



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/022

Judgment No.: UNDT/2022/035

Date: 6 April 2022

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MANCINELLI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Julia Kyung Min Lee, OSLA
Endah Ayuningsih Indini, OSLA

Counsel for the Respondent:

Yun Hwa Ko, UNFPA
André Luiz Pereira de Oliveira, UNFPA

Introduction

1. The Applicant is a former staff member of the United Nations Population Fund (“UNFPA”) based in Conakry, Guinea. She is contesting the imposition of a disciplinary measure of separation from service for misconduct with compensation in lieu of notice and without termination indemnity in accordance with staff regulation 10.1(a) and staff rules 10.1(a) and 10.2(a)(viii) (“the contested decision”).

2. The Respondent argues that the contested decision is lawful because the Organization determined and imposed the contested decision following a valid exercise of the Organization’s discretion and in line with all procedural requirements.

3. The Tribunal held virtual hearings of the case on its merits from 26 - 27 August 2021 and from 1 - 2 February 2022. Following the end of the oral hearing on 2 February 2022, the Tribunal ordered the parties to file closing submissions by 16 February 2022.

4. The Respondent and Applicant filed closing submissions on 16 and 17 February respectively. The Tribunal allowed the Applicant’s late filing of closing submissions vide Order No. 024(NBI/2022). For reasons given below, the application is allowed in part.

Facts and Procedure

5. The Applicant first joined UNFPA in April 2009 as a Programme Specialist. The Applicant then transferred to UN Women on 1 March 2012. On 1 November 2018, Applicant re-joined UNFPA to assume her appointment with UNFPA as the Deputy Representative, UNFPA Guinea Country Office (“CO”), at P-4 level, step 10.¹

¹ Reply, para. 1; the Applicant’s submissions pursuant to the Tribunal’s Order No. 13 (NBI/2021), para.7.

6. On 6 February 2018, the Investigations Division of the Office of Internal Oversight Services (“ID/OIOS”) received, via hotline, a report of possible misconduct, implicating UN Women’s personnel at the United Nations Headquarters in New York.²

7. It was specifically reported that the Applicant had utilized, without authorization, UN Women’s official United Parcel Service (“UPS”) account for personal purposes on at least two separate occasions in December 2017.³

8. OIOS opened an investigation and issued an Investigation Report on 6 November 2018. The Investigation Report concluded that the Applicant: a) used UN Women’s official UPS account to ship personal packages internationally to Italy and Austria by taking discontinued UPS shipping labels from a copy room; and b) expressly elected to bill the charges for those personal packages to UN Women’s corporate UPS account instead of paying directly by personal credit card at the time of shipment.⁴

9. On 13 December 2018, UNPFA’s Chief, Legal Unit (“LU”), received an email and referral from UN Women’s Chief, Legal, referring the Investigation Report from OIOS regarding the Applicant as subject of the investigation as Applicant had joined UNFPA on 1 November 2018.⁵

10. The LU forwarded the Investigation Report to UNFPA’s Office of Audit and Investigation Services (“OAIS”) for review and endorsement.⁶

11. On 16 August 2019, OAIS endorsed the OIOS Investigation Report and referred the matter to the LU and UNFPA’s Division for Human Resources

² Reply, para. 5.

³ Reply, para. 6.

⁴ Application, annex I.

⁵ Reply, para. 9.

⁶ Reply, para. 10.

(“DHR”).⁷

12. By a memorandum dated 5 September 2019, the Director, DHR transmitted the Investigation Report and all exhibits to the Applicant and her Counsel and provided her with an opportunity to submit comments on the factual findings.⁸

13. The Applicant submitted her comments on the Investigation Report on 24 October 2019.⁹

14. Based on the findings of the Investigation Report and the Applicant’s comments, the Director, DHR, issued a notification of charges dated 24 September 2019 notifying the Applicant that there was sufficient evidence to charge her with two counts of misconduct based on her unauthorized use of UN Women’s UPS account on two occasions¹⁰

15. The notification of charges letter informed the Applicant that she could respond to the charges and produce exculpatory evidence within 10 days of receiving the notification. The Applicant requested and received two extensions of time to reply. She provided her response to the charges on 24 October 2019.¹¹

16. On 13 December 2019, having considered the Investigation Report, the Applicant’s comments to the Investigation Report, the notification of charges and the Applicant’s response to the notification of charges, as well as mitigating and aggravating factors, UNFPA’s Executive Director imposed the contested decision.¹²

17. On 18 March 2020, the Applicant filed an application before the Dispute Tribunal challenging the contested decision.

18. The Respondent filed a reply on 20 May 2020 having been granted an

⁷ Application, annex E.

⁸ Application, annex F.

⁹ Paragraph 10 of the Applicant’s submissions pursuant to the Tribunal’s Order No. 13 (NBI/2021).

¹⁰ Application, annex N.

¹¹ Application, annex P.

¹² Application, annex Z.

extension of time to do so.¹³

19. The Applicant filed a rejoinder to the reply on 13 January 2021.

Parties' submissions

The Applicant

20. Only relevant parts of the Applicant's case are summarized in the following paragraphs.

21. The Applicant submits that she was truthful and honest in her actions and throughout the OIOS investigation. All evidence gathered by the OIOS clearly indicates that she never tried to deceive UN Women by using UPS labels and envelopes for personal use. On the contrary, the Applicant never displayed a lack of honesty and truthfulness in her actions. Her conduct towards the Administration was honest at all times and throughout the OIOS investigation. The Applicant's account of events has been consistent and corroborated by other evidence.

22. Ms. Witchy Domond's (Administrative Assistant) evidence corroborates the Applicant's – the exact amount due to Facilities and Administrative Services ("FAS") was unclear and confusing.

a. Ms. Domond explained to the OIOS investigators that she was seeking clarification from the FAS and from Ms. Marianna Belsky, Administrative and Facilities Specialist, in particular regarding the exact amount that the FAS was seeking from the Applicant for the reimbursement of her shipping. She expressed confusion in her understanding of the exact amount because Ms. Nyasia Sanchez, Distribution Unit Focal Point/Mailroom Supervisor, had sent two emails with different amounts.

¹³ Vide Order No. 065 (NBI/2020) issued on 7 April 2020.

b. Contrary to the Respondent's assertion, the exact amount of the shipping fees could not be clearly discerned in the 16-page invoices that the FAS sent to the Applicant. There are several amounts appearing on this 16-page document. The first invoice indicates USD173.66 as the amount to be paid by UN Women instead of USD224.58 that the FAS was claiming from the Applicant. There were deductions under "Adjustments & Other Charges" in the amount of USD50.92, which were not specifically explained. It was confusing to even Ms. Belsky, who initially told the OIOS that the Applicant owed USD173.66 for the first parcel instead of USD224.58.40.

c. Ms. Domond also confirmed that she had expected a response from Ms. Belsky with a clarification on the exact amount for reimbursement, but that Ms. Belsky had never replied confirming the amount until shortly before her interview with the OIOS. Her evidence is consistent with the evidence of Ms. Belsky, Ms. Sanchez and Ms. Bernice Henry, Administrative Assistant, who all informed the OIOS that they were specifically instructed not to contact the Applicant on this matter from the very same day on 30 January 2018.

d. The evidence of Ms. Belsky, Ms. Sanchez and Ms. Henry all corroborate Ms. Domond's and the Applicant's evidence that they were waiting to hear back from the FAS on the exact amount of the shipping costs but had not heard back from them until May 2018. Ms. Domond expressed her frustration from the lack of response from the FAS to the OIOS.

e. Unbeknownst to the Applicant, Ms. Belsky filed a complaint against her to the OIOS accusing her of fraudulently using UN Women's UPS account. During all this time, the Applicant was not aware that she was under investigation for misconduct. She was simply waiting to hear back from Ms. Belsky and FAS on the amount that she needed to pay for her parcels. The Applicant was also not aware that the entire FAS was asked to cease all communications with her. The Applicant was also preparing to go on

maternity leave as she was in her last term of her pregnancy.

f. On 25 May 2018, Ms. Belsky finally replied to the Applicant's request for the clarification on the amount of two UPS shipments and provided the breakdown for the very first time: USD75.48 to Austria and USD224.58 to Italy. The Applicant paid the total amount of USD300.07 immediately thereafter. This evidence refutes any finding that the Applicant only decided to pay the total shipping costs of USD300.07 after being informed that she was subject to OIOS investigation for the alleged misuse of UN Women's UPS account.

g. At all times material to this case, the Applicant was truthful and honest. She made a genuine assumption that she could use the UPS account for personal use, she was truthful to the FAS when inquired about her use of UN Women's UPS account and confirmed that she had used it to ship her Christmas gifts to her family and friend. She consistently told the truth to the OIOS throughout the investigation process. She immediately confirmed to Ms. Sanchez that the shipments were indeed sent by her for personal use when asked on 30 January 2018. She attempted to contact and physically went to see Ms. Belsky, who admitted having deliberately avoided her, to settle this matter. She asked Ms. Domond to follow up on with FAS on 30 January 2018, as soon as she was notified of the UPS charges, which amount required clarification. She immediately reimbursed the full amount of USD300.07 once she received confirmation and breakdown of the exact amount from Ms. Belsky, who only provided this breakdown on 25 May 2018.

23. The new evidence submitted by the Respondent during trial corroborates the Applicant's evidence.

a. During these proceedings, the Respondent introduced new evidence that had never been shown to the Applicant relating to a DHL shipment that the Applicant had used to send a personal item in 2016. This evidence

confirms that the Applicant had been truthful to the OIOS investigators - that she had previously used DHL to send a personal parcel.

b. Ms. Belsky testified that the person responsible for the DHL account was someone called Cecilia, who had worked at UN Women temporarily, but that she was no longer there. Cecilia was the one who was in charge of sending this DHL personal package. This evidence corroborates the Applicant's evidence that there was someone working on a temporary basis called Cecilia and that she had been the one who told her that personal items could be sent as long as staff members paid for them.

c. Since the DHL shipment of 2016 was never disclosed to the Applicant, who no longer has access to her UN Women email accounts, it is unreasonable to expect the Applicant to remember the details of this shipment in 2021/2022. The Respondent has not established that the Applicant did not pay for this shipment simply because her office was charged. The document shows that her office was aware that she had sent this parcel through DHL and may have decided to absorb the costs, as they could have done for phone bills as explained by Ms. Belsky in her testimony. The Applicant has no way of verifying whether she or her office paid for this cost because she no longer has access to UN Women.

d. In light of the above, the Applicant submits that the Administration failed to establish by clear and convincing evidence that she displayed any lack of honesty and truthfulness in her action

24. The Administration failed to prove by clear and convincing evidence that the Applicant failed to exercise reasonable care.

a. The Applicant has not denied using UPS labels that were available from her office floor to ship her personal packages. However, as explained in her response to the charge letter, there was no clear policy on the use of UN Women's account for the use of UPS. Ms. Belsky even admitted that the UN

Women's shipment methods could be used for personal use in certain cases. Ms. Domond, whose job was to coordinate payments for the use of UPS or DHL with the FAS, said that she was not aware of an actual policy on the use of UPS. Ms. Domond also told the OIOS that she had emailed Ms. Belsky on the existence of "an actual policy" on the use of UN Women's shipment for personal use, but Ms. Belsky never responded to her. Ms. Domond told the OIOS that if she did not know about the business norms with the use of UPS account, then there may be other staff members who would not know about this policy.

b. The Applicant genuinely believed that she could use it just like UN Women's business phone could be used to make personal calls, as long as she reimbursed for them. Ms. Belsky confirmed that such practice was indeed used for the use of telephone. Therefore, it was reasonable for the Applicant to assume that using the UN Women's UPS account to send her personal items would be similar to using her UN Women's official telephone to make personal calls.

c. The Applicant understood that she could use UN Women's account to send out personal parcels as long as she paid for them as told by one Cecilia from FAS. In fact, her understanding of the policy allowing personal use of the UN Women' corporate account is corroborated by FAS's own document, which showed that Ms. Sanchez, who was in charge of the UPS and DHL accounts in FAS, had used UN Women's UPS corporate account to send a personal package to an online clothing store called Fashion Nova in Vernon, California. This evidence contradicts Ms. Belsky's position that she had never seen anyone use UN Women's account to send personal items. Ms. Belsky's speculation that Ms. Sanchez could have sent this parcel for another staff member is contradicted by her own evidence on this alleged shipping policy. The only conclusion that can be drawn from this UPS invoice of August 2018 is that Ms. Sanchez used UN Women's UPS account to send her personal

parcel to Fashion Nova online clothing store. Therefore, if FAS's own employees, who are best positioned to know the policy of using UN Women's corporate accounts, were using the office account to send personal items, then the Administration cannot reasonably allege that the Applicant violated such policy for using the account to send her Christmas gifts and undertake to pay for them.

d. In using the UPS labels and envelopes that were readily available for staff member's use on her floor, the Applicant exercised reasonable care. As she was not responsible for sending mail out through the FAS, she could not have known that the UPS labels that were lying around on her floor were discontinued. The Applicant cannot be blamed for the FAS' negligence in discarding those "discontinued UPS labels." Moreover, she used her name on both parcels and clearly identified the content of the parcels, which casted no doubt that they were for personal use. The delay in the reimbursement was caused by the FAS's deliberate actions to avoid all contacts with the Applicant, who was genuinely waiting to hear back from the FAS. The moment the exact amount for reimbursement was confirmed by Ms. Belsky, the Applicant took immediate measures to pay it.

25. The sanction imposed was grossly disproportionate.

a. UNFPA management and the Division of Human Resources played an instrumental role in: 1) the decision to replace the Applicant during her certified sick leave; 2) the decision to place her on Administrative Leave With Pay ("ALWP") immediately after she was cleared to return to her post; and 3) the decision to separate the Applicant from service.

b. It is undisputed that the Applicant was cleared by the United Nations Medical Services Division as of 19 September 2019 to return to her own post. On 20 September 2019, the Applicant informed Human Resources ("HR") about her medical clearance. However, the Administration had replaced the

Applicant with another staff member as of 9 September 2019. On 23 September 2019, the Applicant received a letter dated 20 September 2019 from HR informing her of the decision to place her on ALWP pending investigation and the disciplinary process against her. However, the letter did not provide any specific reason or explanation for placing her on ALWP in violation of staff rule 14.2. Contrary to this letter on ALWP, Ms. Barbara Sow, Country Office Representative, testified that she was not consulted in placing the Applicant on ALWP.

c. On 11 December 2020, the Respondent argued before the Tribunal that the Applicant was not fit to return to work and questioned the validity of the findings of the United Nations Medical Services Division to clear her to return to work, in violation of the Appeals Tribunal's jurisprudence. The decision relating to the fitness of a staff member's return to work from sick leave should be solely based on the assessments or opinions of medical professionals and not those of any supervisor, managers, or even the Tribunal. Neither UNFPA management nor Ms. Sow had the authority to determine on the Applicant's fitness to return to her work. The Respondent confirmed that there was no post that the Applicant could return to at the time she was placed on ALWP. Disallowing the Applicant to return to her post following medical clearance is also in violation of the Appeals Tribunal's ruling in *Lauritzen*, 2013-UNAT-282 which affirmed that staff members have not only the duty but the right to work in the post for which they were hired.

d. Two days later, the Administration issued the Sanction Letter dated 13 December 2020 separating the Applicant from service. The Applicant submits that the Administration did everything it could to prevent her from returning to her duty station despite being cleared by the United Nations Medical Unit that she was fit to return to resume her post as Deputy Representative of UNFPA in Conakry.

26. The Applicant prays for the following reliefs:

a. Payment of the maximum compensation *in lieu* equivalent to two years' net base salary. But for her termination, the Applicant would have been renewed for two years as it had consistently been done and her post still exists today. The Applicant also tried to mitigate her loss but was unable to find any other employment. Her reputation was tarnished, she lost all her savings and had to resort to social services to support her two young children. She also became unable to afford medical treatments.

b. Moral damages. The Applicant asserts that the claim for moral damages is appropriate in her case even in the absence of additional medical documentation.

The Respondent

27. The Respondent's case is summarized below.

28. The Administration established the relevant facts with clear and convincing evidence.

a. On 20 December 2017, the Applicant sent Christmas gifts to her father in Italy and her friend in Austria using two UPS labels with UN Women's account information that she found on the UN Women Headquarters ("HQ") premises. The Applicant never informed anyone at UN Women that she was taking the UPS labels for personal purposes.

b. Such labels had been discontinued well before December 2017; the correct procedures to use UN Women's UPS account for official shipments were outlined on the UN Women FAS team's intranet page. Regardless, the Applicant took the labels and completed them with her name, the UN Women HQ address, and her official cell phone number. The labels provided an option to pay with her credit card. Still, the Applicant intentionally chose the option "Bill Shipper's Account Number."

c. At the hearing, the Applicant stated that she did not elect to pay with her credit card because she was trying not to “create confusion” given that she was using the official account. The Applicant then dropped off her packages with the labels at a UPS store near the UN Women HQ. She did not ask the UPS employees how much her shipments would cost.

d. The UN Women FAS team oversees sending and receiving official correspondence and manages UN Women’s UPS account. The FAS intranet webpage noted: “We do not ship personal shipments.” The Applicant conceded before the Tribunal that the message on the FAS intranet webpage was clear. The Applicant admitted that she was aware that FAS handled the shipments of official packages. Regardless, she did not ask FAS whether she could use UN Women’s UPS account to send personal packages or check the FAS intranet before she took the UPS labels. She did not tell anyone at UN Women after she used them. UPS charged UN Women USD224.58 and USD75.48, respectively, for the Applicant’s shipment to Italy and Austria.

e. On 30 January 2018 at 11:40 a.m., Ms. Sanchez, asked the Applicant to clarify her shipment to her father. Ms. Sanchez included a screenshot of the UPS invoice showing the Applicant’s package. At 11:42 a.m., the Applicant acknowledged that it was a personal shipment and that she would pay for it. At 12:07 p.m., Ms. Belsky requested the Applicant to provide “more detail.” At 12:27 p.m., the Applicant wrote to Ms. Belsky, “I came down but you are in a meeting.” The Applicant provided no other information regarding her unauthorized use of UN Women’s UPS account.

f. At 2.00 p.m., Ms. Sanchez asked the Applicant to add the shipment to Austria to her reimbursement and included a screenshot of the UPS invoice for that shipment. The Applicant did not respond and did not write any further messages to FAS. At 2:05 p.m., Ms. Domond sent Ms. Sanchez a copy of a chart of accounts (“COA”) of the Civil Society Section “for the difference.” To OIOS and before the Tribunal, Ms. Domond clarified she did so because

she had thought that a part of the shipments was official. Ms. Domond further stated that the Applicant never expressed any confusion about the amount she owed and never asked Ms. Domond to contact FAS to clarify the said amount. Ms. Domond noted that the two amounts were explicitly reflected in FAS's messages with invoices to the Applicant.

g. On 24 May 2018, the Applicant received a notice of investigation from OIOS. Only then, i.e., five months after sending the personal shipments, the Applicant asked Ms. Belsky for the first time to specify the total amount that the Applicant owed regarding both shipments. The Applicant reimbursed UN Women USD300.06 one day after. Before the Tribunal, the Applicant conceded that she reimbursed UN Women only after being made aware that she was the subject of an investigation. The Applicant never attempted to reimburse UN Women for her personal shipments before that. UN Women's account with UPS was suspended for non-payment due to the Applicant's inaction.

29. The Applicant's excuses are not supported by any evidence.

a. The Applicant's defence comprises entirely of attempts to blame everyone else but herself. The excuses that the Applicant provides for her misconduct are hardly exculpatory.

b. The Applicant contends that she "assumed" that she could use UN Women's UPS account for personal packages if she reimbursed UN Women afterwards. However, to OIOS and before the Tribunal, she could not articulate any coherent basis for her assumption and only provided contradictory statements. Initially, the Applicant said she "had seen it done before;" however, she later stated she "didn't know" when or where it happened. Then she remembered "conversations" from "previous year" with "someone who was acting temporarily." Next, she stated that it was "tacitly understood" that personal use of official assets was "kind of normal, fine."

However, she did not remember “people referring specifically” to this practice, only that “it was, like, kind of understood that it was okay to do it.”

c. The Applicant then contended that her belief stemmed from how UN Women managed official cell phones, i.e., staff members were to pay afterward for the personal portion of the bill. Nevertheless, the Applicant could not explain what made her think that the cell phone bill management would apply to UPS shipments, especially considering the explicit instruction in the FAS website that “we do not ship personal items.” Furthermore, the Applicant conceded that she never received the same kind of messages for UPS shipments that she received for her cell phone bills, alerting her of the amount of her personal portion.

d. The Respondent submits that the Applicant freely used the official UPS account for her personal shipments because she had done so before without consequence. Before the Tribunal, the Applicant confessed that she had sent a personal package to her mother in Italy using UN Women’s DHL account in 2016. The UN Women Civil Society Section’s COA was used to pay for it. The Applicant’s failure to pay for her shipment to her mother in 2016 renders incredulous her assertion that she thought she could use the official account for personal use if she paid for it. Furthermore, during the OIOS investigation, to the question whether she had mailed items to Rome previously, the Applicant had flatly lied that “this was the first time” and that “normally, [she didn’t] ship things.”

e. The Applicant contends that she did not pay for her shipments immediately following FAS’ alert in January 2018 because she was “confused” about the amount. However, the Applicant could not explain her confusion; she had received two emails from FAS, one for each shipment. The UPS invoice, which the Applicant received, clearly specified the two amounts.

f. The Applicant's assertion before the Tribunal that the invoices contained "all these numbers" or that "she was not conversant with this [sic]" is mind-boggling coming from a professional with adult responsibilities and 10 years of professional experience at the UN. Furthermore, the Applicant's attempt to argue that Ms. Domond was also "confused" is misleading. Before the Tribunal, Ms. Domond stated that the amounts expressed in the invoices were precise. Her confusion related only to whether one parcel was for UN Women to pay, given that she was unaware that the Applicant had used UN Women's UPS account for two personal packages.

g. Furthermore, the Applicant took no action to clarify any alleged "confusion" until she received OIOS' notice of investigation. At the time of the contested facts, the Applicant never disclosed to anyone her alleged confusion about the amounts. The Applicant's purported visit to Ms. Belsky at noon on 30 January 2018 followed Ms. Belsky's message to the Applicant requesting more information from the Applicant, not the other way around.

h. Before the Tribunal, the Applicant could not specify any concrete action she took to clarify any confusion and reimburse UN Women before 24 May 2018. It is irrelevant that the UN Women Legal Adviser instructed Ms. Belsky "not to discuss the matter further" with the Applicant as she had never even tried to contact FAS to solve the issue. She was unaware of the Legal Adviser's instructions to Ms. Belsky and was not prevented from seeking clarification. The Applicant took no action after noon on 30 January 2018.

i. The Applicant's allegation that she had tasked Ms. Domond to clarify the amount the Applicant owed is not corroborated by any evidence. Ms. Domond denied receiving any such instruction. Furthermore, as a UN Women staff member supporting the Civil Society Section, Ms. Domond was not responsible for following up on how much the Applicant owed for the Applicant's personal shipments. The Applicant's contention is another example of her skewed view of official assets and personnel, showing

complete and deliberate ignorance of the public nature of the UN's financial resources and a lack of regard for the duty of every staff member to act reasonably and with integrity when dealing with the Organization's property and assets.

j. The Applicant's allegation that she always "intended to pay" is another null argument presented only before the Tribunal. During the hearing, the Applicant admitted that she did not find out from the UPS employees how much the shipments would cost her and did not provide her personal credit card when she could have done so. Moreover, even when FAS sent her the invoices, the Applicant ignored them. Thus, it is undisputed that the Applicant only addressed the issue on 24 May 2018 after being informed that she was the subject of an investigation. Considering the above, the Respondent established the pertinent facts with clear and convincing evidence.

30. The facts amounted to misconduct.

a. The facts, established through clear and convincing evidence, show that the Applicant breached staff regulations 1.2(b) and 1.2(q), as well as paragraphs 5 and 25 of the Standards of Conduct for the International Civil Service.

b. The Applicant's actions were further inconsistent with the standards outlined in Article 101 of the United Nations Charter. Therefore, the Applicant's actions constituted misconduct under staff rule 10.1(a). Before the Tribunal, the Applicant conceded that the UN Staff Regulations and Rules bound her and that she understood that official assets should only be used for official purposes.

c. Nevertheless, the Applicant exercised zero care when she used UN Women's UPS account for her personal shipments without asking or informing anyone.

31. The sanction was proportionate to the offense.
- a. The UNFPA Executive Director relied on the facts demonstrated by clear and convincing evidence and critical aggravating and mitigating circumstances to conclude that it was appropriate to separate the Applicant from service.
 - b. Consistent with the Administration's practice and within its reasonable discretion, the Administration considered an aggravating factor that the Applicant was a professional staff member working at the United Nations since 2009, charged with the responsibility for and knowledge of United Nations rules and regulations. All these circumstances are undisputed. The Applicant's senior status and length of experience were relevant and added to the severity of her conduct.
 - c. The Administration further considered that the Applicant had used an official cell phone for personal purposes while at UN Women, incurred a bill of USD473.41, and did not pay it promptly even after UN Women management's instruction to do so and Ms. Belsky's reminder. The Applicant claims that this incident was not investigated and could not be used as an aggravating factor. The Applicant's claim is erroneous. First, there is no legal requirement that an aggravating factor must be investigated and established as misconduct. Furthermore, this incident was part of Ms. Belsky's statement to OIOS, which the Applicant reviewed as part of the investigation dossier. Further, while the Applicant painstakingly dissected Ms. Belsky's interview transcript in her response to the charges, she did not once mention the cell phone incident. Because the Applicant never refuted the cell phone incident either in her comments to the investigation dossier or her response to the charges, the incident could reasonably be considered and assigned appropriate weight.
 - d. The Applicant conceded before the Tribunal that she could have used

other communication means than her official cell phone for the personal call that she was placing. She acknowledged that she failed to pay the bill promptly and asked for a waiver. Even when she was not granted such a waiver, the Applicant took two additional months to pay and only did so after receiving a reminder from Ms. Belsky. The foregoing demonstrates the Applicant's tendency to use official assets for personal purposes and then attempt to avoid paying. Thus, it was reasonable for the Administration to consider this incident an aggravating factor.

e. As of 24 May 2018, the Applicant knew that she was under investigation. Nevertheless, she continued to negotiate her terms of employment with UNFPA, her new employer, without disclosing that she was under investigation. As per the applicable rules, a good faith employee is expected to promptly provide such information to the new employer, given the seriousness of the facts investigated. The Applicant failed in this regard.

f. The Applicant claims that she did not disclose to UNFPA that she was under investigation because the investigation was confidential. This argument is disingenuous. The Applicant breached confidentiality when it suited her. For example, just seven minutes after she received the OIOS notification on 24 May 2018, the Applicant shared it with Ms. Domond and Ms. Belsky to try to blame them for her delay in reimbursing UN Women. OIOS' notification attached a pre-interview information sheet which included the need for confidentiality.

g. The Administration also considered several relevant mitigating factors. As a result, the UNFPA Executive Director reasonably determined that the totality of the circumstances rendered the Applicant unfit for further service given the serious breach of trust and integrity. Separation from service with compensation *in lieu* of notice and without termination is not the most severe sanction. Accordingly, it was not blatantly illegal, abusive, or excessive; the sanction was proportionate.

32. The Administration fully respected the Applicant's due process rights. The Applicant knew the accusations against her and mounted a comprehensive defence with the support of the Office of Staff Legal Assistance ("OSLA"). UNFPA fully complied with its Disciplinary Framework and the Organization's established practice when conducting the investigation and disciplinary process.

33. The Applicant failed to show grounds to interfere with the disciplinary measure. A staff member challenging a disciplinary measure must prove that it was biased, improperly motivated or flawed by procedural irregularity or error of law. The burden of proving improper motivation lies with the staff member. Speculations are not evidence. The Applicant alleges that the sanction was tainted by the Organization's intention to replace her. The Applicant has failed to prove her allegation. On the contrary, evidence shows that the Organization accommodated her needs as much as possible since February 2019, only three months after she assumed duty with UNFPA.

34. Since the sanction is lawful, no compensation is due. In any event, any request for compensation for harm must be supported by evidence. The Applicant provided a doctor's note dated 11 January 2021, more than a year after the separation from service; some WhatsApp messages; a medical certificate from an Obstetrics/Gynaecologist dated 13 February 2020 advising the Applicant to return to Rome for labour and delivery; and a note from a psychiatrist dated 26 April 2021 generally noting anxiety and depression, 16 months after her separation from service of UNFPA. These documents do not prove that the Applicant's health conditions deteriorated due to the sanction. On the contrary, the Applicant was on an extended sick leave from February 2019 to September 2019, indicating that she had prior health issues before her separation from service of UNFPA. Therefore, even if the Dispute Tribunal were to find merit in the Applicant's case, it should not award the Applicant compensation, as she provided no consistent evidence in this regard.

Considerations

35. The Tribunal conducted oral hearings in which the Applicant gave evidence on oath, she adopted her witness statement, took questions in examination in chief, cross examination and was re-examined by her Counsel. The Tribunal also sought some clarification from the Applicant, and she obliged. The Respondent paraded three witnesses. They went through the same process as that described for the Applicant. In the final analysis the Tribunal found all four witnesses that testified to be material and their testimonies were reliable, credible and cogent. There was agreement on the substantive issues before the Tribunal to wit that the Applicant used official UPS services without authority to mail personal packages to her relations and friend. The oral hearing also established that the Applicant did not return for duties in Guinea after being cleared by medical services because she had by the time of her clearance been separated from service on disciplinary grounds. The Tribunal shall now address the admitted facts and consider whether the Applicant has made out her case that the separation was unlawful.

36. In disciplinary cases, this Tribunal is called upon to examine the following: (i) whether the facts on which the disciplinary measure is based have been established; (ii) whether the established facts amount to misconduct; (iii) whether the staff member's due process rights were respected; and (iv), whether the sanction is proportionate to the offence.¹⁴

37. The Applicant was charged with two counts of misconduct based on her unauthorized use of UN Women's UPS account on two occasions¹⁵. The Applicant was later separated from service on ground that the facts were established and that they constituted misconduct. Below is an analysis of the facts, law and jurisprudence applicable in this case.

¹⁴ *Suleiman* 2020-UNAT-1006, para. 10, citing *Nadasan* 2019-UNAT-918, para.38; *Siddiqi* 2019-UNAT-913, para. 28.

¹⁵ Application, annex N.

(i) Whether the facts on which the disciplinary measure is based have been established

38. The Applicant admitted the facts during the investigations and during hearing before this Tribunal. She did not at any point deny using official UPS labels to ship her personal packages. This is what the Applicant said at trial:

I was pregnant and having a bit of complicated pregnancy, and Christmas was approaching and it was the first time that I wouldn't travel home. And, in Austria, I had a very very close friend, she [was] very ill from cancer and I wanted to ensure that my nephews, the sons of my sister, would receive something from me, since I couldn't go. And so I bought, you know, a few little gifts, a parcel for the nephews and some creams and candles for my friend, and – to try ensure for them to get it on time, I thought that I could simplify the process by sending them through the official account and reimburse afterwards.

Given that I was not very familiar with the process and that I didn't have an account myself, I thought it would be faster and more reliable. And, yeah, I took these envelopes, there is a printer room in the – there are various printers at each floor and a printer room that had many of these envelopes available, together with the printing paper and labels available every – every time, everywhere... since I've been there. And so I took them and it was already late... after work, like everybody had left or almost left, it was like seven or so. And so I thought I will try not to kind of wait for another day before they leave and I dropped them at a close, you know, service point.

I asked the clerk if the information I had provided with my contact was correct and that anything else was needed and I left the – the packages¹⁶.

39. The admission is clear, however, the Applicant justified her actions. She argued that there was no clear policy on the use of UN Women's account for the use of UPS. She stated that the Organization's UPS services could be used for personal shipments as long as she reimbursed it. The Tribunal finds that lack of policy on management of official UPS is not a licence to breach clear rules and regulations governing use of Organization's assets. In the hierarchy of norms, the United Nations Charter (the Charter) and the Staff Rules and Regulations are superior to any policy whose purpose is mainly to guide implementation of the Charter and the rules and regulations. In the absence of a policy, staff members must comply with their terms

¹⁶ Transcript of proceedings dated 26 August 2021, page 8, lines 6- 24.

and conditions of contract which includes rules and regulations.

40. The Applicant cited an incident where she had used other official shipping facility for personal use and she alluded to evidence that showed that one other staff member had used UPS service to ship items to a clothing company. Although this was not verified, the Tribunal finds that the fact that the Applicant and other staff members had acted in contravention of rules and regulations before is not a valid excuse when considering culpability for misconduct¹⁷. This goes to the Applicant's argument that she was told by someone else in the office that she could use the official UPS facilities for personal benefit.

41. The Applicant further justified the use of the Organization's facilities on ground that she meant to reimburse it. The Applicant did not provide any legal basis for this assumption which the Respondent was able to show is clearly not allowed under the rules and regulations.

42. During the hearing the Applicant asserted that she did not receive any training on use of UPS services. This too is an invalid reason coming from a senior officer with 10 years' experience in the Organization and therefore, implied to know its rules and regulations. Suffice to add that ignorance of the law is not a defence.

43. The Applicant's justifications are not supported by rules and regulations. The evidence speaks for itself and the Tribunal finds that the facts are established to the requisite standard.

(ii) Whether the established facts amount to misconduct

44. It is vital to recognise at this stage that the judicial review of decisions of whether misconduct has been established dictates that due deference be given to the Secretary-General to hold staff members to the highest standards of integrity and the standard of conduct preferred by the Administration in the exercise of its rule-making

¹⁷ *Konate* 2013-UNAT-334, para 24.

discretion. The Administration is better placed to understand the nature of the work, the circumstances of the work environment and what rules are warranted by its operational requirements¹⁸.

45. According to the sanction letter,¹⁹ the Applicant was found to have deviated from the requirements established under the United Nations Staff Regulations and Rules as well as the Standards of Conduct for the International Civil Service, 2013 on two Counts.

a. Count 1 - By using UN Women's business account with UPS, with neither prior authorization nor subsequent notice, to ship her personal packages, she failed to uphold the highest standards of integrity required under staff regulation 1.2(b). In particular, she displayed a lack of honesty and transparency in her actions and her conduct failed the honesty required of her under staff regulation 1.2(b) and paragraph 5 of the Standards of Conduct for the International Civil Service, 2013.

46. Staff regulation 1.2(b) encompasses one of the core values of the United Nations and it reads as follows:

Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

47. Paragraph 5 of the Standards of Conduct for the International Civil Service, 2013, stipulates,

The concept of integrity enshrined in the Charter of the United Nations embraces all aspects of an international civil servant's behaviour including such qualities as honesty, truthfulness, impartiality and incorruptibility. These qualities are as basic as those of competency and efficiency, also enshrined in the Charter.

48. The Applicant had an obligation as a staff member to uphold the highest

¹⁸ *Nadasan* 2019-UNAT-918 para 41

¹⁹ Application, annex Z.

standards of integrity which includes acting with honesty. In her submissions, she argued that she acted truthfully and with honesty. She gave reasons why she thought she could use Organization's assets for personal benefit. In her oral testimony she informed the Tribunal that she had "completed 10 years of service at the P-4 level before the separation".²⁰ The Tribunal has found in this Judgment that the Applicant's justifications are not supported by any rule or regulation. She acted dishonestly in breach of integrity standards by using the Organization's UPS facility for personal benefit without any lawful justification. The Respondent has proved that the facts as established in Count 1 constitute misconduct.

b. Count 2 - By using UN Women's business account with UPS, with neither prior authorization nor subsequent notice, to ship her personal packages; by taking discontinued UPS labels (prepopulated with UN Women's business account information) from the Organization's premises; by billing the charges for those personal packages to UN Women's account and expressly failing to pay for the shipment with her personal credit card, she failed to use the property and assets of the Organization solely for official purposes in violation of staff regulation 1.2(q) and paragraph 25 of the Standards of Conduct for the International Civil Servant, 2013.

49. The use of property and assets of the Organization is governed by staff regulation 1.2(q) and it provides that;

Staff members shall use the property and assets of the Organization only for official purposes and shall exercise reasonable care when utilizing such property and assets.

50. Paragraph 25 of the Standards of Conduct for the International Civil Servant, 2013, provides,

International civil servants are responsible for safeguarding the resources of United Nations organizations which are to be used for the purpose of delivering an organization's mandate and to advance the best interests of the organization. International civil servants shall use

²⁰ Transcript of proceedings dated 26 August 2021, page 6, line 5.

the assets, property, information and other resources of their organizations for authorized purposes only and with care.

51. In her defence, the Applicant stated that there was no clear policy on the use of UN Women's account for the use of UPS. The Tribunal finds that it is a basic tenet of statutory construction that courts or tribunals may not read or insert into statute that which is not intended by the legislature in order to suit a particular case (see generally, *Cooke*²¹). There is no room in this provision for using the Organization's property and assets for purposes other than official and for the benefit of the Organization. The Applicant did not adduce any evidence to show that there are exceptions to the rule. By using official facilities for her own benefit the Applicant breached clear rules and regulations and standards expected of an international civil servant. The Respondent has proved that the established facts constitute misconduct as alleged in Count 2 of the charge.

52. The Tribunal also heard that at the time of the events the Applicant was going through a complicated pregnancy, it was approaching Christmas time, her friend was sick with cancer and she wanted the presents that she had bought her friend and her nephews to be delivered in time for Christmas. She did not produce any evidence to show why she could not send the presents in good time for Christmas. She has not made a connection between her condition and the breach of her terms and conditions of employment. There is no evidence that the Applicant was on sick leave during the period when the events happened. These accounts do not aid the Applicant's case by way of excusing the acts of misconduct.

(iii) Whether the staff member's due process rights were respected

53. It is now well established that the essential question regarding procedural fairness is, "whether a staff member was adequately apprised of any allegations of misconduct and had a reasonable opportunity to make representations before action was taken against him or her. The Tribunal is generally satisfied that the key elements

²¹ 2012-UNAT-275, para. 34.

of the rights of due process are met when the staff member was fully informed of the charges against him/her, the identity of his/her accusers and their testimony and as such, was able to mount a defence and to call into question the veracity of their statements”²².

54. In the case at bar, the Applicant acknowledged that when the complaint was lodged against her she cooperated with the investigators, she was truthful and honest in her actions and throughout the OIOS investigation. She knew the nature of the allegations against her. The Tribunal also notes that although the complaint against her included that she had fraudulently used UPS services, this was found by the Administration as not substantiated hence it was dropped from the charges. Further, during trial, the Applicant did not demonstrate how the endorsement of the “third party dossier” by UNFPA affected the Applicant’s due process rights²³. The Tribunal finds that the Applicant’s due process rights were respected.

Whether decision was vitiated by bias or bad faith

55. The Tribunal was also asked to examine whether the decision was vitiated by bias or bad faith, that is, if it was taken for an improper purpose. A decision taken for an improper purpose is an abuse of authority. In this respect, the Tribunal may examine the surrounding circumstances to determine whether the impugned decision was tainted by abuse of authority or motivated by ill will.²⁴ The onus is on the staff member alleging ill motive including bias and discrimination to prove the allegation to the satisfaction of the Tribunal.²⁵

56. The Applicant argued that the decision to separate her was premeditated and made in bad faith. She argued that the Administration did not want to take her back after she was cleared by medical services to return to her duty station in Guinea.

²² *Andriantseho* 2021-UNAT-1146/Corr1, para. 57.

²³ Application, para. 11.

²⁴ *Jafari*, 2019-UNAT-927, para. 34.

²⁵ See, for instance, *Kisia* 2020-UNAT-1049 para. 38 citing *Obdeijn* 2012-UNAT-201, para. 38 and *Azzouni* 2010-UNAT-081, para. 35.

During trial, the Applicant was not able to single out any particular person or authority who had a grudge against her neither for what reason. She did not adduce any evidence of bias or ill motive. The Tribunal finds that the Applicant did not prove the allegation of bad faith. The reason she was separated was clear to her and to the Tribunal that she had violated her terms and conditions of contract.

(iv) Whether the sanction is proportionate to the offence

57. The Tribunal reminds itself that the Administration has a broad discretion in determining the disciplinary measure imposed on staff members as a consequence of wrongdoing. It is best suited to select an adequate sanction within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance. Thus, in determining the proportionality of a sanction, the Dispute Tribunal should observe a measure of deference, but more importantly, it must not be swayed by irrelevant factors or ignore relevant considerations²⁶.

58. In the case at bar, the Respondent argued that the UNFPA Executive Director relied on the facts demonstrated by clear and convincing evidence and critical aggravating and mitigating circumstances to conclude that it was appropriate to separate the Applicant from service with notice but without separation indemnity. The Respondent averred that the Administration considered that the Applicant was a professional staff member working at the United Nations since 2009, charged with the responsibility for and knowledge of United Nations Regulations and Rules and that the Applicant's senior status and length of experience were relevant and added to the severity of her conduct. The Administration further considered that the Applicant had used an official cell phone for personal purposes while at UN Women, incurred a bill of USD473.41 and did not pay it promptly even after UN Women management's instruction to do so and Ms. Belsky's reminder. The cell phone event "demonstrates the Applicant's tendency to use official assets for personal purposes and then attempt

²⁶ *Ali Halidou* 2020-UNAT-1070, para. 34.

to avoid paying. Thus, it was reasonable for the Administration to consider this incident an aggravating factor”²⁷.

59. The Applicant claimed that this incident was not investigated and could not be used as an aggravating factor. The Tribunal agrees, contrary to the Respondent’s argument that there is no legal requirement that an aggravating factor must be investigated and established as misconduct, due process rights are inherent in the terms and conditions of employment. No action that has an adverse impact on the terms and conditions of employment of a staff member and produces negative legal consequences should be taken before the staff member has an opportunity to be heard. In the instant example, the Respondent did not adduce any evidence to show that any administrative or disciplinary process was instituted where the Applicant was able to explain her conduct. This incident could therefore not be used as an aggravating factor especially when the Administration acknowledged that the Applicant “had not been disciplined before” as a mitigating factor²⁸.

60. Bearing in mind the relevant jurisprudence enunciated above, the Tribunal finds that in arriving at the sanction the Administration applied an irrelevant aggravating factor, in the circumstances, the Tribunal is entitled to interfere with the sanction as it was arrived at arbitrarily, in violation of the Applicant’s due process rights.

61. The Tribunal finds that separation with salary *in lieu* of notice and with termination indemnity is reasonable under the circumstances of this case. The Applicant had a 10- year unblemished record in the Organization in senior positions and she admitted that she had a momentary lapse of judgment. Although the amount involved is not a relevant factor for purposes of finding culpability, in this Tribunal’s view it is a relevant mitigating factor and the fact that the Organization recovered it fully.

²⁷ Respondent’s closing submissions para. 23.

²⁸ Application, Annex Z, para. 40.

Judgment

62. The application is allowed in part. The Respondent shall calculate and pay the Applicant a termination indemnity.

63. The application is dismissed in all other respects.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 6th day of April 2022

Entered in the Register on this 6th day of April 2022

(Signed)

Eric Muli, Legal Officer, for
Abena Kwakye-Berko, Registrar, Nairobi