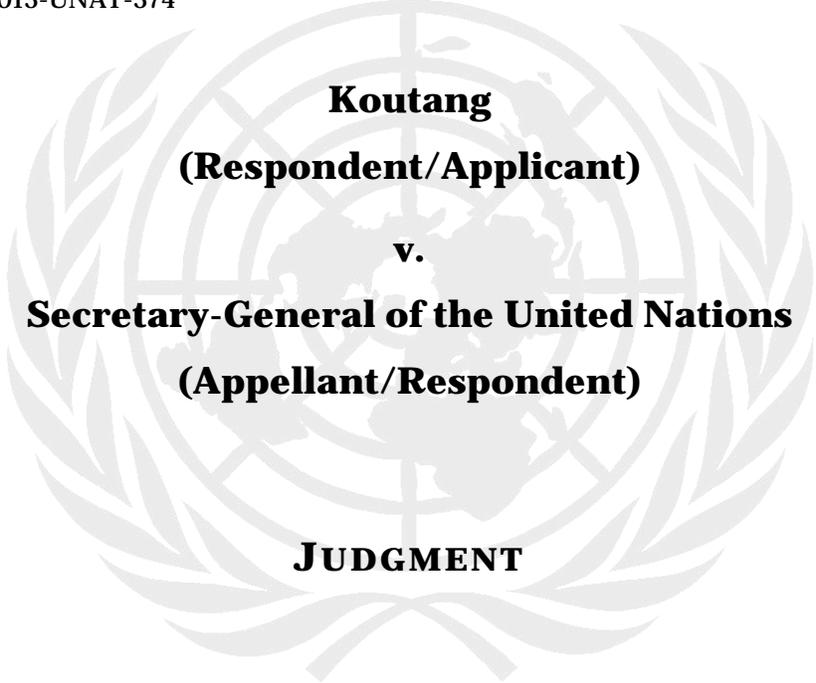




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-374



Koutang
(Respondent/Applicant)
v.
Secretary-General of the United Nations
(Appellant/Respondent)

JUDGMENT

Before: Judge Inés Weinberg de Roca, Presiding
Judge Luis María Simón
Judge Richard Lussick

Case No.: 2013-426

Date: 17 October 2013

Registrar: Weicheng Lin

Counsel for Mr. Koutang: Miles Hastie

Counsel for Secretary-General: Paul Oertly

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2012/158, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 30 October 2012 in the case of *Koutang v. Secretary-General of the United Nations*. The Secretary-General appealed on 7 January 2013 and Mr. Thierry Koutang answered on 7 March 2013.

Facts and Procedure

2. The facts established by the Dispute Tribunal in this case, which are not contested, read as follows:¹

... The following is taken from the statement of facts submitted by the parties and evidence adduced at the hearing of this case from Mr. Koutang and 2 other witnesses called by him. The parties also relied on some findings of fact made by the ... Disciplinary Committee (“DC”).

... Thierry Koutang entered the service of the [United Nations Development Programme (“UNDP”)] in November 1999 as an [Information & Communications Technology (“ICT”)] Expert on a local contract in a UNDP Project in Cameroon. Between 2000 and 2001 he served as Local Area Network (“LAN”) Manager under a Special Service Agreement. In November 2001 he was appointed by the UNDP Country Office as Information Manager on a Fixed-Term contract at the NO-A grade. As such he was responsible for managing the ICT network for UNDP and its affiliated agencies in Yaoundé-Cameroon UNDP Country Office.

... Since 1993 Mr. Koutang had been involved in a business owned by his father called “Infogenie developing software and IT tools” (“Infogenie”). When he joined the UNDP, Mr. Koutang’s work for Infogenie was delegated to third parties. Mr. Koutang claims that his role in Infogenie was limited after that to an “advisory role”, and providing help with software he had developed. He maintained a 22% shareholding in the company and was on the Board of Directors.

... During his 2002 performance review questions were raised by UNDP about the nature of Mr. Koutang’s involvement in an internet café. A meeting of the Career Review Group (“CRG”) reviewed Mr. Koutang’s performance and looked into the allegations.

... The staff representative at this meeting was a senior UNDP manager, Zon Lo, who was also the president of the Staff Association at the time. He told the [Dispute] Tribunal that the CRG discussion focused on the influence that

¹ The facts here are taken from Judgment No. UNDT/2012/158, paragraphs 3–28.

Mr. Koutang's outside activities had on his work and availability and the possible use of the Office's internet connection for running an internet café that he had links with.

... Mr. Lo said an investigation had been undertaken into these matters but as there was no follow up to it he was convinced that the case had been closed without evidence of any kind of fraud. He noted that Mr. Koutang had been promoted after that.

... Mr. Koutang asserts that his supervisors were "well aware" of his activities, that he only provided assistance to the company if there was an urgent issue that his father could not attend to. This was the reason he did not mention the particular branch of his family business Infogenie to his superiors "specifically by name."

... A tenant who occupied an office in the same building as the Infogenie internet cafe complained that Infogenie's employees had frequent access to the roof of the building where some of Infogenie's equipment was stationed. The tenant became uncomfortable with this arrangement and blocked the employee's access to the roof by locking the door.

... The then manager of Infogenie told the Tribunal that this was a dispute that he would normally have dealt with but he was out of the country when the company secretary contacted him about it. Mr. Koutang's father, the company owner was also unavailable as he was in hospital. The manager asked Mr. Koutang to sign two letters to the tenant, on behalf of the company, to protest his actions at blocking access. One letter was written on 31 October and the next on 17 November 2005. Mr. Koutang signed the letters as "Administrateur" and "Computer Engineer" of Infogenie[,] respectively.

... The tenant sent copies of these letters to the UNDP Country Office on 24 April 2006. According to the Respondent, the Country Office senior management had not previously been aware of any involvement of Mr. Koutang in Infogenie and [he] had not sought any authorization from the Organization to be involved.

... As a result of the complaint by the tenant, a Systems Specialist was sent to investigate potential breaches in the ICT networks of the UNDP Country Office. Mr. Koutang was suspended with pay on 1 May 2006 pending the outcome of the investigation.

... In a letter dated 1 June 2006, Mr. Koutang was advised of the background to and outcome of the investigation report. It found that there had been a network security violation that would allow external parties to utilize UNDP corporate resources and possibly the UNDP network. It also found that equipment had been installed which provided access to third parties, without the knowledge of UNDP officials. The investigator found no evidence of unauthorized use of corporate resources such as mail, web or file servers.

... The letter enclosed the two Infogenie letters, the investigation report and further evidence against Mr. Koutang. It requested that he respond to the allegations in the two letters and report.

... Mr. Koutang responded on 16 June 2006. He confirmed that he had signed the two Infogenie letters, was a member of the Infogenie Board of Directors and involved in the management of the company. He said he had used Infogenie personnel to perform his functions as Information Manager for UNDP, because "Procedures for obtaining these personnel are long, cumbersome and costly. Infogenie has often been the company that has provided this free manual labour that enables UNDP to save 'Cost Recovery'." He did not deny that he had connected a personal router in the UNDP and that he had down-loaded movies and other material from the Company's Internet connection with the help of Managers. He said many of them "downloaded movies and episodes of series for which reasons of speed and service is more convenient after-hours service."

... A charge letter dated 11 July 2006 was sent to Mr. Koutang advising him of the charges and requesting him to provide comments on the contents within 10 days of receipt. The letter informed Mr. Koutang that if he was unable to provide a satisfactory response, disciplinary action would be taken against him. The charges ... alleged that in accordance with sections 110.1 and 110.4 of the staff rules there was sufficient evidence to accuse Mr. Koutang of gross negligence for:

... acts or omissions contrary to the general obligations of staff members set forth in Article I of the Staff Regulations and the Staff Rules and instructions for its implementation

... inappropriate use of or mismanagement of property, assets, equipment or records, including electronic records

... non-disclosure of an interest or relationship with a third party which may benefit from a decision made by the staff member concerned

... breach of fiduciary duty vis-à-vis the Organization

... failure by a staff member to meet his obligation to comply with professional standards and ethical standards related to their profession

... The letter said ...:

These actions constitute a serious violation of standards of conduct expected of international civil servants ... and constitute serious misconduct within the meaning of the second paragraph of Article 10.2 of the Statute of staff [sic].

... On 23 August 2006 Mr. Koutang responded [denying the charges of misconduct] ...

... On 26 September 2006, the Administration informed Mr. Koutang of his summary dismissal, effective 2 October 2006. The UNDP determined that

Mr. Koutang was guilty of misconduct enumerated in staff rule 110.1, and UNDP/ADM/97/17 of 12 March 1997 Annex A 1(a), (e), (h), (i) and (m). The determinations against Mr. Koutang were as follows:

a. The intervention by Mr. Koutang in disputes on behalf of Infogenie with the use of the title “Administrateur” and “Computer Engineer” could not be reconciled with his explanation.

b. Mr. Koutang had not obtained authorization to engage in outside activities. ...

c. The functions Mr. Koutang engaged in at Infogenie were within the same area as that of his official functions at the local UNDP office which created an appearance of a conflict of interest. ...

d. Mr. Koutang’s conduct violated staff regulation 1.2(e) which provides that staff members must discharge their functions and regulate their conduct with the interests of the Organization only in view.

e. Staff regulation 1.2(o) provides that “staff members shall not engage in an outside occupation or employment, whether remunerated or not, without the approval of the Secretary-General” and by being employed or engaged in an activity outside the Organization Mr. Koutang’s conduct was in violation of the standards of conduct required of United Nations staff members.

f. Mr. Koutang jeopardized the integrity of the local UNDP office computer system by connecting his personal router to the UNDP system thereby providing access to third parties, and the configuration of the base station of the wireless network permitted the unauthorized connection of any compatible equipment.

...

i. Mr. Koutang’s actions indicate that he jeopardized the security and integrity of the local UNDP office’s computer system for which, as [Information Technology] Manager, he was responsible and he admitted in his letter of 23 August 2006 that with regard to the opening of the base station of the wireless network, he “underestimated the security risk involved in leaving the station open.”

j. ... Mr. Koutang’s actions indicated that he used the property and services of the Organization for personal means in contravention of staff regulation 12 (q).

... On 15 December 2006, Mr. Koutang made a request to [the UNDP/United Nations Population Fund/United Nations Office for Project Services] DC for a review of the decision to summarily dismiss him. ...

...

... The Administration responded on 31 January 2007 that the charges against Mr. Koutang were fully sustained and the impugned decision was taken within their discretionary power. On 1 October 2007, the DC issued its report. In summary it determined that:

- a. while Mr. Koutang had engaged in outside activities without prior authorisation on two occasions, they did not substantiate the Administration's findings that the similarity of his duties in UNDP and the nature of Infogenie's business automatically created a conflict of interest.
- b. while there was evidence that Mr. Koutang jeopardized the integrity and security of the Country Office's wireless network, this charge should be treated as performance issue that does not give rise to misconduct.
- c. The DC also concluded that the Administration had not proved that Mr. Koutang used the Organization's assets for personal purposes.
- d. while Mr. Koutang's conduct fell short of that of an international civil servant, it did not warrant summary dismissal.

The DC instead recommended that the Administration reinstate Mr. Koutang and he be demoted by one grade and not be considered for promotion for two years.

... The Associate Administrator of UNDP forwarded this report to Mr. Koutang on 21 January 2008 and stated:

I regret to inform you that I do not fully share the recommendations of the Disciplinary Committee ... I maintain that the acts with which you were charged are serious and, considering the importance and sensitivity of your functions as LAN manager, that the bonds of trust between you and the Organization have been broken.

... The Administration decided "not to follow the recommendation of the DC to reinstate Mr. Koutang" but took into consideration the conclusion of the DC that Mr. Koutang's conduct warranted a disciplinary measure less severe. The Administration commuted the summary dismissal into separation with payment of notice and termination indemnity.

... Mr. Koutang submitted an application to the former United Nations Administrative Tribunal ... in September 2008, contesting the decision of the Administration to separate him.

... The case was transferred to the Nairobi Registry of the United Nations Dispute Tribunal in accordance with the provisions of ST/SGB/2009/11 (Transitional measures related to the introduction of the new system of administration of justice) on 4 February 2010.

3. The Dispute Tribunal found in favour of Mr. Koutang, concluding that the charges of misconduct were not sustained. It held that, although Mr. Koutang was involved with his family business, without the required authorization “his involvement was known to the Organisation since 2005 and [it] had raised no objection”. Moreover, the UNDT found that his involvement did not rise to the level of “outside employment”.

4. With respect to the charge of conflict of interest, the Dispute Tribunal recalled that the Secretary-General had conceded:

there was no evidence that Mr. Koutang’s employment as a staff member in any way benefitted or appeared to benefit Infogenie financially or otherwise. As the DC noted and as was confirmed by the former manager, on some occasions UNDP benefitted from the free use of Infogenie’s technical staff at no cost to UNDP. There was no evidence or even an allegation that Mr. Koutang’s association with Infogenie interfered with his obligations to the United Nations.

5. Finally, the UNDT considered that, in connecting a router to the UNDP system, Mr. Koutang had “no ulterior motive or malicious intent in installing the router” and, “[a]t worst it was an error of judgment which had no proven adverse effects on the Country Office”. Accordingly, it rejected the charge that he had jeopardised the integrity and security of the Country Office’s wireless network.

6. Notwithstanding the foregoing, the UNDT reviewed the proportionality of the disciplinary sanction imposed on Mr. Koutang, i.e., separation from service with payment in lieu of notice and with termination benefits. It found that, even had the charges against him proved well-founded, termination of appointment was disproportionate, given the circumstances and when weighed against other staff members who had been dismissed for “considerably more serious” misconduct.

7. The Dispute Tribunal thus upheld Mr. Koutang’s application. Holding that, “[w]hile he had no expectation of on-going employment, his history of employment and performance reviews since 2002 are strong indicators that he was more likely than not to have continued his employment for at least another Fixed-Term contract”, the UNDT awarded him compensation of one year’s net base salary at the rate in effect on the date of his separation from service.

Submissions

The Secretary-General's Appeal

8. The Secretary-General contends that the UNDT erred in law, when it found that Mr. Koutang's association with Infogenie did not create a conflict of interest. The Dispute Tribunal set an unreasonably high threshold for review. In fact, the appearance, or possibility, that an improper benefit could result from a staff member's association is the threshold; not proof that an improper benefit actually resulted. Moreover, Infogenie benefited from a "reputational advantage" as a result of its association with UNDP, and its provision of *pro bono* services outside the relevant legal framework.

9. The Secretary-General submits that the UNDT erred in law and fact when it found that Mr. Koutang's actions with respect to the Country Office network did not amount to misconduct. By focusing on the installation of the router, the Dispute Tribunal overlooked the fact that Mr. Koutang "opened" the configuration of the network base station, leaving it vulnerable to hackers.

10. The Secretary-General further submits that in failing to show the appropriate deference to UNDP's analysis of Mr. Koutang's actions, the UNDT substituted its own opinion of the facts and was out of step with the jurisprudence of the Appeals Tribunal.

11. The Secretary-General considers that the Dispute Tribunal erred in concluding that the disciplinary sanction imposed would have been disproportionate even if a finding of misconduct could have been sustained. He argues that this finding was based on an inaccurate assessment of the facts and law, both with respect to conflict of interest and the network security breach, and avers that UNDP acted within the spectrum of appropriate sanctions. He again submits that the UNDT failed to grant the deference due to the Organization in making such determinations.

12. The Secretary-General requests the Appeals Tribunal to vacate the UNDT Judgment in its entirety and to uphold the disciplinary sanction imposed on Mr. Koutang.

Mr. Koutang's Answer

13. Mr. Koutang submits that the Secretary-General has not proven his case of reversible error or manifestly unreasonable result. Rather, the Secretary-General appears to seek *de novo* review of the facts of this case.

14. Mr. Koutang contends that the Dispute Tribunal properly found that he had not committed misconduct.

15. With reference to the charge of conflict of interest, Mr. Koutang disputes the Secretary-General's claim that any possibility that an individual staff member or the company with which he or she is associated could benefit from their relationship with the United Nations amounts to conflict of interest, arguing that such a scenario is unduly broad and entirely subjective.

16. Mr. Koutang further contends that the findings of the UNDT with respect to the alleged security breach were thorough and appropriate, and supported those made by the DC.

17. Insofar as proportionality is concerned, Mr. Koutang submits that "[t]he Administration's bare plea for deference should hold no sway in the face of factual error and the joint conclusions of the DC ... and Dispute Tribunal".

