



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/013

Judgment No.: UNDT/2011/061

Date: 31 March 2011

Original: English

**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Santiago Villalpando

YISMA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
Brian Gorlick, OSLA

**Counsel for Respondent:**  
Thomas Elftmann, UNDP

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

## **Introduction**

1. On 11 February 2011 the Applicant, a staff member of the Multi-Donor Trust Fund Office (“MDTF Office”) of the United Nations Development Programme (“UNDP”), filed an application contesting the imposition of the disciplinary measure of separation from service with notice and termination indemnity. The Applicant was notified of the imposed disciplinary measure on 5 December 2010.

2. The contested decision was based on the findings of an investigation conducted during December 2009 and January 2010 by the Office of Audit and Investigations (“OAI”) of UNDP, which established, *inter alia*, that the Applicant had submitted falsified information to the New York City Housing Development Corporation (“HDC”). The Applicant seeks rescission of the contested decision and reinstatement to her original post with full restoration of her employment benefits.

## **Procedural matters**

3. On 11 February 2011 the Applicant filed a separate motion requesting that the matter be heard on an expedited basis and seeking confidentiality. In response to the Tribunal’s Order No. 43 (NY/2011), the Respondent filed a submission on 18 February 2011, consenting to an expedited hearing but objecting to the request for confidentiality.

4. On 22 February 2011 the Applicant filed and served an application for temporary relief pending the Tribunal’s final judgment in her case. The relief requested was either a suspension of action of the administrative decision to separate the Applicant or, alternatively, payment of salary entitlements pending a final decision by the Tribunal. The Respondent filed a reply to this application on 25 February 2011.

5. On 1 March 2011, following a hearing on the application for temporary relief, the Tribunal issued Order No. 63 (NY/2011), rejecting the Applicant's motion for confidentiality, as well as Order No. 64 (NY/2011), denying the Applicant's application for temporary relief.

6. Both parties were eager to have this matter determined as soon as possible, and, in light of the already voluminous amount of work created by the various submissions in this case, the Tribunal considered it necessary for a fair and expeditious disposal of the case, as well as in the interests of judicial economy, to deal with the matter promptly. By Order No. 65 (NY/2011), the Tribunal therefore granted the Applicant's request for an expedited consideration of the matter on an exceptional basis, directing the Respondent to file and serve the reply to the application by 4 March 2011.

7. The facts in this case are not in dispute. The only legal issue being whether the imposed disciplinary measure was proportionate to the admitted misconduct, the Tribunal directed that any requests for a hearing in relation to the substantive application be filed on or before 7 March 2011. Having received no such requests by the specified deadline, and both parties having addressed the Tribunal at length on the substantive issues at the hearing for temporary relief, the Tribunal proceeded to consider the matter on the papers.

## **Facts**

8. The Applicant joined the Organisation in 1981 and thereafter served as an Administrative Assistant, Procurement Assistant, and Operations Assistant with various United Nations entities and in various locations for twenty years. She left the Organisation in July 2001 and worked in the private sector as a real estate agent, in New York City, until November 2007.

9. From 26 November 2007 to 30 June 2008 the Applicant was engaged with UNDP under a Special Service Agreement as an Administrative Assistant with the

MDTF Office. The MDTF Office acts as the focal point and administrator of donor funds intended for multi-agency operations in which UNDP is appointed as the administrative agent. The donors include Member States, non-governmental agencies and private individuals. From the MDTF Office's website, its mission statement is: "To provide transparent and accountable fund management services to the United Nations system to enhance its coherence, effectiveness and efficiency". Whilst the MDTF has its own management board, the personnel are UN staff members subject to the Staff Regulations and Rules.

10. On 1 July 2008 the Applicant's contractual status with the MDTF changed to that of an Administrative Associate on a fixed-term contract at the G-6 level, step 6. Her contract was set to expire on 1 July 2011. On 1 November 2009 the Applicant and one of her relatives ("Relative No. 1") submitted a rental application form to the HDC for a two-bedroom apartment located in a new housing complex in New York City, with a rent of USD2,187 per month. This housing complex is financed by the HDC, a public benefit corporation and a corporate governmental agency of the State of New York. The HDC provides financing for affordable housing reserved for people with low to middle-income earnings. The mission of the HDC is identified on its website as follows: "[T]o increase the supply of [m]ulti-family housing, stimulate economic growth, and revitalize neighborhoods by financing the creation and preservation of affordable housing for low, moderate and middle income New Yorkers". Apartments financed by the HDC are rented out at below-market rates because of the low-cost mortgages provided to developers. To be eligible for an HDC-financed apartment, the Applicant and her Relative No. 1 were required to show a combined income not exceeding USD134,400.

