

Case No.: UNDT/NBI/2023/080
Judgment No.: UNDT/2024/075
Date: 9 October 2024

Introduction

1. The Applicant is a former Finance Associate at the United Nations High Commissioner for Refugees (“UNHCR”), based in Kampala-Uganda. He contests a decision of 2 August 2023 to separate him from service with compensation *in lieu* of notice and without termination indemnity, pursuant to staff rule 10.2(a)(viii).

Factual background

2. The Applicant joined UNHCR on 24 May 2017 as a Finance Assistant (G-4) in Arua, Uganda. On 7 January 2019, he was promoted to Senior Finance Assistant (G-5) in Kampala. On 1 November 2020, he was promoted to Finance Associate (G-6) in Kampala. Between 1 June and 1 December 2022, the Applicant held temporary higher functions at the G-7 level.

3. On 3 February 2023, the Inspector General’s Office (“IGO”) received information of possible misconduct implicating the Applicant. It was specifically alleged that the Applicant had:

- a. Initiated a payment of UGX 3,279,000 to another staff member and driver, Mr. CO’s bank account,
- b. Disregarded a request from the technical approver to address concerns identified at the time of actioning the payment; and
- c. Called CO to request that CO refund a portion of the funds to the Applicant.

4. The IGO commenced investigations and produced its investigation report on 22 March 2023. The IGO established that there was sufficient evidence to conclude that the Applicant initiated a double payment into CO’s bank account with a view to obtaining part of the payment for himself.

- i. Between 1 to 9 March 2022, [CO] (Driver, Kampala) undertook a mission to support the installation of a “*rubhall*” (hereinafter the “*March mission*”); for which [CO] was issued travel authorization TA 330411 (valued at UGX 3,279,000).
- ii. On 3 and 14 March 2022, advance payments of UGX 1,528,000 and UGX 1,740,00 respectively were made to [CO] in connection with the March mission.
- iii. On 23 April 2022, [CO] completed the self-certification for the mission; at that time, he had been paid all amounts due under travel authorization TA 330411.
- iv. On 3 November 2022, travel claim 0000295434 was created and it was correctly determined that all sums had been paid to [CO]. However, in November 2022, a DSA recovery for UGX 1,807,789 was effected; this led to an erroneous recovery of this amount from [CO’s] salary.
- v. On 14 December 2022, the Applicant created a new stand-alone travel claim to reimburse CO for the amount erroneously recovered from him (UGX 1,807,789). This new travel claim also included the full amount of the original travel claim for the March mission (UGX 3,279,000); for a total of UGX 5,086,789.
- vi. On 15 December 2022, the technical reviewer ST, asked the Applicant to re-examine the stand-alone claim. On the same day the Applicant answered that the claim was valid, noting that CO had never been paid for the March mission.
- vii. On 23 December 2022, after further scrutiny, ST answered with a detailed analysis of the matter (setting out the facts presented above). She concluded that there had been a double payment of the March mission travel claim to CO.

viii. On 27 December 2022, the Applicant accepted ST's analysis, acknowledged that there had been double payment, set out an explanation for his mistake, and asked CO to reimburse the overpayment.

6. The Applicant submitted his response to the allegations on 5 May 2023. In his response, the Applicant accepted that he had initiated a double payment but did so by mistake. He denied that he did so with an intention of obtaining part of the payment. He stated that, "I am an honest person who made a genuine mistake".

7. On 2 August 2023, the Applicant received the sanction letter.

Procedural background

8. On 6 November 2023, the Applicant filed the present application.

9. The Tribunal held a case management discussion ("CMD") on 8 August 2024. At the CMD, the Applicant indicated that the theme of his (of)63 5,2whuTte2r 44ense

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).

13. 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*.

14. The Appeals Tribunal clarified 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).

15. The Appeals Tribunal has, 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". 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" (*Sanwidi, op. cit.*).

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

16. In disciplinary cases "when termination is a possible outcome", UNAT has held that the evidentiary standard 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".

17. In *Hallal*, (UNDT/2011/046, *para. 55*) the Dispute Tribunal also held that “[a]s is always the case, any witness testimony should be evaluated to determine whether it is believable and should be credited as establishing the true facts in a case”.

18. As the Applicant acknowledged in his closing submission, “during the case management discussion held on the 8th of August 2024, the parties agreed that the issue to be resolved by this Honourable Tribunal is **whether the facts on which the disciplinary measure is based have been established to the required standard.**” (emphasis in the original). The Applicant accepts that he initiated and made a double payment to CO, but he claims that double payment was due to a system error and not intentional on his part. The Respondent argues that the double payment was intentional and was done in hopes of getting a share of the over payment.

19. The background to that double payment is important to resolving this dispute, and the parties agree as to this factual chronology.

20. Between 1 to 9 March 2022, CO undertook a mission to support the installation of a “*rubhall*” and was issued travel authorization TA 330411 (valued at UGX3,279,000). Advance payments of UGX1,528,000 and UGX1,740,00 respectively were made to CO for the March mission. On 23 April 2022, CO completed the self-certification for the mission, correctly certifying that he had been paid all amounts due under travel authorization TA 330411. On 3 November 2022,

told CO his March mission had never been certified, hence the deduction. When CO disagreed, the Applicant said he would get back to him about the matter.

29. The Applicant claims that these calls and SMS message were about his request for financial assistance. The Applicant further explains that borrowing money from colleagues and friends is a common practice in Uganda.

30. However, CO testified that the Applicant was calling, asking “have you gotten the thing?” CO understood the Applicant was demanding a share of the excess money. CO told the Applicant he had not checked whether he received the payment, or pretended to be busy, or even ignored his calls.

31. CO testified that on 14 December 2022, the Applicant sent to him his private phone number, asking him to deposit the excess money to that number. The Applicant agreed that he shared the number so that CO could deposit the requested financial assistance. The Applicant also testified that besides the financial assistance, he was calling CO asking him to return to the office the excess money that he had received.

32. On 23 December 2022, after further scrutiny, ST provided a detailed analysis of the matter and concluded that there had been a double payment of the March mission travel claim to CO.

33. Finally, on 27 December 2022, the Applicant accepted ST’s analysis, acknowledged that there had been double payment, set out an explanation for his mistake, and asked CO to reimburse the overpayment.

34. In analysing the credibility of the witnesses, the Tribunal finds CO to be credible and the Applicant to be less than credible. The testimony of CO is consistent, and he withstood efforts to confuse him in cross-examination. The other evidence supports his testimony.

35. The Applicant challenges CO’s credibility as not corroborated. Specifically, he complains that several witnesses were not interviewed to ascertain if they would corroborate CO’s testimony. However, this complaint is unavailing.

36. First, the Applicant was asked by the investigator if there was anyone who he should speak with regarding the incident. He said “there is no one, because the

dealing was between me and [CO]. I didn't involve anyone else...I didn't involve anyone else. It was an act of guilt.”

37. Additionally, the Applicant had an opportunity to call these witnesses himself and failed to do so. Thus, it is mere speculation what they would have said and whether they would have corroborated or contradicted CO.

38. Moreover, at best these witnesses would have testified to collateral matters and not really shed any light on the factual dispute at the heart of this case. For example, whether CO reported the overpayment to his supervisor and was told to take it to Finance (see, para. 28 above) is irrelevant.

39. Similarly, it is irrelevant to whether the Applicant's office mates observed him calling or interacting with CO since the Applicant concedes he did so. And it is unnecessary to hear from the employee who the Applicant alleges instigated the situation in early November by creating an open item during a system update. It is undisputed that the Applicant initiated both deduction and then the subsequent overpayment to CO. The issue in the case is not how the situation came about but whether the Applicant seized upon the situation in an attempt to enrich himself.

40. The Applicant also claims that there are material inconsistencies in [CO's] testimony.” He points to only one alleged inconsistency, that CO testified at the hearing that the Applicant asked him for money during a drive to the Uganda Revenue Authority and accosted him in the corridors asking him if he had received the payment yet, but did not mention this during his interview.

41. The Tribunal notes that this argument is ironic in that the Applicant himself admitted that his testimony contained many details that he did not tell to IGO during his interview.

42. More importantly, the record shows that, in his interview, CO said the

the claim. Indeed, the Applicant admitted to “over-pushing” CO because he needed the funds. Thus, there were no material inconsistencies in CO’s testimony and no valid attacks on his credibility.

43. On the other hand, the Applicant’s claim, that he was innocently seeking financial assistance independent of the excess payment, is not credible. The Applicant told IGO that, before processing the double payment, he called CO and said he was going to process a payment and “when the payment comes, if it comes in excess of what he’s expecting, he would refund part of it to [the Applicant]”. He also admitted that he had a similar conversation with CO after the money had come: “I said, ‘Yes, you have gotten money, yes. I have such a problem, I’ll need maybe your help’. That’s why of the frequent calls.”

44. He explained the inconsistency between these admissions and his hearing testimony because “at that time there was a lot of confusion during the interview.” However, six days after the interview the Applicant reviewed the transcript and affirmed that “this is a true and accurate record of the interview.”

45. It is noteworthy that the Applicant basically admitted his wrongdoing during his interview with IGO.

It is my apology. I was working under pressure...because there was something that was oppressing that made me, I think, think I’ll go away to get the money to clear something that was oppressing me. And it just—it went into my integrity. Then it went into my integrity that I wasn’t thinking, because **my mind was always – or it was already focused that if this payment is paid, [CO] would give me something small**, because I’d initially talked to him, because I had, okay, personal problem that made me push, it was like a pressure, but with the – with all that, **when it was refunded. And this happened at the time, okay, yes, I called him several times to that we are very nagging because of the persistent pressure that I wanted to resolve.** But thanks to [CO] for his insisting that made now, as we were running out of the integrity, because me, I needed the funds to come to my account. So I had to push to incite him beyond reason, which wasn’t right, and it made me act not in a professional manner, which wasn’t good. **I saw it as an opportunity that I would clear something of sort and**

standard, a challenge to the proportionality of the sanction would not arise. He later confirmed this in his closing submission.

58. The Respondent submits that the time of his actions, the Applicant had worked for UNHCR for 6 years and had an unblemished disciplinary record, which was considered a mitigating factor. The aggravating circumstance in this case was that he held a finance function, which carries a heightened responsibility and necessity of integrity in dealing with the Organization's funds. The High Commissioner has imposed measures involving separation from service on staff

Conclusion

63. In view of the foregoing, the Tribunal DECIDES to deny the application in its entirety.

(Signed)

Judge Sean Wallace

Dated this 9th day of October 2024

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

(Signed)

Wanda L. Carter., Registrar, Nairobi