



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/065

Judgment No.: UNDT/2012/124

Date: 9 August 2012

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar:

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conflict of interest with her employment with the United Nations. He also required her to provide a written explanation as to why action should not be taken against her for involving herself in such activity.

6. A Board of Inquiry (BOI) was constituted to look into the allegations of conflict of interest against the Applicant on 5 May 2009. On 6 and 7 May 2009, the BOI conducted interviews and assessed evidence in respect of the complaints. On 8 May 2009, the BOI issued a preliminary report containing its findings concluding, *inter alia*, that

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UN. Seen in this light, misconduct born of being in a conflict of interest is a graver sub-set of the wider type of misconduct which consists of engaging in unauthorised outside activities. The Applicant was in a potential conflict of interest between her obligations as a Radio Dispatcher and her involvement in *Blessed Seasons*; almost by definition she was equally engaging in outside activities. One flows from the other, but they cannot form separate bases for the ensuing sanction.

16. The charge of “bringing the Organization into disrepute” is in this case a still wider catch-all, which flowed naturally from the staff member’s conflict of interest.

17. The most serious of these three charges is that of the potential conflict of interest. The Applicant does not dispute that the Respondent may sanction the Applicant on this basis. The question remaining is only what a proportionate sanction for a potential conflict of interest from which the Applicant obtained no personal gain would be. Even though the Applicant was in a situation where she arguably could perhaps have given preferential treatment to the *Blessed Seasons* truck, she did not do so, and the Respondent has not even alleged that she did.

18. The Tribunal’s jurisprudence shows that the material factors in cases where staff members engaged in conflicts of interest are: how high the staff member’s job level was; whether the staff member worked in procurement; and whether the staff member obtained personal gain as a result of the conflict of interest. The higher the staff member’s job level, the higher the standard of conduct expected of that staff member. It is wrong to aver that the same level of conduct is to be expected from a low level general service staff as from a high level professional staff member. Additionally, the questions of whether the staff member was a Procurement Officer and whether the staff member

actually obtained personal financial gain, both impact on the severity of the appropriate sanction.

19. The Respondent has failed to prove that the Applicant's outside activities interfered with her work as a Radio Dispatcher. He has not submitted that the Applicant deviated from the strict rota according to which she dispatched vehicles. There is no evidence that the Applicant's outside activities interfered in any way with her work as a Radio Dispatcher.

20. The Applicant submits that according to the prevailing jurisprudence, her dismissal without indemnity or notice was disproportionate.

21. The decision to dismiss the Applicant without termination indemnity or payment in lieu of notice was discriminatory, and therefore unlawful. erfor payinaTw(appr Twrfailed

appointment and that she had signed an acknowledgement of having received them. Despite this, UNDP found that

Ms. Herfkens appear[ed] to have unknowingly breached the Staff Regulations, in good faith and without mal-intent.

and that

Ms. Herfkens [would] remain an advocate in the global effort to achieve the MDGs, and [that UNDP would] count on her continued support in this effort.

24. The Applicant submits that in contrast to Eveline Herfkens, she was a low level general service staff member, and that unlike Eveline Herfkens, she obtained no personal gain. In light of this, to excuse Eveline Herfkens, while dismissing the Applicant without termination indemnity or payment in lieu of notice, is discriminatory and unlawful.

25. The Respondent cannot rely on the Applicant's failure to comply with her obligations during the investigation when the Respondent failed first to comply with his. From the outset of the investigation, she was considered a possible wrongdoer and the Organization was obliged to advise her that she had the right to secure the assistance of counsel. This omission amounted to a violation of her right to due process.

26. Had the Applicant had the benefit of access to counsel, as was her due process right, she would have been advised on how to conduct herself during the investigation. In light of this breach of the Respondent's obligations vis-à-vis the investigation, the Applicant contends that the Respondent cannot now be heard in his argument that the Applicant failed to comply with her obligations vis-à-vis the same investigation, in that she was not immediately fully honest and candid with the investigators.

27. In light of the above, the Applicant requests the Tribunal to find that the sanction of dismissal without indemnity or payment in lieu of notice was

33. The Applicant, as part of her duties, assigned escort vehicles to UN agencies, while at the same time, holding a personal interest in a private company that provided escort vehicle services to the UN. This situation gave rise to a perception in the public that the Applicant's private interest in *Blessed Seasons* could improperly influence the performance of her duties. Consequently, the Applicant positioned herself in an apparent conflict of interest, as confirmed by the UNDP Ethics Office.

