



1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2012/124, in the case of *Akello v. Secretary-General of the United Nations*, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 9 August 2012. The Secretary-General filed his appeal on 1 November 2012, and Ms. Anne Akello filed her answer on 26 December 2012.

Facts and Procedure

2. On 4 June 2007, Ms. Akello joined the United Nations Department of Safety and Security (UNDSS) on a four-month fixed-term appointment at the G-4 level issued by

for Human Rights (OHCHR) and collected checks from OHCHR; and that on 14 April 2009, she signed as “Managing Director” of Blessed Seasons a letter addressed to the United States Embassy in support of a request for an entry visa and stamped it with the official stamp of the company. The IAU concluded that Ms. Akello was guilty of misconduct and recommended that appropriate action be taken against her.

7. By letter dated 12 January 2010, Ms. Akello was charged with misconduct for engaging in outside activities, engaging in a serious conflict of interest, and bringing the Organization into disrepute. She was also charged with breaching the highest standards of integrity, given that in addition to the above, she had misrepresented facts to the IAU investigators. By letter dated 17 May 2010, Ms. Akello was summarily dismissed for misconduct pursuant to Staff Rule 10.2(a)(ix).

8. Ms. Akello filed an application with the UNDT in Nairobi contesting the decision to dismiss her. On 9 August 2012, the UNDT disposed of her application by Judgment No. UNDT/2012/124. While the UNDT found that she had engaged in outside activity and that her outside activity provided her personal financial gain, it concluded that her unauthorized outside activity did not result in an actual conflict of interest. The UNDT further held that the investigators had the obligation to notify Ms. Akello of her right to the assistance of counsel during the investigation, and that, in light of the failure to notify her, the charge that Ms. Akello had breached the highest standards of integrity by lying/attempting to lie to the investigators was not sustainable. In addition, the UNDT concluded that the summary dismissal of Ms. Akello was “a grossly disproportional sanction” and ordered that it be reduced to a written censure. The UNDT ordered Ms. Akello’s reinstatement with retroactive effect or, in the alternative, payment of compensation in the amount of two years’ net base salary.

9. The Secretary-General appeals the UNDT Judgment. Upon Ms. Akello’s request, the Appeals Tribunal held an oral hearing on 20 June 2013.

14. The Secretary-General requests the Appeals Tribunal to annul the Judgment in its entirety.

Ms. Akello's Answer

15. The UNDT correctly held that Ms. Akello did not violate the applicable provisions on conflict of interest. Former Staff Regulation 1.2(m) prohibits only actual conflicts of interest. There was no legal provision prohibiting potential or perceived conflicts of interest at the time of Ms. Akello's involvement with Blessed Seasons.

16. The UNDT did not err in concluding that Ms. Akello had a right to counsel during the second investigation. Contrary to the Secretary-General's contention, the IAU's investigation was not a preliminary investigation. A preliminary investigation cannot include an interview of the prime suspect. At the time of the interview with the IAU, Ms. Akello had a right to be assisted by counsel and the IAU failed to inform her of that right.

17. The UNDT did not err in concluding that the disciplinary measure imposed was grossly disproportionate. The UNDT examined the evidence and the facts of the case, weighed the arguments of both parties and came to the conclusion that the sanction was not proportionate to the offense. The Secretary-General does not address the UNDT's factual considerations, but merely disagrees with its conclusion. Staff Rule 10.2 lists ten

actual or perceived conflicts of interest. We are thus satisfied that Ms. Akello's activities, viewed against the unambiguous provision of former Staff Regulation 1.2(m), amounted to a conflict of interest. The UNDT, in ruling otherwise, erred in law and fact. The Secretary-General's appeal succeeds on this ground.

The claimed right to be advised of the right to the assistance of counsel during the investigation phase

27. The Secretary-General submits that the Dispute Tribunal erred in concluding that "investigators had an obligation, in accordance with the universal principles of natural justice, to inform [Ms. Akello] of her right to the assistance of counsel during investigations". The Secretary-General further maintains that neither the UNDP Legal Framework nor the OAI Guidelines refer to an obligation to inform staff members of such a right during the investigation phase and he argues that the OAI Guidelines merely require that witnesses or suspects may have legal counsel and investigators "are not required to interact with" such counsel.

28. Section 8.8 of the OAI Guidelines, which describes who should be present during an interview states that: "[u]nder special circumstances, witnesses or suspects can request to be accompanied by an observer (who has no connection to the investigation and is readily available). Considering the cultural context, gender balance and other elements of the case, the investigator may approve the request and select the observer (e.g. field security officer, lawyer etc.)."

29. Ms. Akello's submissions on this issue are to the effect that the particular facts of the present case imposed an obligation on the Administration to advise her that she had the right to seek the assistance of counsel, and that "[a]s soon as the [IAU] investigators met with [Ms. Akello], the disciplinary process had reached a stage which could no longer be called preliminary. Therefore, [Ms. Akello's] right to counsel was triggered as soon as [she] was invited to an interview with the Internal Affairs Unit". It is also asserted that Ms. Akello was subjected to "a full-fledged investigation after a preliminary investigation had already been completed".

30. Furthermore, it is submitted that the jurisprudence of this Tribunal relied upon by the Secretary-General,¹ cannot be determinative of the issue of whether a staff member should be informed of his or her right to seek the assistance of counsel during the investigation phase. Ms. Akello submits that while this Tribunal ruled in *Applicant* that “ST/AI/371 and former Staff Rule 110.4 apply once the disciplinary proceedings have been initiated”,² this ruling does not cover the present case, which is governed by Staff Rule 10.3(a). This latter Rule provides that disciplinary proceedings are initiated when the “findings of an investigation indicate that misconduct may have occurred”. On behalf of Ms. Akello, it is maintained that “the first investigation, conducted unlawfully and irregularly, had already generated sufficient grounds to believe that misconduct may have occurred” and that “during the second investigation, the investigators undoubtedly knew that misconduct may have occurred”, thus necessitating Ms. Akello’s right to counsel during the second investigation.

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disrepute, as [Ms. Akello's] behaviour created the perception that UNDSS (staff) owned vehicles that competed with other vendors in the running of the escort duties and (iv) breaching the highest standards of integrity, given that, in addition to the above, she also misrepresented facts to the IAU investigators.

34. The issue for this Tribunal is whether the very fact that the IAU investigation (conducted as it was pursuant to the UNDP Legal Framework), but having been preceded by a procedurally flawed and irregular earlier investigation, compelled the IAU investigators to advise Ms. Akello (the alleged suspect) of her right to seek the assistance of counsel. Notwithstanding the arguments made on her behalf, we do not find that the circumstances of this particular case gave right to the legal entitlement sought. Other than the fact that the personnel who conducted the second investigation knew of the existence of a previous flawed investigation, we do not accept as necessarily logical or certain that the investigators had advance knowledge that the second investigation would be detrimental notwithstanding Ms. Akello's identification as an alleged suspect.

35. Furthermore, it has not been suggested that as soon as Ms. Akello was identified as a wrongdoer (that is post the IAU investigation), she was not afforded a right to counsel. Paragraph 99 of the UNDP Legal Framework provides:

The charge letter initiates the disciplinary proceedings. In that letter, the staff member is notified in writing of the formal charges ... [and the staff member is] given a specified period of time ... to answer the charges and produce countervailing evidence, if any. The staff member shall also be notified of his or her right to counsel to assist in his or her defence, and be informed as to how to obtain the assistance of the Panel of Counsel.

36. While the statutory instruments governing the investigation and disciplinary process in the present case are different instruments to those which governed the *Applicant* case,³ our jurisprudence remains that the due process entitlements, which every staff member has, come into play in their entirety once a disciplinary process is initiated. Furthermore, we have held in *Powell* that at the preliminary investigation stage, only limited due process rights apply.⁴

³ *Ibid.*

⁴ *Powell v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-295.

37. In all the circumstances of this case, we are not persuaded that Ms. Akello has put forward any compelling argument to merit a departure from the established jurisprudence of this Tribunal.

38. We thus find that the UNDT erred in law in concluding that there was a right to be apprised of the assistance of counsel during the investigation stage. The Secretary-General's appeal on this ground is allowed.

Did the Dispute Tribunal err in concluding that the disciplinary measure imposed on Ms. Akello was disproportionate to the offence she committed?

39. Given that the Dispute Tribunal found Ms. Akello only to have engaged in "unauthorized outside activity", and that she should have been informed of her right to the assistance of counsel during the investigation stage, it determined the summary dismissal imposed to be grossly disproportionate and held that "[t]he doctrine of proportionality is applicable in this case to reduce [Ms. Akello's] summary dismissal to a written censure in line with the Secretary-General's practice in disciplinary cases".

40. In light of our determinations that Ms. Akello's unauthorized activities also constituted a conflict of interest and that her due process rights were not breached, we hold, with Judge Faherty dissenting, that her summary dismissal was a proportionate discipline.

41. In *Sanwidi* we stated:

In the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective.⁵

42. We do not find that the Secretary-General exceeded the constraints on his discretion which *Sanwidi* imposes.

⁵ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 39.

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Original and Authoritative Version: English

Dated this 28th day of June 2013 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Simón

(Signed)

Judge Chapman

Entered in the Register on this 26th day of August 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar

Partial Dissent by Judge Faherty

To the extent that the Dispute Tribunal erred in determining that the circumstances of the case merited only a written censure, I agree with the majority decision and I agree there were grounds for removing Ms. Akello from the Organization. My agreement on these issues notwithstanding, I am satisfied that the Secretary-General, who, it is accepted, enjoys a wide discretion in applying sanctions for misconduct, nonetheless offended the concept of proportionality set out in *Sanwidi*, in imposing summary dismissal. Regard should have been taken of Ms. Akello's rank as a G-4 staff member within the Organization and of the fact that in carrying out her duties she did not give preference to Blessed Seasons' vehicle when selecting vehicles for escort. Thus, I am satisfied that the circumstances of this case lent themselves to a sanction of separation from service with notice or compensation in lieu of notice, and with termination indemnity, a sanction which in my view achieves the Secretary-General's objective in protecting the interests of the Organization against the type of activity and conflict of interest which gave rise to this case.

Original and Authoritative Version: English

Dated this 28th day of June 2013 in New York, United States.

(Signed)

Judge Faherty, Presiding

Entered in the Register on this 26th day of August 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar