



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/041

Judgment No.: UNDT/2022/036

Date: 14 April 2022

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TESFAYE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Esther Shamash, UNDP

Introduction

1. The Applicant contests the disciplinary measure imposed on him of a loss of two steps in grade and deferral for two years of eligibility for salary increment for concealing and abetting fraud in that he failed to report the preparation of a backdated Memorandum of Understanding (“MOU”) pursuant to staff rule 10.1(a) and 10.2(a)(ii) and (iii) (“the contested decision”).
2. The Respondent filed his reply on 6 May 2019 urging the Tribunal to dismiss the application in its entirety.
3. On 29 September 2020, pursuant to Order No. 175 (NBI/2020), the Applicant filed an amended application¹ challenging the contested decision.
4. The Tribunal received oral evidence from the Applicant and from Ms. Helina Tadesse, Programme Specialist, United Nations Development Programme Country Office in Ethiopia (“UNDP Ethiopia”). For reasons given below the application is dismissed.

Facts

5. On 18 November 2015, the UNDP anti-fraud hotline email account received two complaints, one from “NSTC Labo” and another one from Mr. Abeje Belew, alleging corruption in the award of the National Soil Testing Centre (“NSTC”) project to Digata Industries Public Limited Company (“Digata PLC/Digata”) (NSTC project).²
6. On 23 April 2016, a local Ethiopian newspaper, The Reporter, published an article titled “Ministry denies blame against misuse of UNDP Fund” in reference to the NSTC project, the article alleged misuse of UNDP funds, reporting that the

¹ The original application was filed on 29 March 2019 but was not submitted in the appropriate form and within the 10-page limit.

² Reply, annex 1, exhibits 2 and 3.

Ethiopian Ministry of Agriculture (“MOA”) hired Digata PLC in violation of formal bidding procedures exercised by public agencies in the country.

7. On 27 April 2016, the Applicant sent an email to Mr. Tegegnetwork Gettu, UNDP Associate Administrator, referring to The Reporter article.

8. On 30 January 2017, the UNDP Office of Audit and Investigations (“OAI”) Deputy Director, Head of Investigations, *ad interim*, informed the Applicant that OAI was investigating allegations of procurement fraud in which he was alleged to have participated in the misrepresentation of documents in order to justify the direct procurement of Digata preventing a competitive process for the NSTC project.³

9. On 29 September 2017, a copy of OAI’s Draft Investigation Report was sent to the Applicant for his comments. He submitted his comments on 26 October 2017.⁴

10. On 19 July 2018, the Applicant was charged with concealment and abetting of fraud in that he knew, and did not report, that a UNDP staff member had created an MOU to be signed by the Ethiopian MOA and Digata which misrepresented its signature date to facilitate the contracting of Digata.⁵ The Applicant responded to the charge letter on 30 August 2018.⁶

11. On 8 January 2019, after a review of the entire dossier, including his comments, Mr. Mourad Wahba, the UNDP Assistant Secretary-General and Director Regional Bureau for Arab States (“ASG/DRBAS”) found that the Applicant’s actions rose “to the level of serious misconduct necessitating the imposition of disciplinary measures”. The ASG/DRBAS decided to impose the contested decision.⁷

³ Reply, annex 1, exhibits 4 and 5.

⁴ Application, annex 1; Reply, annex 1, exhibit 45.

⁵ Reply, annex 3.

⁶ Application, annex 2; Reply, annex 4.

⁷ Application, annex 3; Reply, annex 5.

Submissions

The Applicant

12. The Applicant submits that he was notified of the OAI's findings on 26 October 2017. He responded rejecting all the allegations made against him. He was not involved in the NSTC project process, he did not give any order to Ms. Tadesse to draft the backdated MOU and her testimony was fabricated to shift her blame to him.

13. The NSTC project was managed by Dr. Samuel Bwalya, then UNDP Country Director and Resident Representative, *ad interim*, Ms. Tadesse and the Ethiopian MOA. However, OAI in its report concluded its findings that:

- a. he and Dr. Bwalya instructed Ms. Tadesse to prepare a letter to be signed by the MOA and addressed to UNDP requesting that UNDP conduct the renovation of the NSTC and hire Digata for this activity;
- b. he had been present at the 9 April 2014 meeting and Ms. Tadesse assumed that the instruction to produce those documents was coming from the Applicant and Dr. Bwalya; and
- c. he indicated in a handover note sent out on 3 August 2014 to "follow up on the signing of the MOU".

14. It was only after the media reports about a potential fraud at the renovation of the NSTC that he noticed that the back dated MOU was drafted by Ms. Tadesse and signed by MOA and Digata.

15. His witness statement was improperly interpreted to impose the contested decision. Ms. Tadesse's communication to him in June or July 2014 was about her preparation of a Letter of Intent or MOU which was forwarded to the Ethiopian MOA. What he understood at the time of her communication was the usual MOU drafting procedure to assist the MOA, not the backdated MOU which is illegal. At that time, he was not aware of the backdated MOU, it was after his assignment to

coordinate with OAI that he started to see the files. As argued in his response to the charges of 30 August 2018, he was never involved in the process of contracting Digata. In his witness statement, he reconfirmed to the OAI that he could have done something had there been any information he noticed at that time. He raised the criminality of back dating an MOU to the Investigators to reflect his general understanding and this should not be taken as confession on the issue.

16. At no time did he admit or confess to avoiding opening emails related to Digata because he suspected that there were irregularities in the way UNDP Ethiopia was conducting its process. In his 17 January 2017 investigation interview, he testified that he raised his concern of direct contracting of Digata in the past projects without any competitive process and the challenges he endured in 2012 and 2013, proved by the testimony of the previous Country Director, Ms. Alexandra Tisso. He had no information that there was an irregularity in the 2014 NSTC project process and of his obligation to report the existence of a risk.

17. The Letter of Intent was reviewed and changed to a MOU by Digata and submitted for the further thoughts of the Minister, MOA. However, OAI in its investigation report, for unknown reasons, changed the Letter of Intent to a MOU in violation of section 4 of the OAI Investigation Guidelines which requires the Office to maintain objectivity, impartiality and fairness.

18. Dr. Bwalya's email of 1 August 2014 was the only email in which the signing of the MOU between Digata and the MOA was communicated to him for the first time. In his handover note, he was referring to the MOU that was raised by Dr. Bwalya, not the backdated one which he neither prepared nor instructed to be drafted.

19. The backdated MOU was signed before the circulation of his handover note of 14 August 2014. However, Ms. Tadesse communicated to the Minister on Friday, 15 August 2004 at 5:19 a.m., nine hours prior to the circulation of his handover note. The Applicant argues that the issues of "Back dated MOU and Letter of Intent" were erroneously understood both by the OAI and the Bureau of Management Services

(“BMS”) and urges the Tribunal to, “examine [his] handover note email and the mentioned email of Ms. Tadesse between lines to reach to logical conclusion”⁸.

20. The chains of email communications between 9 and 19 August 2014 were not copied to him or the delegated acting Team Leader, Ms. Selamawit Alebachew. According to these communications, the back dated MOU was signed prior to his handover note of 14 August 2014.

21. The justification of recklessness raised by BMS disregards the objective standard of recklessness which depends on his role in the project implementation. The relevant implementation arrangements include a Steering Committee, Technical Committee and UNDP Program analyst as a focal person. It is the responsibility of the Steering Committee to determine the role and responsibilities of members of the project management team and to review and appraise detailed project plans.

22. The OAI investigators disregarded pertinent facts and evidence and failed to conduct an “all rounded investigation” based on those relevant facts in violation of “section 4 of OAI Investigation Guidelines which requires, among others, the Office to maintain objectivity, impartiality and fairness”⁹. BMS charged him without analysing the OAI Investigation report. The charge of failure to report the backdated MOU and the imposed disciplinary measures are not based on the investigation and findings of OAI.

23. The Applicant prays for rescission of the imposed disciplinary measures.

The Respondent

24. The Respondent submits that he has met his burden to establish that the charges against the Applicant are proven and amount to misconduct; that the measure of loss of two steps in grade and deferral for two years of eligibility for salary increment was not disproportionate and that the Applicant’s due process rights were

⁸ Application, para. 22.

⁹ Application, para. 18.

respected. The Respondent requests the Tribunal to dismiss the application in its entirety.

25. Ms. Tadesse testified that the Applicant was at the meeting when she was instructed to backdate that MOU and that he knew about the backdated MOU. Her testimony is supported by the documentary evidence. First, Ms. Tadesse copied the Applicant on her first email of 31 July 2014, to the Country Director, to which she attached the backdated MOU and in which she asked for approval of the MOU. Second, Ms. Tadesse copied the Applicant on her second email of 31 July 2014, to Mr. Selassie, to which she also attached the backdated MOU. Third, in the Applicant's interview of 17 January 2017 with OAI, the Applicant told OAI that Ms. Tadesse had informed him that in June or July of 2014, pursuant to the Country Director's instruction, she had backdated an MOU between Digata and the Ethiopian Ministry of Agriculture. Fourth, in his interview of 1 February 2017 with OAI, the Applicant again told OAI Investigators that he had been aware of this matter as early as June 2014, but that he chose not to act. Fifth, in his handover note of 14 August 2014, the Applicant himself tasked Ms. Tadesse to "[f]ollow-up the signing of MoU between [Digata] and MoA".

26. The Applicant claims that he did not read the Ms. Tadesse's emails, and that his handover note referred not to the MOU but to the "final contract" between Digata and the MOA. Neither defence holds water.

27. Ms. Tadesse testified that when she saw the Applicant's handover email, she understood him to be referring to the back dated MOU. She testified that there was nothing else he could have been referring to since there was no other contract to follow up on.

28. Ms. Tadesse's testimony in this regard is supported by additional evidence. It was only on 25 August 2014, after receiving the signed request from MOA, that the Country Director sent that request, supported by the backdated MOU, to UNDP's Procurement Unit. Only once the Procurement Unit informed the Country Director

that they could not support the award of a direct contract to Digata, did the Country Director search for alternatives, and this search is what ultimately led, on 22 October 2014, to MOA contracting Digata directly. That “final contract” between Digata and the Ministry was not yet envisioned on 14 July 2014, since the Procurement Unit had not yet been approached with the signed request from the Ministry: Ms. Tadesse only sent MOA the draft of that request on 15 July 2014.

29. It follows, as Ms. Tadesse testified, that on 14 July 2014, when the Applicant tasked her to follow up on the MOU, the Applicant could not have been referring to the “final contract” between Digata and the Ministry; he could only have been referring to the backdated MOU. The evidence proves conclusively that, contrary to his claims, the Applicant was aware of that backdated MOU.

30. The Applicant’s credibility is itself in question. During his testimony, under oath, when he was asked whether the Country Director had ever asked him to backdate or fabricate a document, the Applicant lied outright, and claimed that this had never happened. It was only once he was confronted on the stand with his own prior statement to OAI, in which he clearly stated that he had been asked to fabricate a document, that he changed his testimony. The Respondent submits that the Tribunal should consider the Applicant’s credibility to be diminished and asks that the Tribunal find that the Applicant knew and did not report that Ms. Tadesse had back dated the MOU.

31. In the alternative, the Respondent argues that if Tribunal finds that the Applicant did not know about the MOU, this was because he intentionally closed his eyes to the conduct unfolding before him:

- a. The Applicant testified that he was unaware of the MOU because he intentionally avoided opening emails with Digata in the subject line and never read Ms. Tadesse’s emails of 14 July 2014. However, if the Applicant, as he himself testified, chose not to read the emails to which the backdated MOU was attached in order to distance himself from what he suspected to be fraud

and corruption, then that conduct breached the Applicant's obligations to the Organization, being the essence of an "aggravated failure to exercise the standard of care that a reasonable person would have exercised with respect to a reasonably foreseeable risk [; or] a complete disregard of a risk which [was] likely to cause harm", namely recklessness.

b. By intentionally avoiding reading Ms. Tadesse's emails, the Applicant engaged in misconduct.

32. This was not the only time that the Applicant chose not to report corruption, or rather, to wait to make his report until it seemed expedient to do so. When the Country Director instructed the Applicant to back date Steering Committee minutes, the Applicant did not immediately report this request either, instead, he waited until his interview with OAI. Similarly, the Applicant made his "report" of the fraud with Digata to Mr. Gettu, close to two years after the event, and only after the scandal had been reported in the press and become public knowledge. Even then, his report included no mention of the backdated MOU. Reporting misconduct once it has become public knowledge is too little, too late: staff are required to report misconduct, *inter alia*, to prevent the reputational and other harms caused by media scandals and managers are supposed to model that behaviour. Sharing the link to the media scandal itself, as the Applicant did, is no report at all. This was not a good faith report of misconduct but a cynical attempt to distance himself from the fraud he had known about from the start.

33. A failure to report fraud can warrant demotion. As a senior staff member at the National Officer - D level and as Ms. Tadesse's manager, the Applicant had an increased duty of care. The Organization suffered financial loss and reputational damage because of his inaction. In determining the sanction, the Respondent considered that the Applicant had raised his misgivings about Digata to his supervisors, that he cooperated with OAI, that he received no benefit, that he expressed remorse in his response to the allegations, admitted that he could have made "additional reports to a different forum" and expressed willingness to undergo

appropriate training. The Respondent considered that these mitigating factors justified the relatively light sanction of a loss of two steps in grade and deferral of eligibility for salary increment. This sanction was proportionate.

34. The Applicant complained of procedural irregularities in his matter but provided no evidence of any irregularity or prejudice to him. The Applicant's claim, that referring to the MOU as an "MOU" rather than as a "Letter of Intent" represented a violation of OAI's impartiality has no merit. The email of 10 August 2014 from Mr. Selassie to the Ministry was neither inculpatory nor exculpatory because it did not reflect on the Applicant's conduct and the Applicant was not prejudiced by its omission from the Investigation Report. The transcript of the Applicant's interview with OAI of 26 May 2016 was neither inculpatory nor exculpatory and the Applicant was not prejudiced by the decision not to include it in the Investigation Report. Further, when the Applicant requested that it be shared with him again prior to his submitting his response to the allegations, the transcript was sent to him.

Considerations

35. The Tribunal reminds itself that 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. The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred. As the disciplinary sanction imposed in this matter was not termination, it is sufficient that the Tribunal find that there was a preponderance of evidence¹⁰. This means that the standard of proof is lower than clear and convincing evidence which is required when the outcome of the

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

disciplinary process is a termination.

The Charges

36. The Administration found that the evidence obtained by OAI indicated that the Applicant either recklessly failed to report, or that he wilfully concealed and abetted fraud, in that he knew and did not report that a UNDP staff member had created an MOU to be signed by the Ethiopian Ministry of Agriculture and Digata which purported to have been signed almost three years before its actual date of signature. The evidence showed that the Applicant was aware that the purpose of this MOU was to justify direct procurement of Digata by UNDP without a competitive bidding process.

37. The Respondent concluded that the Applicant's action constituted misconduct under:

a. staff rule 10.1 which provides that:

(a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

b. Paragraph 24 of the UNDP Legal Framework providing that:

Such a failure could be deliberate (intentional or wilful act), or result from an extreme or aggravated failure to exercise the standard of care that a reasonable person would have exercised with respect to a reasonably foreseeable risk (gross negligence) or from a complete disregard of a risk which is likely to cause harm (recklessness).

c. Paragraph 25 (a) of the UNDP Legal Framework prohibiting:

Acts or omissions in conflict with the general obligations of staff members set forth in article 1 of the staff regulations, chapter 1 of the staff rules and other administrative issuances as applicable; failure to comply with the standards of conduct expected from international civil servants.

- d. Paragraph 25 (e) of the UNDP Legal Framework which prohibits:
- Misrepresentation, forgery or false certification, including but not limited to, in connection with any official claim or benefit, the failure to disclose a fact material to that claim or benefit.
- e. Paragraph 25(q) of the UNDP Legal Framework which prohibits;
- Abetting, concealing or conspiring in any of the above actions, including any act or omission bringing the Organization into disrepute.
- f. Section 3 of the UNDP Policy on Fraud and other Corrupt Practices applicable at the time (UNDP Anti-Fraud Policy) defining fraud as
- Any act or omission that intentionally misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation.
- g. Section 6 of the UNDP Policy on Fraud and other Corrupt Practices applicable at the time (“UNDP Anti-Fraud Policy”) which provided that;
- [s]taff members and other personnel have the obligation to report information pointing to fraud involving UNDP staff members or affecting UNDP funds and assets.
- h. Section 20 of the International Civil Service Commission (ICSC) Standards of Conduct for the International Civil Service providing that:
- international civil servants have the duty to report any breach of the Organization’s regulations and rules to the official or entity within their organizations whose responsibility it is to take appropriate action, and to cooperate with duly authorized audits and investigations.

38. The Applicant disagreed with the Administration's conclusions that he had breached any rules and regulations and urged the Tribunal to find that the Respondent had not made its case and that the sanction was unwarranted and should be set aside.

39. The Tribunal heard two witnesses including the Applicant. The Respondent's witness, Ms Tadesse, gave clear, cogent and uncontradictory evidence that she worked under the direct supervision of the Applicant. That although the Applicant was not involved in the management of the contract leading to these proceedings, he was privy through email communications and instructions to her, to the back dated MOU. The witness averred that she prepared a fraudulent Letter of Intent which was attached an email copied to the Applicant as her supervisor. She was emphatic that the Letter of Intent was the same fraudulent MOU it was just the title that changed and that the Applicant was aware of this and that is why she received from the Applicant hand over notes in which he instructed her to handle the fraudulent MOU. These documents are replicated below for ease of reference:

- (a) Email from Tadesse copied to Applicant referring to MOU.

From: Helina Tadesse <helina.tadesse@undp.org>

Sent: Thursday, July 31, 2014 9:20 AM

To: Samuel Bwalya; Samuel Bwalya

Cc: Eyob Tesfaye; Eyob Tesfaye

Subject: Letter of Intent - MoA and DIGATA

Attachments: Letter of Intent.docx

Dear Sam,

As discussed this morning, I've prepared and attached a draft letter of Intent for your review and comment. I am available anytime this afternoon to contact Ato Girma, so please let me know when will be convenient for you.

Thanks,

Helina

- (b) The pertinent part of the handover notes from the Applicant instructing Tadesse to follow up on signing of the MOU by MOA and Digata.

No	Programme	Activities	Action	Remark
10	AGP	Follow-up the signing of MoU between DIGATA and MoA		Helina to follow up

40. The Tribunal reviewed the Applicant's submissions to the investigators, his testimony in this Tribunal and his closing submissions. The impression that the Tribunal gets is that the Applicant is not a credible witness. He would like the Tribunal to find that the documents relied upon by the Respondent are not reliable. He urged the Tribunal to read into the documents an interpretation that justifies that he was not aware of a fraudulent MOU.

41. The Applicant's case is flawed in the following instances:

a. The Applicant did not adduce any evidence to show that Ms. Tadesse had sent him a wrong Letter of Intent and that he confronted her about the fraud. Instead, he said he did not open the email because he was not involved in management of the project. The Tribunal finds that failure to open an email and its attachments prepared and sent by his direct supervisee to acquaint himself of its contents and in the process allowing a fraudulent document to pass through his office as (Team Leader) is direct proof of recklessness as alleged by the Respondent.

b. The Applicant did not produce evidence to show that his handover notes, item number 10 in the table extract above, referring to an MOU was misunderstood by its recipient, his direct supervisee. She was consistent in her testimony that she had no doubt in her mind at the time of execution that her supervisor, the Applicant, was referring to the fraudulent MOU. This evidence has not been contradicted, undermined or discredited by any contrary interpretation or record of events. During the oral hearing, the Applicant

admitted that the MOU referred to in his hand over notes was the one and the same fraudulent MOU subject of these proceedings¹¹.

c. The Applicant's play with semantics in relation to whether the fraudulent document was a Letter of Intent or MOU is not relevant because it was clear from the evidence and from the totality of the case that the Letter of Intent was fraudulently prepared under his supervision and its change to an MOU by a third party did not diminish the fraudulent act.

d. The Applicant's assertions that he reported the fraud as soon as he became aware of it through the Reporter newspaper are self-serving. As at this point, in 2016, the fraud was already in the public domain through the media and according to the record, the UNDP anti- fraud hotline had prior to the newspaper report in 2015, already received two complaints of possible corruption relating to the NSTC project and neither complaints emanated from the Applicant.

42. The events relating to the Applicant's role are also clear through his own testaments that he was right from the beginning of the negotiations into this contract suspicious of the activities of Digata and its associates either in the Ethiopian MOA or within UNDP. To this effect he said:

Then after Ms. Tisot left the office, Mr Bwalya assumed the post as a team leader. He had some, you know, information, I guess, and as a team leader we had discussion with him and the then deputy director, Mrs. Betina, regarding our projects. One of the issues I have raised during the discussion was about the support with the Ministry of Agriculture and I had said that we need to follow, you know, project implementation manuals and we have to be very careful when requests are coming from the ministry. And I have also raised and discussed about the weak performance of Digata, which I have got during my engagement with middle level officials of the ministry. I had given the

¹¹ Transcripts of the proceedings dated 11 January 2022, at pages 56 to 57.

director verbal advice that we have to be very careful, you know, during our engagement with the ministry, and raised my doubts.¹²

43. The Applicant says that he raised his doubts to his supervisor Dr. Bwalya about the poor performance of Digata and the conduct of the Ethiopian MOA. The Tribunal finds that having this foresight obliged him to take not only an active part in ensuring that he followed his own advice to his supervisor by being ‘very careful’ but also to report any suspicious activities noted by him. In reckless disregard of his obligation, he did neither.

44. There was no suggestion that the Applicant’s supervisee held ill motive against the Applicant. Although suggestions of retaliation were advanced by the Applicant, these could only relate to his supervisor who had power to retaliate against him and the process dealing with retaliation should be clear to the Applicant and was not subject of these proceedings¹³.

45. Applying the broader picture to the circumstances of this case, the Tribunal agrees with the Respondent that the Applicant was reckless in his failure to report a fraud which he was aware of. The evidence speaks for itself¹⁴, that he chose to conceal and abet the perpetration of a fraud. The facts are established to the requisite standard by the Applicant’s own admissions and the evidence on record.

(i) Whether the established facts amount to misconduct

46. 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 discretion. The Administration is better placed to understand the nature of the work,

¹² Transcripts of the proceedings dated 11 January 2022, at page 11, lines 19 – 25 and page 12, lines 1 – 5.

¹³ Then applicable ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations).

¹⁴ See generally, *Nadasan* 2019-UNAT-918.

the circumstances of the work environment and what rules are warranted by its operational requirements¹⁵.

47. The established facts clearly constitute misconduct as charged. The elements of the charge of abetting and concealing fraud were established through the evidence. The Applicant who had possession of important knowledge about fraudulent document passing through his office under his supervision failed to report it as was expected of him. He chose to remain silent until the matter became public knowledge. In failing to report, he committed the misconduct of concealing and in the process abetted the fraud. As Team Leader, a senior position, and an international civil servant, he behaved recklessly by abdicating from his obligations in allowing fraud to take place and to be facilitated by his direct supervisee.

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

48. 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 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”¹⁶.

49. The Applicant argued that the OAI and BMS misinterpreted his interview and that the documents relied upon were erroneously construed. The Tribunal studied these documents (email with Letter of Intent and the hand over notes) and is satisfied that the Respondent attributed the correct meaning to them. The documents were not ambiguous. They did not require any clarification. They spoke for themselves. The Applicant also attacked the credibility of Ms Tadesse, the Respondent's witness. The

¹⁵ Ibid, para. 41.

¹⁶ *Andriantseho* 2021-UNAT-1146/Corr. 1, para. 57.

Tribunal heard Ms. Tadesse and found her to be a truthful and reliable witness. The Tribunal finds that the Applicant's due process rights were respected.

(iii) Whether the decision was vitiated by bias or bad faith

50. 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.¹⁷ The onus is on the staff member alleging ill motive including bias and discrimination to prove the allegation to the satisfaction of the Tribunal.¹⁸ The Tribunal did not find any evidence of ill motive.

(iv) Whether the sanction is proportionate to the offence

51. The Tribunal reminds itself that the Administration has a broad discretion in determining the disciplinary measure imposed on staff members because 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 considerations¹⁹.

52. In the case at bar the Applicant has not convinced the Tribunal that the sanction is disproportionate. The Respondent considered that the misconduct was very serious, perpetrated by a senior official but was swayed by mitigating factors including that he collaborated well with the investigators and met out a more lenient

¹⁷ *Jafari*, 2019-UNAT-927, para. 34.

¹⁸ See, for instance, *Kisia* 2020-UNAT-1049 para. 38 citing *Obdeijn* 2012-UNAT-201, para. 38 and *Azzouni* 2010-UNAT-081, para. 35.

¹⁹ *Ali Halidou* 2020-UNAT-1070, para. 34.

sanction. The Tribunal finds that the sanction is appropriate.

Judgment

53 The Applicant has failed to satisfy the Tribunal that the Administration acted unlawfully in sanctioning him for misconduct. He failed to comply with standards of conduct expected from him as an international civil servant. The application is dismissed.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 14th day of April 2022

Entered in the Register on this 14th day of April 2022

(Signed)

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