34. As the Applicant did not seek the approval of the UNDP Administrator to carry out her outside activity with *Blessed Seasons*, the Applicant's conduct also contravened the then applicable staff regulation 1.2 (o).

35. Various complaints were received from UN vendors who claimed *inter alia*, that staff of the UN Department for Safety and Security (UNDSS), including, but not limited to the Applicant, owned vehicles that were hired by various UN agencies and that the Applicant was a Director of *Blessed Seasons*. This shows that the wrongdoing of the Applicant had an adverse external effect which negatively affected the reputation of the UN.

36. Since it was perceived by vendors that the Applicant was a Director of *Blessed Seasons* and that UNDSS owned some of the vehicles that were hired by the UN agencies, the Applicant's conduct also brought the Organization into disrepute. The image and the reputation of the Organization suffered as a result of the vendors' perception. The Applicant's conduct was therefore in breach of section 23 (q) of the then applicable UNDP Legal Framework for Addressing Non-compliance with UN Standards of Conduct ("the Legal Framework").

37. As international civil servants, UN staff members must be seen to uphold public interests above private interests. This is especially significant

for UNDP, an organization whose development activities and delivery depend on voluntary contributions from member states. UNDP receives a budget of over USD5 billion per year, of which approximately 80% is funded through such voluntary contributions which, in themselves, stem from public funds. UNDP is, thus, under the increasingly stricter scrutiny of donors and member states and very dependent on the positive image it strives to project to attract public interest and funds in what is now a very competitive environment. As a consequence, UNDP has to hold its staff members to higher standards of conduct than private sector employees. Conversely, this also means a higher level of accountability for wrongdoing.

38. The Applicant, before admitting to her misconduct, attempted to conceal her association with *Blessed Seasons* in the course of the investigation. As an international civil servant, the Applicant's conduct demonstrated a lack of integrity leading to a breach of trust, in violation of UN staff regulation 1.2 (b), as then applicable.

39. Contrary to the Applicant's contention that her due process rights were breached during the UNDSS investigation as she was not notified of her right to Counsel during the investigation, neither the then applicable Legal Framework nor the tht

40. The Respondent did not double-count accusations. Engaging in an apparent conflict of inte

that Ms. Herfkens was found to be in a conflict of interest, but that no disciplinary action was taken against her. According to the Applicant, this demonstrated that the Respondent applied double-standards.

44. The Respondent submits that the Applicant's reference to the letter is of limited relevance in the context of her case. Ms. Herfkens' appointment expired on 31 October 2007 and was not subsequently renewed. Ms. Herfkens was no longer a staff member when the investigation report of 20 May 2008 was purportedly issued. Thus, in light of the foregoing, UNDP could not possibly have initiated disciplinary proceedings against Ms. Herfkens as she was no longer a staff member.

45. The Respondent has wide discretion in disciplinary cases. The UN Appeals Tribunal has held that both the UN Appeals Tribunal and the UN Dispute Tribunal do not interfere in the Administration's execution of its discretionary authority in this context, unless there is evidence of major impropriety. The process leading to the imposition of the contested decision

47. In light of the foregoing, the Respondent's submission is

50. It is in evidence in this case and has been conceded by the Applicant that she was involved in the running of a private company, *Blessed Seasons*, without having received the approval of the Secretary-General to do so. The Tribunal finds that the Applicant was engaged in an unauthorized outside activity.

Did this unauthorized outside activity create a conflict of interest situation

Did the investigators have an obligation to notify the Applicant of her right to assistance of Counsel during investigations?

54. The Applicant asserts that having been identified as the subject of an investigation, the Organization was under the obligation to apprise her of her right to secure counsel. The failure by the investigators to advise her that she had the right to counsel meant that she did not know how to conduct herself during the investigation. The Respondent argues that neither the then applicable Legal Framework nor the then applicable Investigation Guidelines of the UNDP Office of Audit and Investigations (OAI), which were followed by the UNDSS investigators in this case, stipulate an obligation to notify subjects of investigations of their right to be assisted by Counsel during investigations.

