



**Before:** Judge Coral Shaw

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

KOUTANG

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Manuel Eising, OSLA

**Counsel for the Respondent:**

Thomas Elftmann, UNDP

## **Introduction**

1. Mr. Koutang was employed as an Information and Communications Technology (“ICT”) Manager in the United Nations Development Programme (“UNDP”) in Cameroon. By letter dated 26 September 2006, he was summarily dismissed from service with the United Nations for misconduct. Following a finding by a Disciplinary Committee that his actions did not warrant such formidable consequences the Administration amended its decision on 21 January 2008 to one of dismissal but with termination benefits. Mr. Koutang is contesting that decision.

## **Issues**

2. The issues before the Tribunal in this case are:
- a. Did the actions and conduct of Mr. Koutang amount to misconduct?
  - b. Was the disciplinary sanction of separation with notice and termination benefits proportionate to Mr. Koutang’s conduct?

## **Facts**

3. 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 UNDP’s Disciplinary Committee (“DC”).

4. Thierry Koutang entered the service of the UNDP in November 1999 as an 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.

5. 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.

6. 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.

7. 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 Tribunal that the CRG discussion focussed on the influence that Mr. Koutang's outside activities had on his work and availability and the possible use of the Offices internet connection for running an internet café that he had links with.

8. 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.

9. 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.'

10. 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.

11. 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.

12. 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 had not sought any authorization from the Organisation to be involved.

13. 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.

14. 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 unauthorised use of corporate resources such as mail, web or file servers.

15. 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.

16. 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.”

17. 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 (“Les chefs d’accusation”) 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:

- (a) 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
- (e) inappropriate use of or mismanagement of property, assets, equipment or records, including electronic records
- (h) non-disclosure of an interest or relationship with a third party which may benefit from a decision made by the staff member concerned
- (i) breach of fiduciary duty vis-à-vis the Organization

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

18. The letter said that :

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

19. On 23 August 2006 Mr. Koutang responded as follows:

a. His role in Infogenie was only that of an advisor with an “arm’s length” relationship, similar to that of a member of a board of directors of an NGO;

b. His relationship with the Internet café Infogenie was well known to his superiors and they had raised no objections to it, so that at the very least it was tacitly authorized and approved;

c. There was no, and had never been any, conflict of interest between Mr. Koutang’s role as advisor and strategic support to Infogenie and his functions and responsibilities at UNDP since “Computer Engineer” was merely an academic title derived from his Engineering Grade, and “Administrateur” which means “Member of the Managing Board”, is an honorary one that did not entail any operational elements;

d. Although the opening of the base station for practical reasons had been a breach of security, for which he assumed full responsibility, this opening could not permit “unrestricted access” to the local UNDP office computer system and at no time and in no manner did Mr. Koutang’s personal access to the system constitute a threat to the integrity of the local UNDP office computer system;

e. Mr. Koutang's access to the system was legal and in accordance with the current practice at the local and other UNDP field offices, the installation of his personal router and its use was beyond reproach because of the nature of the router installed, and the fact that Infogenie technicians did not have access to it, and no "unrestricted access to the UNDP information system was possible through his router";

f. Mr. Koutang's access to the Organisation's resources during non-working hours was solely for the purpose of improving his professional knowledge and this was done with the primary objective of better meeting professional challenges so that he could effectively respond to UNDP's constantly changing operational assignments.

20. 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. His interaction with his superiors had merely taken the form of a spate of questions about his activities. The Administration used the example of a memorandum in which Mr. Koutang mentioned he had 'extra professional' activities, however, he downplayed such activities as though they were limited to outstanding activities connected with software he had developed prior to joining UNDP, and Mr. Koutang had never specifically mentioned Infogenie. There was therefore no evidence of a request for authorization for involvement in outside activities, or permission granted.

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. In his response of 23 August 2006 Mr. Koutang denied that there was a conflict of interest and explained that he had received assistance from persons with whom he had “personal relationships to assist him and not from the entity Infogenie offering services to UNDP”. However, his explanations contradicted his comments of 16 June 2006 cited in the charge letter and which clearly indicated that it was Infogenie and its technicians that provided such assistance. This closeness and the confusion of roles only added to the appearance of conflict of interest and constituted aggravating circumstances of the fact that Mr. Koutang engaged in employment outside the Organisation without authorization.

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 Organisation 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 Organisation 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.

g. Mr. Koutang’s response of 23 August 2006 confirmed that his personal router was connected to the local UNDP office’s computer

network which software was provided by Infogenie technicians and provided access to several persons at Mr. Koutang's home, nevertheless, Mr. Koutang explained that it was only members of his family. However, Mr. Koutang admitted that the Infogenie technicians added access accounts to his router but that these accounts had been disconnected a long time ago, without specifying who deactivated them, and indicated that the router could not have permitted unrestricted access to the local UNDP officer computer network, nor access to the Organisation's intranet but access to general internet content.

h. The confusion surrounding the connection of Mr. Koutang's personal router to the local UNDP office's wireless network and the installation by the Infogenie technicians, the activation and deactivation of the accounts by them, indicates clearly to what extent there was confusion between Mr. Koutang's functions and those of the IT Manager and Mr. Koutang's role at Infogenie.

i. Mr. Koutang's actions indicate that he jeopardized the security and integrity of the local UNDP office's computer system for which, as IT 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. In Mr. Koutang's comments of 23 August 2006 he indicated that he had used his personal router connected to the local UNDP office to download films for professional educational purposes but his explanations were not convincing because the tenor of his previous statements and his "admission" indicated that his activities in downloading were primarily for entertainment, consequently, Mr. Koutang's actions indicated that he used the property and services of the Organisation for personal means in contravention of staff regulation 12 (q).

21. On 15 December 2006, Mr. Koutang made a request to UNDP/UNFPA/UNOPS DC for a review of the decision to summarily dismiss him. Mr. Koutang reiterated his prior submissions to the Office of Legal and Procurement Support (OLPS) to the Disciplinary Committee. He submitted that he merely owned 22% of the shares in the family owned business, and he was only an advisor to the company, describing his role as passive.

22. Mr. Koutang claimed that his supervisors had given him at the least tacit approval to his involvement in these outside activities. As to the network security allegations, he further claimed that the investigator's report failed to establish that Infogenie benefited from his service with UNDP and failed to establish whether he had derived personal gain from the Organisation's assets. He also asserted that the investigator's report was unfair as it was carried out without a third party.

23. Mr. Koutang claimed that he had connected his personal router to the UNDP network in the interest of the Organization. His punishment was disproportionate, as the Administration had failed to prove any harm sustained by the Organization due to his involvement with Infogenie, or any benefit on Infogenie's part from his employment with UNDP.

24. 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 Organisation'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.

25. 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 Organisation have been broken.

26. 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.'

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

28. 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.

### **Applicant's submissions**

29. The Respondent's characterisation of Mr. Koutang's conduct as serious misconduct warranting summary dismissal is an abuse of discretion as such characterisation is not supported by the facts, general principles of international administrative law or the Standards of Conduct for International Civil Service, 2001.

30. According to the DC report, even if his conduct was not fully consistent with the standards of an international civil servant, the nature of misconduct did not warrant a summary dismissal but a lesser sanction.

31. The Respondent failed to meet its burden of proof concerning both Mr. Koutang's alleged conflict of interest and outside occupation or employment. In order for Mr. Koutang to have been found guilty of a conflict of interest, the Respondent must have had sufficient evidence to support a finding that Mr. Koutang's conduct, at the very least, fell within what the Standards of Conduct for International Civil Service, 2001 defines as "conflict of interest."

32. The Administration failed to provide any evidence, other than two letters Mr. Koutang signed, that he was actively engaged in an ongoing manner with the management of Infogenie. As the DC noted, there was a distinction between a failure to insulate himself sufficiently from Infogenie and giving the impression that he was actively engaged in outside activities without explicit authorisation.

33. Given the facts, Mr. Koutang's conduct did not amount to 'wilful', 'reckless' or 'irresponsible' conduct which deserved punishment. The evidence relied upon was not sufficient to establish a *prima facie* case of serious misconduct that warranted termination of employment and the sanction was not proportionate to the offence.

34. The decision taken in the particular circumstances of Mr. Koutang's case was a decision that was taken in an arbitrary manner. It constitutes an abusive exercise of discretionary power, since the essential elements required to constitute

the alleged offences for which Mr. Koutang's appointment was terminated could not even be established, the conclusions and assumptions that formed the basis for the allegations were found to be without merit.

35. Different investigations of the UNDP Country Office's IT-network conducted in this case concluded that there was no unauthorised access let alone use of UNDP's electronic files or data. Infogenie never earned money from UNDP.

36. The Respondent's modification of the charge from outside 'employment' to outside 'activity' shows the weakness of his case. Several UNDP staff members had provided internet access through the UNDP connection which was presumably used for private purposes. Not only was private internet usage allowed, but the management had thought about offering home connections to staff members. The singling out of Mr. Koutang for punishment was unjustified and unfair.

37. Mr. Koutang accepts that he made errors but maintains these amounted to a performance rather than a misconduct issue. None of the investigations show there was any security breach.

### **Respondent's submissions**

38. Mr. Koutang was engaged in outside unauthorised employment. This involvement created the appearance of a conflict of interest. Mr. Koutang had misused UNDP ICT resources. The Respondent's decision to dismiss Mr. Koutang from the service of the Organisation was a reasonable exercise of the Respondent's discretion in disciplinary matters. Mr. Koutang's conduct was in the higher end of misconduct warranting separation from service or dismissal.

39. It is within the discretionary power of the Secretary-General, or in this case the Administrator of UNDP, to determine what behaviour constitutes misconduct, as well as the disciplinary measures to be imposed.

40. There was no evidence that the Respondent's decision to dismiss Mr. Koutang was improperly motivated and Mr. Koutang's right to due process was fully respected throughout the disciplinary proceedings.

41. There is no material difference between the two terms 'employment' and 'activity'.

42. Counsel for the Respondent submitted in oral submissions that it was not the outside employment or activity that was of concern to the Administration, but the fact that it had been done without authorisation. If it had been authorised then he would not have been dismissed. However, in the Respondent's submission, as Mr. Koutang was in a conflict of interest such authorisation would not have been given.

43. The Respondent relied on the UNDP Ethics office distinction between actual, apparent and potential conflicts of interest and submitted that Mr. Koutang was in an apparent conflict of interest.

44. The Respondent does not claim that Mr. Koutang benefitted or favoured Infogenie by his employment by the UNDP but that the appearance of such was sufficient to create a conflict of interest in the mind of a bystander who knew the facts.

45. In response to a question from the Tribunal the Respondent submitted that the disciplinary measures taken against Mr. Koutang were based on a 'holistic view of all the facts' which showed a breach of the standards expected of United Nations staff members and set out in staff regulation 10.2 rather than on breaches of specific staff rules.

46. ST/AI/371/Amend.1 is not applicable to UNDP as it was signed by the United Nations Secretariat's Under-Secretary-General who did not have the delegated authority to decide on administrative issuances binding the Respondent. Since UNDP is a separately funded programme of the General Assembly, the UNDP Administrator was delegated the authority in disciplinary matters. UNDP

thus issued its own legal framework governing its investigation and disciplinary process.

## **Considerations**

### **Issue 1**

*Did the actions of Mr. Koutang amount to misconduct?*

47. Notwithstanding the Respondent's submissions about the holistic approach to establishing misconduct, Mr. Koutang faced 3 specific charges of misconduct that allegedly breached staff regulation 1.2, and UNDP/ADM/97/17 of 12 March 1997 Annex A 1(a), (e), (h), (i) and (m). He was also charged with having an apparent conflict of interest and that he had installed a personal router to the local UNDP office computer network.

48. Staff rule 110.1 states:

Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and the 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.

49. The UNDP Staff Rules (UNDP/ADM/97/1712 March 1997) Annex A gives examples of unsatisfactory conduct which have been investigated and which have led to disciplinary actions.

50. UNDP Staff Rules on Misconduct

1. Unsatisfactory conduct of a staff member which may be investigated and for which disciplinary measures may be imposed includes, but is not limited to:

- (a) acts or omissions in conflict with the general obligations of staff members set forth in Article I of the Staff Regulations and Rules;
- (e) misuse of official property, assets, equipment or files, including electronic files;
- (h) gross negligence, wanton disregard or reckless mishandling of property and assets leading to a loss for the organization;
- (i) premeditated action or omission to avoid or to deviate from Financial Regulations, Rules and Procedures, including inappropriate use of certification or approval authority;
- (m) failure to disclose promptly the receipt of gifts, remuneration or incentive payments or other benefits received by the staff member from an external source;

51. The first allegation of misconduct made by the Respondent is that Mr. Koutang was employed or engaged in unauthorised outside activity in breach of staff regulation 1.2(o) which stipulates that:

[s]taff members shall not engage in any outside occupation or employment, whether remunerated or not, without the approval of the Secretary-General

52. The Shorter Oxford English Dictionary (6th Ed) defines occupation as “The state of having one’s time or attention occupied; employment. What a person is (habitually) engaged in, especially. to earn a living; a job, a business, a profession; a pursuit, an activity.”

53. Black’s Law Dictionary (9<sup>th</sup> Ed) defines occupation as “[a]n activity or pursuit in which a person is engaged; esp., a person’s usual or principal work or business.”

54. Mr. Koutang accepts that he was involved in Infogenie although he disputes the extent of his involvement.

55. The Tribunal finds that Mr. Koutang was involved with the family business and as he had made no specific request for the approval of these

activities it was not formally authorised by the Organisation. However, the Tribunal finds that his involvement was known to the Organisation since 2005 and had raised no objection.

56. From the evidence of the former manager, the Tribunal finds that any involvement Mr. Koutang had in the business was limited. He held a 22% shareholding, and was on the Board of Directors. Beyond that the only evidence of his involvement in the day to day affairs of the business was his signature on the two letters sent to the tenant in exceptional circumstances which were fully explained.

57. The Respondent has not established that Mr. Koutang had outside employment. Although he had a role as a Board member this could barely be regarded as outside occupation in the correct definition of that word. Occupation denotes more than involvement and is particularly related to a person's employment. At the most the signing of the two letters gave the appearance of Mr. Koutang being engaged in outside activities.

58. That appearance was enough to justify further investigation into the matter by the Administration but in the absence of any evidence of a deeper involvement being uncovered by the investigation, the Tribunal finds that the existence of the two letters was not sufficient to show that he continued to have an occupation with Infogenie or to establish the serious charge of misconduct warranting dismissal, summary or otherwise. This is particularly so given the tolerance of the Administration up to that time to the Applicant's limited involvement and its willingness to benefit from it.

59. The second and related allegation of misconduct is that the outside association of Mr. Koutang with Infogenie placed him in a conflict of interest with the UNDP, as his functions in Infogenie were within the same area as that of his official functions at the local UNDP office.

60. The DC relied on a definition in paragraph 21 of the Standards of Conduct of the International Civil Service 2001 which defines conflict of interest as:

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 organisation.

61. The Respondent quoted a reference to conflict of interest in staff regulation 1.2(m) which states

[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.

62. The common element in each of these quotations is that a conflict of interest only exists where it is possible for the staff member or the business that he or she was involved to benefit by reason of the staff member's position with the United Nations. The policy reason for this is to ensure that the private interests of staff members do not interfere with their professional, United Nations interests.

63. It was accepted by the Respondent that 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

64. The Respondent has failed to prove the existence of the essential element of a benefit to either Mr. Koutang, or to the company in which he had some involvement.

65. The third allegation of misconduct was not relied on to the same extent by the Respondent. It was that Mr. Koutang jeopardised the integrity and security of

the Country office's wireless network by connecting his private router to the UNDP system and enabling third parties to access it. He had used his personal router for personal means in contravention of staff regulation 12(q).

66. Mr. Koutang accepted from the beginning that he had installed a private router in the UNDP office. The DC found that there was no evidence that Mr. Koutang had used it for his private purposes. In the light of office practice regarding private use of UNDP internet access by UNDP staff and their families, if he had done so it would have been unfair to single him out for charges on that ground. There was also no evidence that the security system had been breached and the investigator found that no evidence of unauthorised use of corporate resources such as mail, web or file servers. Those findings were not challenged by the Respondent.

67. The Tribunal finds that Mr. Koutang had no ulterior motive or malicious intent in installing the router. At worst it was an error of judgment which had no proven adverse effects on the Country Office.

### **Conclusion on issue 1**

68. The Administration did not have sufficient evidence of Mr. Koutang's level of engagement in outside activities to justify a finding that he had been engaged in an outside occupation or employment. Mr. Koutang's actions therefore did not warrant a charge of misconduct.

69. The Administration had no reasonable grounds to sustain its allegation that Mr. Koutang had an apparent conflict of interest through his involvement with Infogenie.

70. Mr. Koutang had installed his private router at UNDP but there was no resulting breach of security and no wilful misconduct by him to justify his separation.

## Issue 2

71. If the Tribunal is wrong on these conclusions, the question is whether the disciplinary sanction of separation without notice but with payment of termination benefits was proportionate to Mr. Koutang's conduct as alleged by the Respondent.

72. Not all misconduct must result in termination. Staff rule 10.2 sets out a range of disciplinary options available to the Respondent when dealing with cases of misconduct. It states:

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

(i) Written censure;

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

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

(iv) Suspension without pay for a specified period;

(v) Fine;

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

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

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

(ix) Dismissal

73. Of these available sanctions, only the last two contemplate the cessation of employment. In *Yisma* UNDT/2011/061 the Tribunal held that:

A disciplinary measure should not be a knee-jerk reaction and there is much to be said for the corrective nature of progressive discipline. Therefore, ordinarily, separation from service or dismissal is not an appropriate sanction for a first offence. However, the gravity of the misconduct is an important factor in determining the appropriateness of separation or dismissal as a sanction

74. In *Sanwidi* 2010-UNAT-084 the Appeals Tribunal made the following points about the role of the Dispute and Appeals Tribunals when reviewing the proportionality of disciplinary measures:

- a. the UNDT, in exercising judicial review, may interfere with the exercise of the Secretary-General's discretion in disciplinary proceedings against a staff member on the ground that the disciplinary measure is not proportionate to the misconduct.
- b. the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result.
- c. the Tribunal should examine the balance struck by the decision maker between competing considerations and priorities in deciding what action to take.
- d. there should be recognition that decision makers have some latitude or margin of discretion to make legitimate choices between competing considerations and priorities in exercising their judgment about what action to take.
- e. the Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse.
- f. it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.
- g. due deference must be shown to the Secretary-General's administrative decisions because Article 101(3) of the Charter requires the Secretary-General to hold staff members to the highest standards of integrity and he is accountable to the Member States of the United Nations in this regard.

75. Generally it is only in cases where the Tribunal finds that the decision is manifestly unreasonable, unnecessarily harsh, obviously absurd or flagrantly arbitrary (see *Sanwidi* 2010-UNAT-084 and *Aqel* 2010-UNAT-040) that the

Tribunal will find that the disciplinary measure was disproportionate. In such cases it may order imposition of a lesser measure.<sup>1</sup>

76. One of the factors relevant to the assessment of proportionality of a disciplinary outcome is whether the alleged conduct of staff member is capable of improvement through performance management. This was discussed in *Goodwin* UNDT/2011/104. Broadly put, if the actions in question are caused by a staff member's lack of capability or by systemic or organizational issues, and may be improved or rectified by performance management and training, they may be regarded as performance issues. On the other hand, misconduct involves a degree of wilfulness or gross and inexcusable negligence by the staff member.

77. The line between the two may be blurred. The lawful and just consequences of either type of behaviour will be determined by a number of factors including the position of responsibility held by the offender, the length of their service; their past work record, the extent and consequences of their behaviour and the degree to which that behaviour has reasonably affected the trust and confidence of the managers of the staff member.

78. Finally, in some cases a comparison may be made between the disciplinary measures imposed on staff members in similar circumstances. While this approach may assist an assessment of whether a measure imposed is proportionate generally the circumstances of each case differ so greatly that comparisons may be difficult to make.

79. Pursuant to ST/IC/2006/48, Information Circulars on the practice of the Secretary-General in disciplinary matters and possible criminal behaviour are issued. These contain common examples of misconduct and/or criminal behaviour and their disciplinary consequences in cases dealt with during the previous 12 month period ending 30 June. They may provide some guidance to the present case.

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<sup>1</sup> *Abu Hamda* 2010-UNAT-022, *Doleh* 2010/UNAT/025, *Zerezghi* UNDT/2010/122.

80. For the period July 2005 to 30 June 2006 some cases which justified summary dismissal included theft and misappropriation; unauthorised outside activities such as full time outside employment without prior approval; disclosure of highly confidential information; publically discrediting a supervisor and the organisation and interference with the official activities of the organisation.

81. Even at the highest level as alleged by the Respondent, the behaviour of Mr. Koutang did not reach these serious levels of misconduct. If he were associated with a company outside the United Nations this association was at a low level; any conflict of interest was apparent not actual; and the admitted installation of the router caused no actual breach of security.

82. The Administration is bound to act in a proportionate manner and it had an extensive range of options open to it for the conduct which it found Mr. Koutang to have committed. Even with termination benefits, in all of the circumstances of this case, dismissal was disproportionate to the conduct which the Respondent believed had been committed.

83. The Tribunal finds that even if Mr. Koutang had been properly found guilty of misconduct, the sanction of termination of his employment was disproportionate to the seriousness of the conduct, and also disproportionate to the sanctions imposed on other staff members whose misconduct was considerably more serious.

84. The Applicant's challenge is successful.

### **Compensation/ Remedies**

85. Mr. Koutang told the Tribunal that since his termination he has applied for posts with the United Nations but in spite of being shortlisted he has not been appointed. He has since pursued a career as an IT consultant so has mitigated his financial losses since his separation. He received termination benefits upon reconsideration by the Secretary-General.

86. The Applicant has lost all opportunity for re-employment by the United Nations due to his wrongful separation. While 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.

87. For this, the Tribunal awards the Applicant compensation of **one year's net base salary** at the rate at the time of his separation.

*(Signed)*

Judge Coral Shaw

Dated this 30<sup>th</sup> day of October 2012

Entered in the Register on this 30<sup>th</sup> day of October 2012

*(Signed)*

Jean-Pelé Fomété, Registrar, Nairobi