11. On 9 December 2009, after detecting irregularities in the Applicant's rental application form, the HDC contacted the Office of Human Resources, Bureau of Management, UNDP. On 10 December 2009 the Office of Human Resources referred the matter to the OAI for investigation. The OAI issued its investigation report in January 2010, finding that the Applicant had (i) misrepresented her annual salary and

working hours in the HDC application form, and (ii) forged a letter purportedly written by the Personal Assistant to the Chief and Director, Executive Office, UNDP, in order to qualify for a subsidised apartment to which she was otherwise not entitled.

12. More specifically, the investigation established that the rental application form submitted and signed by the Applicant stated, under a section entitled “HDC Tenant Income and Family Size Certification Form”, that the Applicant’s annual salary was USD65,510.97 and her Relative No. 1’s annual salary was USD65,109.99. Their combined annual income was declared as USD130,620.96, qualifying them to rent the apartment as it was below the limit of USD134,400. The OAI established that the Applicant knowingly included false information in her rental application form as her actual annual salary at the time was USD71,426 and that of her Relative No. 1 was USD64,528. The investigation further established that, on the rental application form, the Applicant had listed the fax number of the MDTF Office, where she worked, as the purported fax number for the Office of Human Resources.

13. In addition, on 30 November 2009 the Applicant also submitted to the HDC a letter containing details of her annual income and working hours, purportedly written and signed by the Personal Assistant to the Chief and Director, Executive Office, UNDP. The investigation determined that this letter was, in fact, written and signed by the Applicant, and not the Personal Assistant. The letter contained false information and misrepresented the Applicant’s working hours and annual salary.

14. The investigation did not find that the Applicant was aided in her actions by either of her relatives or the Personal Assistant, and no adverse findings or criticism was made with respect to the Applicant’s real estate agent.

15. The Applicant withdrew her rental application form on 14 December 2009, three days after being notified of the commencement of the OAI investigation on 11 December 2009. She was interviewed by the OAI on 29 December 2009.

16. By letter dated 2 March 2010, the Legal Support Office, Bureau of Management, UNDP, transmitted to the Applicant a copy of the OAI investigation report and supporting material for her comments. The Applicant provided her comments on 16 March 2010.

17. By letter dated 26 May 2010 the Applicant was charged with misconduct. The Applicant, at the time already represented by the Office of Staff Legal Assistance (“OSLA”), replied to the charges on 28 June 2010, taking “full responsibility for [her] grievous mistake” and requesting UNDP to take into account a number of mitigating circumstances. Her letter stated, *inter alia* (emphasis in original):

2. [The Applicant] concedes to her culpability in the charges brought against her. She admits her mistake of (i) submitting a 1040 Form and rental application to HDC that misrepresented the amount of her annual income and earning; and (ii) writing a letter purporting to be an official UNDP document that misrepresented her working hours and annual salary and forging the signature of [the Personal Assistant] on that letter.

3. [The Applicant] takes full responsibility for the grievous mistake that she made and is aware of the magnitude of her mistake. She takes full responsibility for her actions and has felt nothing but regret and remorse for her poor judgment. ...

...

**Mitigating Factors:**

11. While a serious infraction[, the Applicant’s] mistake was her first infraction in nearly 30 years of unblemished service to the Organization. [The Applicant] is a hard worker and has been dedicated to the Organization since she began her work here.

12. This incident has not affected [the Applicant’s] job. It is evident from her most recent [electronic performance appraisal system] evaluation that [the Applicant] has been successful or exceeded expectation in all her tasks.

13. [The Applicant’s] mistake was not made out of greed, but rather out of desperation to be able to afford housing near [Relative No. 2] who has a [medical condition], and for whom [the Applicant] is the primary care taker.

14. [The Applicant] is currently, and has been for some time, in a financial crisis due to the medical expenses that [Relative No. 2] incurs. She has been paying [Relative No. 2's] bills since 2007 and was forced to withdraw her pension fund and sell her apartment in order to cover these expenses. Her bank account currently has [USD]2,400, which is the extent of her entire personal savings at this point in time.

15. [The Applicant] currently resides with her [Relative No. 1] ... in a small one bedroom rental apartment. It is very inconvenient for two adults to live in such close proximity to each other. [The Applicant] was trying to make their lives more bearable by moving into a two-bedroom apartment as opposed to the one-bedroom they currently live in.

16. Furthermore, if [the Applicant] were to lose her job with the Organization at this point, her life would be in complete disarray. It is unclear whether she would be able to stay in this country or would be forced to move back to her home country ... . Her prospects of a new job in the United States would be severely undercut by the negative stigma of being dismissed from the United Nations. If [the Applicant] is forced to leave, the effects on herself and her family would be devastating.

17. Although this does not exonerate her actions, [the Applicant] withdrew her application for HDC housing and never received any benefit. Furthermore, neither HDC nor the United Nations has incurred any loss based on [the Applicant's] actions.

**Request for Disciplinary Measures:**

18. ... [The Applicant] respectfully urges the UNDP Administrator to consider the mitigating factors mentioned above in determining what disciplinary action to take.

19. Equality of treatment in the workplace is a core principal recognized and promoted by the United Nations. It is evident from recent [Dispute Tribunal's] decisions and numerous UN Administrative Tribunal cases that similar conduct has not resulted in the disciplinary sanction of dismissal. Those cases that have resulted in dismissal had much more significant infractions and the employees were dismissed due to serious misconduct, not just misconduct. In light of the number of years of service and the level of misconduct committed, as well as the fact that this is [the Applicant's] first offence, that she admitted to her transgression and has given full cooperation with the investigation, it would be inappropriate to dismiss [her].

20. [The Applicant] sincerely urges the UNDP Administrator to consider that for her to lose her position with the Organization would be a disaster[,] both professionally and personally, from which it is unlikely she will be able to recover.

21. Therefore, [the Applicant] respectfully requests that she be subject to the following disciplinary measures pursuant to Staff Rule 10.2(a): (i) written censure and/or (ii) loss of one or more steps in grade.

...

18. By letter dated 1 December 2010 the Associate Administrator of UNDP imposed on the Applicant the disciplinary measure of separation from service with three months' notice and two weeks' termination indemnity, pursuant to Staff Rule 10.2(a)(viii). In this letter, the Associate Administrator referred to, *inter alia*, the mitigating factors offered by the Applicant, but found that the Applicant's misconduct warranted the disciplinary measure of separation from service. The Associate Administrator's letter stated, *inter alia*:

I [the Associate Administrator of UNDP] refer to the letter dated 2 May 2010, addressed to you by ... [the] Assistant Administrator and Director, Bureau of Management, charging you with misconduct ("the charge letter"). On 28 June 2010, the UN Office of Staff Legal Assistance (OSLA) submitted a written response to the charge letter ("the response") on your behalf.

Following a thorough review of all the evidence on record and having considered the matter carefully, I have come to the conclusion that your actions warrant the imposition of a disciplinary measure of separation from service with notice and termination indemnity.

My decision is based on evidence that you (i) misrepresented your annual salary and working hours in a rental application form ("the rental application form") for a two-bedroom apartment located in a newly constructed housing complex in New York City, which is financed by the New York City Housing Development Corporation (HDC) and (ii) forged a letter purportedly written by one of your colleagues in order to qualify to rent a HDC-subsidized apartment to which you were otherwise not entitled.

...

Given the gravity of your misconduct, I [the Associate Administrator of UNDP] have no alternative but to impose the



measure of separation from service with notice and termination indemnity, pursuant to Staff Rule 10.2[a](viii). Please note that the notice period is three months and that two weeks' termination indemnity will be granted to you, pursuant to Annex III of the Staff Regulations for cases involving misconduct.

In your response, you claimed mitigating circumstances in an effort to reduce the seriousness of the anticipated disciplinary measure. We thoroughly reviewed all of your statements in this respect. In summary, whilst we acknowledge that your otherwise long record of unblemished service with the United Nations constitutes a mitigating circumstance, the way your actions were planned as well as the fact that you implicated an innocent colleague in your scheme constitute aggravating factors in this case.

We have also considered the case law that you indicated and note that the cases cited are not comparable factually or, where exceptionally lenient disciplinary measures were imposed, they were inconsistent with the overwhelming tribunal jurisprudence. Our analysis of relevant precedents and cases of the Administrative Tribunals (i.e. the former UN Administrative Tribunal, as well as the current UN Dispute Tribunal and UN Appeals Tribunal), show that misrepresentation and/or forgery with a fraudulent intent committed by a staff member in connection with his or her status as an international civil servant to the detriment of a third party, go to the UN core values of integrity and represent acts of dishonesty that call for separation from service or dismissal. In this connection, it is important to note that you did not only misrepresent information related to your UNDP employment, but also forged a letter that was purportedly written by a UNDP staff member in her official capacity in order to deceive the HDC. Your actions, thus, reveal a serious breach of the highest standards of integrity that is incompatible with continued employment with the Organization.

...

### **Applicant's submissions**

19. The Applicant's principal contentions may be summarised as follows:
  - a. The disciplinary measure was irregular and defective because not all essential facts, including mitigating factors, were fully and fairly considered by the Administration. The exercise of the Secretary-General's discretionary power to determine the appropriate sanction is subject to the overriding

requirement to do justice. The principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result (*Sanwidi* 2010-UNAT-084). Although reference is made to the mitigating circumstances in the letter from the UNDP Associate Administrator dated 1 December 2010, there is no indication or evidence that UNDP made any efforts to contact the Applicant's current supervisor or other colleagues or sought other information which would form the basis for the decision to separate the Applicant from service in the particular circumstances.

b. The following mitigating factors, when taken into account, warrant a lesser punishment: (i) the Applicant has been an excellent employee for approximately 30 years, often working in difficult and dangerous duty stations, thus exhibiting loyalty and professionalism; (ii) she acknowledged her improper conduct, accepted responsibility for it, withdrew her rental application form, and fully cooperated with the investigation; (iii) the act occurred only as a result of her extreme desperation to find affordable housing near her Relative No. 2, who suffers from a medical condition and to whom she provides support; (iv) the Organisation did not suffer any financial loss or harm to its reputation; (v) the Applicant did not retain any benefit from her improper conduct and "the evidence does not demonstrate that she acted in a strategic, intentional and calculated manner".

c. Further, the Applicant's poor decision was hastily made on account of the extreme pressure put on her by the Applicant's real estate agent who was advising her in applying for an apartment. Moreover, had the Applicant received adequate information and been properly advised about the application process, she would have understood that her real net income did in fact qualify her for renting the apartment she was applying for under this subsidised housing scheme.

d. The United Nations recognises equality of treatment in the workplace as a core principle that must be promoted. It is evident from the decisions of the Dispute Tribunal (see, e.g., *Applicant* UNDT/2010/171), the Appeals Tribunal (see, e.g., *Doleh* 2010-UNAT-025), the former UN Administrative Tribunal, and the World Bank Administrative Tribunal that similar conduct has resulted in less severe disciplinary measures.

### **Respondent's submissions**

20. The Respondent's principal contentions may be summarised as follows:

a. The disciplinary measure imposed was proportionate to the misconduct. The Respondent was cognisant of all mitigating circumstances and facts referred to in the Applicant's response to the charge letter and her application, and took them into account before taking the contested decision. Even conceding the Applicant's successful performance and long service, her actions constituted serious misconduct resulting in a serious breach of integrity and a breach of trust.

b. Misrepresentation or forgery with a fraudulent intent, committed by a staff member in connection with her or his status as an international civil servant, go to the core values of integrity and represent acts of dishonesty that call for separation from service or dismissal. The Applicant's misconduct affected the reputation and image of the United Nations.

c. The Applicant's cooperation with the investigation is not a mitigating circumstance as she was required to cooperate with the investigators. The Applicant's admission of "her mistake" and withdrawal of her HDC application cannot be considered mitigating circumstances. Further, as a former real estate agent in New York, the Applicant was supposed to be familiar with the ways of the trade and be in a position to resist "extreme

pressure” from a local real estate agent. There is, therefore, no mitigating factor in this respect.

d. Taking into account the Applicant’s long unblemished service with the United Nations, the Administration had determined that the disciplinary sanction of summary dismissal from service would have been too harsh in the present case, whilst a sanction of demotion would have been too lenient in view of the wilful misrepresentation and forgery. In light of the wide discretion afforded to the Organisation, the Administration considered the sanction of separation from service with three months’ notice and two weeks’ termination indemnity to be proportionate to the gravity of the Applicant’s misconduct.

e. The Respondent was not required to contact and consult the Applicant’s supervisors when making the decision concerning the appropriate disciplinary measure in her case.

### **Consideration**

21. It is common cause that the Applicant committed misconduct as a result of which she was separated from service on three months’ notice and with two weeks’ termination indemnity. Both parties accept that the Applicant knowingly and wilfully misrepresented her and her Relative No. 1’s annual salary and working hours in the rental application form submitted to the HDC, supplementing it later with a fictitious letter on a United Nations letterhead, with the forged signature of another United Nations staff member. These acts were in breach of the Applicant’s obligations under staff regulation 1.2(b), which requires staff members to uphold the highest standards of integrity, including probity, honesty, and truthfulness in all matters affecting their work and status.

22. The Applicant’s case is that there is no evidence that UNDP took into account all the mitigating circumstances present in this case and, further, that it failed to

afford them due weight. The Applicant requests the Tribunal to find that a reasonable decision-maker, having taken into account all the mitigating factors, would have chosen a less severe disciplinary measure. The Respondent on the other hand contends that all mitigating and aggravating facts and circumstances were taken into account and given due weight, and that the disciplinary measure was proportionate to the offence committed.

*Role of the Tribunal in reviewing the proportionality of a disciplinary measure*

23. Disciplinary matters are within the discretionary authority of the Secretary-General. However, it is a general principle of administrative justice that administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law (*Abu Hamda* 2010-UNAT-022).

24. As the Appeals Tribunal has stated in a number of cases, when reviewing a disciplinary sanction imposed by the Administration, the role of the Tribunal is limited to examining: (i) whether the facts on which the disciplinary measure is based have been established; (ii) whether the established facts legally amount to misconduct under the Staff Regulations and Rules; and (iii) whether the disciplinary measure applied is proportionate to the offence (*Mahdi* 2010-UNAT-018, *Abu Hamda* 2010-UNAT-022, *Haniya* 2010-UNAT-024, *Maslamani* 2010-UNAT-028, *Masri* 2010-UNAT-098).

25. Since the Applicant has conceded culpability, the present case is about one legal issue only—whether the disciplinary measure imposed on the Applicant is proportionate to the established misconduct. There are no questions with respect to the propriety of the investigation and no dispute as to any pertinent facts.

26. In *Sanwidi* 2010-UNAT-084, the Appeals Tribunal elaborated on the role of the Dispute and Appeals Tribunals when reviewing the proportionality of disciplinary measures. The Appeals Tribunal stated:

**Principle of proportionality**

39. ... 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. This entails examining the balance struck by the decision-maker between competing considerations and priorities in deciding what action to take. However, courts also recognize that decision-makers have some latitude or margin of discretion to make legitimate choices between competing considerations and priorities in exercising their judgment about what action to take.

40. 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. But 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. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

...

42. In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. 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. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision.

This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

...

47. Keeping in mind the matters outlined above, we hold that the UNDT, in exercising judicial review, may interfere with the exercise of the Secretary-General's discretion in disciplinary proceedings against a staff member on the ground that the disciplinary measure is not proportionate to the misconduct. The UNDT is not bound by the jurisprudence of the former Administrative Tribunal, although in appropriate cases its judgments concerning disciplinary proceedings may have non-binding persuasive value. However, while exercising judicial review, due deference must be shown to the Secretary-General's administrative decisions because Article 101(3) of the Charter requires the Secretary-General to hold staff members to the highest standards of integrity and he is accountable to the Member States of the United Nations in this regard.

27. As stated in *Sanwidi*, in disciplinary matters due deference must be given to the decision-maker, and the Tribunal has limited powers with respect to its review of the severity of an imposed sanction (see also *Zoughy* UNDT/2010/204). However, whilst the determination of the appropriate sanction is largely within the discretion of the decision-maker, such discretion must be exercised fairly, properly and proportionately. When considering applications challenging the proportionality of the disciplinary measure imposed, the Tribunal will give due deference to the Secretary-General unless the decision is manifestly unreasonable, unnecessarily harsh, obviously absurd or flagrantly arbitrary (see *Sanwidi* and *Aqel* 2010-UNAT-040). Should the Dispute Tribunal establish that the disciplinary measure was disproportionate, it may order imposition of a lesser measure (*Abu Hamda* 2010-UNAT-022, *Doleh* 2010-UNAT-025, *Zerezghi* UNDT/2010/122).

28. As there is no dispute as to the facts in this case and that as the Applicant admitted that her actions constituted misconduct, the Tribunal will proceed to considering whether, in the circumstances and considering all relevant factors, the imposed disciplinary measure was proportionate to the established misconduct.

*General observations regarding mitigating and aggravating factors*

29. Both aggravating and mitigating circumstances factors are looked at in assessing the appropriateness of a sanction. Mitigating circumstances may include long and satisfactory service with the Organisation; an unblemished disciplinary record; an employee's personal circumstances; sincere remorse; restitution of losses; voluntary disclosure of the misconduct committed; whether the disciplinary infraction was occasioned by coercion, including on the part of fellow staff members, especially one's superiors; and cooperation with the investigation. Aggravating factors may include repetition of the acts of misconduct; intent to derive financial or other personal benefit; misusing the name and logo of the Organisation and any of its entities; and the degree of financial loss and harm to the reputation of the Organisation. This list of mitigating and aggravating circumstances is not exhaustive and these factors, as well as other considerations, may or may not apply depending on the particular circumstances of the case.

*Mitigating and aggravating factors in the Applicant's case*

30. As part of its consideration of the proportionality of the contested disciplinary measures, the Tribunal will discuss the various mitigating and aggravating factors present in the Applicant's case.

31. In her submission, the Applicant stated that her "poor decision was hastily made on account of the extreme pressure put on her by the real estate agent who was advising her in applying for an apartment" although the nature of this alleged "extreme pressure" remains unclear. The Applicant worked as an estate agent in New York for some six years, and no doubt was well aware of the consequences of making false representations with a view to securing a tenancy. The Tribunal is not persuaded that the Applicant was a victim of some improper pressure. The Applicant's actions were clearly of her own choosing, as she acknowledges throughout her application,



and it is unacceptable to suggest that she was under some form of duress from the estate agent in the legal sense, in the absence of any evidence suggesting so.

32. The Applicant says her actions were not premeditated. The facts are that the Applicant completed an application form for a subsidised apartment with a false declaration of her and her Relative No. 1's joint income. She listed the fax number of the MDTF Office as the purported fax number of the Office of Human Resources. The Applicant submitted this form to the HDC on 1 November 2009. She subsequently contrived a letter, purportedly from UNDP, misrepresenting her annual salary for 2009 by falsely indicating she would be taking special leave without pay for the month of December 2009, and further misrepresenting her annual salary for 2010 by falsely indicating that her working hours were reduced to three days a week due to a fictitious "multi-departmental restructuring and streamlining of duties". She then signed this letter, forging a colleague's signature, purportedly in her official capacity. The Applicant submitted this fictitious letter in support of her rental application form on 30 November 2009. The Applicant thus had had a whole month to consider the path she had chosen, yet continued to seek to derive personal benefit of a pecuniary nature through improper means, withdrawing the housing application only on 14 December 2009 after she was informed that the matter was under investigation by UNDP. These are acts of gross dishonesty constituting serious misconduct, and they are inconsistent with the Applicant's submission that her actions were not premeditated.

33. It is also an aggravating factor that the Applicant's actions implicated an innocent co-worker in her official capacity (the purported author of the letter dated 30 November 2009), and that the misconduct was committed not only within but also outside the workplace, putting the reputation of the Organisation at greater risk.

34. At the hearing of the application for temporary relief, the Applicant's Counsel maintained that the offence was *de minimis* and would probably not be prosecuted by authorities external to the United Nations; the Respondent's Counsel disagreed,

stating that the matter was still under consideration by the national authorities. Whilst the Staff Rules provide that one of the basic obligations of all staff members is that they must comply with local laws and honour their private legal obligations (staff rule 1.2(b)), potential criminal charges are not a precondition to a disciplinary measure. In particular, it would be absurd to argue that certain disciplinary measures, including separation from service and dismissal, may be imposed only in cases where there is an active ongoing criminal investigation or prosecution.

35. The Applicant also contended that her long service and hitherto unblemished record were strong mitigating factors. Depending on the circumstances, long service may be a weighty consideration, but there are also limits to the extent to which an employee can rely on a clean disciplinary record and length of service as mitigating factors. Although a long period of service will usually be a mitigating factor, there are certain acts of misconduct which are of such a serious nature that no length of service can rescue an employee who is guilty of them from the harshest of disciplinary measures (see, e.g., UN Administrative Tribunal Judgment No. 850, *Patel* (1997)). One such clear act of misconduct is gross dishonesty. Long service does not lessen the gravity of such misconduct.

36. The impact of the misconduct on the employer's business is also an important consideration. The MDTF is entrusted with donor funds, including from Member States, "to provide transparent and accountable fund management services to the United Nations system" and, as the United Nations Appeals Tribunal stated in *Sanwidi*, "the Charter requires the Secretary-General to hold staff members to the highest standards of integrity and he is accountable to the Member States of the United Nations in this regard". The reputation of the MDTF was put at risk and the Tribunal is satisfied that, although no financial loss was suffered by the Organisation, the Applicant's misconduct caused harm to its reputation.

37. It is a mitigating factor that the Applicant has shown contrition and remorse and cooperated with the investigation, although the Tribunal is surprised that the Applicant is requesting a clean slate by her plea for reinstatement with full benefits.

*Was the decision proportionate?*

38. Staff rule 10.2 lists the types of disciplinary measures available to the Respondent when dealing with cases of misconduct. It states:

**Disciplinary measures**

(a) Disciplinary measures may take one or more of the following forms only:

(i) Written censure;

(ii) Loss of one or more steps in grade;

(iii) Deferment, for a specified period, of eligibility for salary increment;

(iv) Suspension without pay for a specified period;

(v) Fine;

(vi) Deferment, for a specified period, of eligibility for consideration for promotion;

(vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;

(viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;

(ix) Dismissal.

Among these sanctions, only the last two contemplate the cessation of employment.

39. The mitigating factors listed by the Applicant in the present application were previously raised by her in response to the charges of misconduct. From the letter of the Associate Administrator of UNDP, dated 1 December 2010, by which the contested disciplinary measure was imposed, it is clear that the Respondent was aware of the mitigating factors put forward by the Applicant in her response to the

charges of misconduct and took the relevant facts and factors into account. In the present case, the Respondent submitted that the Administration, in light of the mitigating factors present in this case, had purposefully chosen the lesser measure of separation from service with notice and termination indemnity, and not dismissal, which was the harshest measure available. According to the Respondent, the nature of the Applicant's misconduct made it no longer possible for the employment relationship to continue.

40. A disciplinary measure should not be a knee-jerk reaction and there is much to be said for the corrective nature of progressive discipline. Therefore, ordinarily, separation from service or dismissal is not an appropriate sanction for a first offence. However, the gravity of the misconduct is an important factor in determining the appropriateness of separation or dismissal as a sanction. Each case must, of course, be decided on its own merits since there is no fixed rule regarding the degree of misconduct for any particular offence which will justify dismissal. In assessing the gravity of the offence, regard may be had to the employee's circumstances, the nature of the job, the circumstances of the infringement, consistency in taking disciplinary action and so on. Separation from service or dismissal is often justified in the case of serious or gross misconduct of such gravity that it makes the continued employment relationship intolerable, especially where the relationship of trust has been breached.

41. What is required is a conspectus of all the circumstances. This does not mean that there can be no sufficient mitigating factors in cases of dishonesty. However, if dishonesty is of such a degree as to be considered serious or gross and such that it renders a continued relationship impossible, the cessation of the employment relationship becomes an appropriate and fair sanction. Based on the facts before the Tribunal, the Applicant's misconduct can be characterised as serious. Her conduct did not result from a momentary lapse of judgment and, indeed, involved elements incompatible with her status as an international civil servant. The Tribunal is mindful of the fact that the Applicant was employed by the MDTF Office, which manages funds on behalf of the international community and which identifies its mission

statement as “provid[ing] transparent and accountable fund management services to the United Nations system”. The Applicant betrayed the high degree of trust reposed in her, and the Respondent’s expectations from a long serving loyal staff member were misplaced. Such a fundamental breach, coupled with the involvement of an innocent colleague, led to the irretrievable breakdown of the employment relationship. The Tribunal finds that the Applicant’s actions amounted to serious misconduct and it was reasonable for the Respondent to conclude that the relationship of trust and confidence between the parties was no longer present. The Tribunal finds that UNDP’s approach, in the light of all the circumstances with respect to the Applicant’s case, was measured and reasonable and, even with all the mitigating factors present in this case, the contested decision was within the reasonable range of options available to the decision-maker.

42. The parity principle requires equality and consistency in the treatment of employees. It would be unfair to dismiss a staff member for an infraction which has habitually or frequently been condoned in the past, or for which other staff members have received a lesser sanction. The Applicant referred the Tribunal to several cases—including, *inter alia*, *Doleh* 2010-UNAT-025, *Applicant* UNDT/2010/171, and the World Bank Administrative Tribunal Decision No. 158, *Smith* (1997)—stating that other international civil servants have been treated differently in circumstances similar to hers. Disciplinary cases tend to be very fact-specific and the parties, as well as the Tribunal, the parity principle notwithstanding, must exercise caution in extracting general principles concerning proportionality of disciplinary measures from the types of measures imposed in other cases, as each case has its own unique facts and features. The Tribunal finds that there is a clear distinction between the facts in the instant case and in the authorities the Applicant cites in support of her claims. For instance, in *Applicant* UNDT/2010/171 the Dispute Tribunal found that the staff member concerned acted on her supervisor’s instructions when altering a refugee registration form. In the present case, no duress by a supervisor was present. Further, in the present case, unlike in *Applicant* UNDT/2010/171, the Applicant did

not disclose her misconduct voluntarily and her actions were of a significantly graver nature and were aimed at obtaining a personal pecuniary benefit. The facts in *Doleh* are also distinguishable from the facts in the present case, as, *inter alia*, the actions of the staff member in *Doleh* were not aimed at deriving a personal pecuniary benefit while misusing the official United Nations logo and did not cause any harm to the reputation of the Organisation. In *Smith*, the World Bank Administrative Tribunal found that the World Bank had failed to give sufficient weight to several significant mitigating factors, which is not the case in the present matter.

43. There is one other consideration in regards to the parity principle. In the imposition of a sanction, an employer may be justified in differentiating between employees guilty of the same offence, on the basis of differences in their personal circumstances or the merits of the case. However, in dealing with acts of gross dishonesty by staff, the Organisation must be conscious of the consequences of the particular infraction for the future good of the Organisation and the workplace example that is set. Even taking into account the Applicant's personal circumstances, it would not set a good workplace example if the Respondent were to condone the serious infractions committed by the Applicant.

44. It is unfortunate that the Applicant's previously unblemished career with the Organisation came to such regretful conclusion. The Tribunal is also sympathetic to her personal situation. However, in all the circumstances of this case, it cannot be said that the sanction of separation with notice and termination indemnity was disproportionate to the seriousness of the offence in this case.

45. The Tribunal notes the diligent efforts of both Counsel in the expedited disposal of this matter. As recalled above at para. 6, the Tribunal granted the Applicant's request for an expedited consideration of the matter on an exceptional basis. However, expedited consideration of cases disrupts the ordinary course of business of an extremely busy Tribunal and such applications must be discouraged.

Counsel should take a very considered and firm decision before moving applications of this nature.

**Conclusion**

46. In all the aforesaid circumstances, the Tribunal finds that the Respondent's discretion in imposing the contested disciplinary measure of separation from service with notice and termination indemnity was properly exercised and that the imposed disciplinary measure was not disproportionate.

47. The application is dismissed.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 31<sup>st</sup> day of March 2011

Entered in the Register on this 31<sup>st</sup> day of March 2011

*(Signed)*

Santiago Villalpando, Registrar, New York