55. Notwithstanding the Respondent's contentions, the circumstances of this case and the alleged violations at issue mediated in favour of informing the Applicant to avail herself of Counsel in line with principles of natural justice. It cannot be conceived that an Organization such as the United Nations would have intended that a staff member subject to an internal investigation stands alone like an alleged criminal suspect against several investigators, facing prolonged questioning on issues related to complex Staff Regulations and Staff Rules.

56. Such a situation would only lead such a staff member to making involuntary confessions or becoming unnecessarily defensive or evasive in order to end such an ordeal as quickly as possible. The charge that the Applicant had breached the highest standards of integrity because she lied or attempted to lie to investigators before admitting to her business interests in *Blessed Seasons* is not sustainable.

57. Access to counsel during investigations would have helped her to present and articulate her role in *Blessed Seasons* better. What is important is that she admitted her involvement with *Blessed Seasons* to investigators. For an Organization such as the United Nations which champions human rights, the interrogation of a staff member suspected of wrong doing by investigators ought to comply with recognised human rights standards and best practices. That the UNDP Investigation Guidelines at the time did not provide for these cannot discharge that obligation.

58. The Tribunal finds that the investigators had an obligation, in accordance with the universal principles of natural justice, to inform the Applicant of her right to the assistance of Counsel during investigations.

Proportionality of disciplinary sanctions and equality of treatment of all UN staff members.

59. In *Sanwidi* UNDT/2010/036, this Tribunal held that:

Equality of treatment in the workplace is a core principle recognized and promoted by the United Nations. Simply presented, the principle of equality requires that those in like cases should be treated alike.

60. There was evidence before the Tribunal that the Respondent had investigated a highly placed international UNDP staff member who was found to have collected financial benefits from her home Government in the form of rents and relocation allowances for work which she was doing for the United Nations. She also continued to be enrolled in the Netherlands national pension scheme. This was in spite of her having received the applicable UN Staff Regulations and Rules relating to her appointment. Although it was found that she collected double allowances from her Government and the Organization, no disciplinary action was taken against her and instead, in a letter to the Government of the Netherlands, the UNDP Administration stated that the

implicated staff member had “unknowingly breached the Staff Regulations in good faith and without mal-intent”.

61. In *Doleh* 2010-UNAT-025 and *Sanwidi* 2010-UNAT-084, the UN Appeals Tribunal held that the doctrine of proportionality can be relied upon to reduce a summary dismissal to a written censure. In the latter case, UNAT held that some of the factors that should be considered in determining the proportionality of the sanction include; the seniority of the staff member and the type of position occupied by the said staff member such as a procurement related position.

62. The Secretary-General’s Report to the General Assembly on “Practice of the Secretary-General in disciplinary matters and possible criminal behaviour”, A/66/135 for the period 1 July 2010 to 30 June 2011, at paragraphs 62-64 reports actions taken against staff members who were found to have engaged in outside activities:

62. A staff member worked as a consultant for a private company for three years while employed with the United Nations, without the authorization of the Secretary-General. *Disposition*: censure and a fine of one month’s net base salary. *Appeal*: none.

63. A staff member co-founded a company for the purpose of providing certain services for remuneration. *Disposition*: censure, loss of step in grade, and deferment for one year of eligibility for within-grade increment. *Appeal*: none.

64. A staff member engaged in private legal occupation, while employed by the Organization, without the approval of the Secretary-General. *Disposition*: censure and a loss of step in grade. *Appeal*: none.

63. UNDP’s equivalent Report titled “2011 UNDP Annual Report of the Administrator on Disciplinary Measures and Other Actions Taken in Response to Fraud, Corruption and Other Wrongdoing “ provides as follows:

Failure to cooperate with an investigation

15. By deliberately providing false statements to the OAI investigators, a senior staff member failed to fully cooperate with an official investigation. Sanction: *Written Censure*.

16. By refusing to attend a fact-finding interview, a senior staff member failed to cooperate with an official investigation. Sanction: *Demotion with deferral for one year of eligibility for consideration for promotion*.

Unauthorized Outside Activities

23. A senior staff member was found to have engaged in short-term, paid outside employment without approval from the Organization while being on Special

(Signed)

Judge Nkemdilim Izuako

Dated this 9th day of August 2012

Entered in the Register on this 9th day of August 2012

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi