introduced AH (and IPA) to his Team to consider these projects. This was not a situation of UNDP

deciding they wanted embedded evidence labs, then determining that IPA was a responsible vendor of such labs, contacting IPA, and IPA selecting AH as its focal point (for the reasons that the Applicant presumes).

51. Finally, the Applicant argues that the Organization was not adversely affected by the project. Of course, the Applicant was not disciplined because the embedded labs project failed. He was disciplined for the way in which IPA was selected to be the vendor for the labs. The concern is the risk of reputational damage to UNDP in the event of a conflict of interest, or even a perception or appearance thereof.

52. The Applicant acknowledges that perception is important and that at least one person saw a conflict of interest. That is precisely the purpose for the rules and regulations on conflict of interest and the duty to disclose possible conflicts. As ST/SGB/2016/9 makes clear:

It will be for the Secretary-General and heads of departments to assess whether a particular act or omission raises a potential conflict of interest situation. Staff are obliged to disclose even possible conflicts and to follow instructions on how to resolve the situation, including to avoid and remove the conflict or the circumstances that make it a possible conflict. Failure by a staff member to disclose an actual or possible conflict can seriously disrupt operations of the Organization and pose detriment to the Organization's integrity and reputation as a whole, and may lead to the imposition of disciplinary measures against the staff member. *Id.*, p. 20/48.

53. The Applicant failed to disclose the possible conflict in this IPA procurement, instead arguing that there was no reason to disclose because “everybody knew.” As discussed above, everybody did **not** know that the Applicant's former romantic partner and current close friend was the focal point for IPA, a possible vendor. Thus, the appropriate senior management were deprived of the opportunity to assess whether there was a potential conflict and to instruct the Applicant as to how the conflict could be mitigated or avoided. There is no way to assess the actual damage to UNDP's reputation that occurred and merely exposing the Organization to such damage amounts to misconduct.

54. As for the misuse of his position by sharing confidential information with AH, the Applicant admits it was a mistake for him to share this information and

that, in retrospect, he should not have done so. Whether the information was “officially marked as confidential or restricted” does not change the nature of this information or excuse his admittedly improper sharing of it.

55. The Applicant also argues that staff regulation 1.2(i) includes an exception to the prohibition on sharing non-public information “as appropriate in the normal course of their duties.” However, there is no evidence that the Applicant shared this information in the normal course of his duties. He was unable to explain the reasons for sharing some of the information. As for other shared information, his explanation was that he relied on AH as a sounding board. It is not within the normal course of duties to select an outsider as one’s sounding board about internal information, and certainly not when the internal information relates to a procurement where the outsider is a potential vendor’s focal point.

56. His argument that none of the shared information favored IPA is clearly refuted by the record. The Applicant told IPA (through AH) how much money was available for outside projects and what types of projects IPA could propose. When IPA’s proposal was deemed insufficient, the Applicant told AH exactly what was necessary to have the proposal approved. It is inconceivable how the Applicant can maintain that this did not favor IPA.

57. In sum, the Tribunal finds that the established facts amount to misconduct.

Was the disciplinary sanction proportionate to the offence?²

58. Article 9.4 of the UNDT Statute requires the Tribunal to assess whether the discipline imposed was proportionate to the offense. “The principle of proportionality meant that an administrative action should not be more excessive than is necessary for obtaining the desired result.” *Sanwidi*, 2010-UNAT-084, para. 39; *Applicant*, 2013-UNAT-280 para. 120; *Akello*, 2013 UNAT-336 para. 41; *Samandarov*, 2018-UNAT-859, para. 23; *Turkey*, 2019-UNAT-955, para. 38. The Tribunal “is vested with the authority to overturn a prescribed penalty if it is regarded as too excessive in the circumstances of the case.” *Rajan*,

² The Applicant does not argue that his due process rights were violated in any way.

2017- UNAT- 781, para. 48; *Negussie*, 2016-UNAT-700, para. 28; *Ogorodnikov*, 2015-UNAT-549, paras. 30-35.

59. The Appeals Tribunal has said that 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 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.” *Samandarov, supra*. para. 23, citing *Sanwidi supra* paras. 39-40, 42 and 47.

60. In applying this principle, the Appeals Tribunal has directed that

[t]he most important factors to be taken into account in assessing the proportionality of a sanction include the seriousness of the offence, the length of service, the disciplinary record of the employee, the attitude of the employee, and his [or her] past conduct, the context of the violation and employer consistency.” *Rajan, supra*.

61. It is generally appropriate “to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction.” *Toukolon*, 2014- UNAT-401, para. 31; *Jahnsen Lecca*, 2014-UNAT-408, para. 27; *Portillo Moya*, 2015-UNAT-523, paras. 23-24; and *Jaffa*, 2015-UNAT-545, paras. 16-20. But “constitutive elements of an offence must be considered separately from mitigating and aggravating factors.” *Turkey, supra*. para. 40.

62. In applying these factors, the Tribunal notes that the Administration properly considered, as mitigating factors, the Applicant’s cooperation with the investigation, his expressed remorse, and “during your relatively short tenure with UNDT, [you] have not otherwise been the subject of a disciplinary finding.” However, the Administration failed to consider that this was the Applicant’s first posting within the United Nations system, and that he was named Resident Representative in a challenging duty station without any prior organizational experience. These factors also should have been considered as mitigating circumstances.

63. With regard to the seriousness of the offence, the Tribunal notes that conflict of interest and sharing non-public information can be serious offences. However,

the Administration erred in conflating the constitutive elements of the offences including “that your actions directly undermined the transparency and purpose of [the procurement] process, in direct and clear violation of the relevant rules” with an aggravating factor. Violation of the rules, and the purpose behind those rules, is the essence of the offence and cannot also be considered as an aggravating factor. *Turkey, supra.*

64. As to employer consistency, the contested decision makes no reference to the sanctions imposed by the Organization for similar conduct. The Respondent attempts to fill this gap in his reply by citing to a single case as evidence that

UNDP’s practice has consistently been to separate staff members who engaged in conflicts of interest in procurement matters, even in absence of any evidence of personal financial gain, as evidenced by the *Hoyce-Temu* case [2022-UNAT-1281], which involved a UNDP staff member.” Reply, para. 43.

65. Of course, a single case really does not constitute “consistent practice.”

66. More importantly, *Hoyce-Temu* does not stand for the proposition that separation for conflict of interest is appropriate “even in the absence of any evidence of personal financial gain.” To the contrary, in that case, the Appeals Tribunal found that Ms. Temu

engaged in a conflict of interest and used her position with UNDP **for her own personal profit**, when on numerous occasions she conducted business, on behalf of Anderson PR, with the European Union, and another partner of UNDP in Tanzania.” *Id.* para. 40.(emphasis added).

67. Indeed, the Appeals Tribunal specifically noted that Ms. Temu maintained an ownership interest in Anderson PR while working at UNDP, and also used her UNDP e-mail and office to communicate with both a UNDP partner/vendor and the Head of the European Union (EU) delegation to Tanzania, resulting in contract awards from those parties to Anderson PR. *Id.* para. 17. Clearly, there was evidence of Ms. Temu’s personal financial gain and thus that separation was appropriate.

68. By contrast, in the instant case, there is no evidence that the Applicant profited at all from his interactions with AH. In those circumstances, the Organization’s

Compendium of Disciplinary Measures³ indicates that, for conflict of interest without person gain, the common sanction is written censure, sometimes accompanied by a fine or demotion.

69. For example, in Reference Number 63, “a staff member placed himself in a situation with the clear potential for a conflict of interest in relation to a recruitment process, which affected the process” and received a written censure and a fine of one month’s net base salary. In Reference Number 415, “a staff member, without authorization, gave an interview to a news organization on matters concerning the United Nations outside the staff member’s normal work duties. The staff member’s admission and remorse served as mitigating factors” and they were given a written censure.

70. In Reference Number 483, “without prior approval, a staff member used a United Nations email account and engaged in outside activities by assisting the business of an external individual. The staff member made a false statement in favour of the individual and for the individual’s acquaintance” and was censured along with the loss of two steps in grade. In Reference 674, “a staff member instructed subordinates to engage in conduct that violated policies of the Organization and local law. The staff member also failed to disclose a conflict of interest arising from their involvement with this matter. There was one aggravating factor and one mitigating factor” for which a censure and loss of five steps with deferment for two years of promotion eligibility.

71. To be sure, there were cases in which separation was imposed, although those raised aggravating factors not present in the current case.⁴

³ Compendium of disciplinary measures July 2009-December 2023
<https://hr.un.org/page/compendium-disciplinary-measures>

⁴ See, e.g., Reference Number 537 (altered an official document, engaged in unauthorized outside activities for many years and used official ICT resources in these activities); Reference Number 602 (second case involving the same previously sanctioned conduct); Reference Number 675 (inappropriately facilitated the recruitment of an individual with whom the staff member had a personal relationship, failed to disclose the conflict of interest, and remained in a direct reporting line with the individual); Reference Number 746 (engaged in unauthorized outside activities and acted under a possible conflict of interest, issuing cheques during the activities without having sufficient funds); Reference Number 747 (engaged in unauthorized outside activities that constituted a conflict of interest, also provided false information regarding previous employment in a job application, and

72. Having considered all the required factors, and the circumstances of this case, the Tribunal finds that sanction imposed on the Applicant (separation from service with compensation *in lieu* of notice and without termination indemnity) was excessive.

73. The Applicant's motivation was to advance the Organization's goals by instituting what he considered to be a valuable project. It was not for the financial gain of himself or his close friend. The record indicates that IPA may have been the only vendor capable of handling that project and that the project was successful. The Applicant acknowledged his mistakes, his lapses in judgment, and expressed remorse for the misconduct.

74. The Tribunal finds that the desired result of imposing a disciplinary measure could have been achieved by a written censure confirming the misconduct. Instead, the Organization ended the budding career of a committed, talented and energetic young director with a bright future in the Organization.

75. The decision to separate the Applicant is therefore rescinded and the Respondent is directed to impose the disciplinary measure of written censure instead.

Compensation in lieu

76. Article 10.5 of the Dispute Tribunal Statute requires that, where the rescinded decision concerns appointment, promotion or termination, the Tribunal must set an amount of compensation that the Organization may elect to pay instead of implementing the rescission.

77. The Appeals Tribunal has held that "the purpose of *in lieu* compensation is to place the staff member in the same position he or she would have been in, had the unlawful decision not been made." *Saleh*, 2023-UNAT-1368 para. 69. (citing

other aggravating factors); Reference Number 755 (senior staff member, acted under conflict of interest and inappropriately facilitated a family member's business resulting in a service contract awarded to the business, inappropriately requested hiring former personal assistant as an individual contractor without disclosing a conflict of interest); and Reference Number 756 (colluded with a staff member of a UN agency to facilitate hiring their respective spouses in their respective offices, unduly influenced the recruitment of the other's spouse as a consultant acting under a conflict of interest, with other aggravating factors).

Ashour, 2019-UNAT-899, para. 18). Calculating the amount to set as compensation *in lieu* must be done on a case-by-case basis. *Saleh, supra* para.69; *Mwamsaku* 2011-UNAT-265. The determination depends on the circumstances of each case, considering the grounds upon which the termination decision was rescinded, the nature of the post formerly occupied, the remaining time to be served by a staff member on their appointment, and their expectancy of renewal. *Siddiqi*, UNDT/2018/086, para. 86, *Saleh*, para. 70; and *Krioutchkov* 2017-UNAT-712, para. 164.

78. In analyzing those factors in light of the circumstances in this case, the Tribunal notes that the decision to terminate the Applicant is rescinded because it was grossly excessive. The Applicant held a fixed-term appointment at the D1, Step 4 level as the Resident Representative for UNDP in Guinea-Bissau. His appointment was due to expire on 21 May 2024, eleven months after his improper separation.

79. The record is silent as to any express promise of renewal, and the principle is well-established that fixed-term appointments carry no expectation of renewal. *Kule Kongba* 2018-UNAT-849, paras. 25-27; *Muwambi* 2017-UNAT-780, para. 25; 2017-UNAT-721, para. 15 ; *Pirnea* 2013-UNAT-311, para. 32.

80. In setting the appropriate amount of compensation *in lieu* of rescission for this case, the Tribunal has surveyed the facts and amounts set in other cases. The observations of the Appeals Tribunal in *Lucchini* 2021-UNAT-1121 seem apt:

He has lost his employment, his reputation has been unjustifiably sullied and his future employment prospects... undoubtedly harmed. In any other legal system, the only fair remedy to properly vindicate his rights would be retrospective reinstatement on full benefits to the date of his dismissal. *Id.* para. 62.

81. The same is true here. The Applicant has lost his employment and, due to the unfair separation, his reputation and future employment prospects have certainly been harmed. Placing him in the same position he would have been in, had the unlawful decision not been made, would necessarily include full benefits from the date of separation until the expiration of his appointment eleven months later. In

addition, if the Organization elects not to implement the rescission, the Applicant's reputation will remain unfairly tarnished, and an additional (thirteen-months' net base salary seems an appropriate amount to reflect this loss.

82. Accordingly, the Tribunal sets the amount of compensation that the Organization may elect to pay instead of implementing the rescission at two years net base salary.

Additional Compensation for Harm

83. The Tribunal is also authorized by art. 10.5(b) of its Statute to award "[c]ompensation for harm, supported by evidence". In his application, the Applicant makes a perfunctory request to be compensated for damages to his "health, 'dignitas' and professional reputation." He also attached correspondence stating that he was under care from August to October 2023, having "arrived in a state of physical, mental and emotion exhaustion due to the circumstances at this place of work" and was "recovering from burnout and traumatic experiences."

84. As noted, above, if the Organization refuses to implement the rescinded separation (and thus to restore the Applicant's reputation), the Organization shall pay compensation for that reputational loss. However, the Tribunal does not find sufficient evidence that the Applicant's condition of burnout and exhaustion resulted from the imposition of an excessive and disproportionate sanction.

85. Accordingly, the request for an award of compensatory damages is denied.

Conclusion

86. The Application is GRANTED in part.

87. The Tribunal rescinds the disciplinary measure imposed on the Applicant, and ORDERS his reinstatement or, in the alternative, compensation *in lieu* calculated at two (2) years net base salary.

88. In all other respects, the Respondent's decision is AFFIRMED and the Applicant's prayers refused.

(Signed)

Judge Sean Wallace

Dated this 9th day of December 2024

Entered in the Register on this 9th day of December 2024

(Signed)

Wanda L. Carter, Registrar, Nairobi