18. Mr. Koutang protests the argument of the Secretary-General that he breached the relevant legal instrument in having Infogenie provide *pro bono* services to the Organization, which, he contends, cannot be raised for the first time on appeal.

19. He requests the Appeals Tribunal to affirm the UNDT Judgment and to dismiss the appeal in its entirety.

Considerations

20. The United Nations Appeals Tribunal has had recent occasion to address the question of the appropriate level of review in disciplinary matters. Its reasoning in *Applicant v. Secretary-General of the United Nations*² applies equally in this case:

² Judgment No. 2013-UNAT-302, para. 29.

Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration.³ In this context, the UNDT is “to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence”.⁴ And, of course, “the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred”.⁵ ...

21. Mr. Koutang appealed his summary dismissal and the UNDT found in his favour, concluding that the charges of misconduct were not sustained and that, in any event, the sanction imposed was not proportionate to the offence.

22. In October 2007, the DC recommended that the Administration reinstate Mr. Koutang and that he be demoted by one grade and not be considered for promotion for two years. The Administration decided “not to follow the recommendation of the DC to reinstate Mr. Koutang” but took into consideration its conclusion that his conduct warranted a less severe disciplinary measure. Accordingly, the Administration commuted his summary dismissal into separation with payment in lieu of notice and termination indemnity.

23. The undisputed facts in this case are Mr. Koutang’s association with Infogenie and that by installing a private router he was responsible for a network security violation that would allow external parties to utilize UNDP corporate resources and possibly the UNDP network.

24. Staff Rule 110.1 states that

Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant, may amount to unsatisfactory conduct within the meaning of staff regulation 10.2, leading to the institution of disciplinary proceedings and the imposition of disciplinary measures for misconduct.

³ *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.

⁴ *Masri v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-098; *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084; *Haniya v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-024; *Mahdi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-018.

⁵ *Liyanarachchige v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-087.

25. Staff Regulation 1.2(m) adds that “[s]taff members shall not be actively associated with the management of, or hold a financial interest in, any profit making business or other concern, if it were possible for the staff member or the profit making, business or other concern to benefit from such association or financial interest by reason of his or her position with the United Nations”.

26. According to the Standards of Conduct for the International Civil Service (2001)

... Conflict of interest includes circumstances in which international civil servants, directly or indirectly, would appear to benefit improperly, or allow a third party to benefit improperly, from their association in the management or the holding of a financial interest in an enterprise that engages in any business or transaction with the organization.⁶

27. There is little dispute as to the facts of this case; indeed, most were conceded. The Appeals Tribunal has reviewed them, together with the DC report and the UNDT findings, but cannot sustain the conclusion of the UNDT that Mr. Koutang’s actions did not amount to misconduct.

28. This Tribunal has consistently held that, “when reviewing a disciplinary sanction imposed by the Administration, the role of the Tribunal is to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence”.⁷

29. The Appeals Tribunal has further held that it would not substitute the criteria of the administration for its own judgment, finding that: “Though perhaps the Secretary-General, in his discretion, could have come to a different conclusion, we cannot say that the sanction of summary dismissal was unfair or disproportionate to the seriousness of the offences.”⁸

30. Whilst the sanction ultimately imposed upon Mr. Koutang could be considered harsh, it was not unreasonable, absurd or disproportionate. As such, the Appeals Tribunal finds that it was a reasonable exercise of the Administration’s broad discretion in disciplinary matters; a

⁶ Paragraph 21.

⁷ *Masri, ibid.*, para. 30. See also *Haniya, ibid.*; *Nasrallah v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-310; *Maslamani v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-028.

⁸ *Cabrera v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-089, para. 27.

discretion with which it will not lightly interfere. The UNDT thus erred in finding the sanction disproportionate and in substituting its opinion for that of the Administration.

31. For these reasons, and in all of the circumstances of the case, the Appeals Tribunal cannot sustain the UNDT Judgment. It finds in favour of the Secretary-General and vacates the UNDT Judgment in its entirety.

Judgment

32. The UNDT Judgment is vacated in its entirety.

Original and Authoritative Version: English

Dated this 17th day of October 2013 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Simón

(Signed)

Judge Lussick

Entered in the Register on this 19th day of December 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar