



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

KANGANATHAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Sri Hemamal Jayawardena

Counsel for Respondent:

Stefan Grieb, UNICEF

Bart Willemsen, UNICEF

Introduction

1. By application submitted via email on 16 June 2015, and filed via the Tribunal's eFiling portal on 23 June 2015, the Applicant contests a decision of 6 April 2015 by the United Nations Children's Fund ("UNICEF") to dismiss her for misconduct from her position of Operations Assistant (G-6).

Facts

2. The Applicant joined UNICEF in November 2003, as an Operations Assistant, Jaffna Office. From 1 January 2013, she worked as an Operations Assistant at the GS-6 level at the Kilinochchi Zone Office ("Kilinochchi Office"), on one year fixed-term appointments.

3. The Applicant's role was to provide operational and administrative support to the management of the Kilinochchi Office, which included the following duties:

- a. "Serves as custodian/cashier for office petty cash in accordance with financial rules and regulations. Assures that vouchers are completed for each transaction. Creates monthly accounting records and requests for replenishments for payment by Colombo as often as needed."
- b. "Certifies administrative invoices in accordance with financial/administrative rules and regulations. Compiles all supporting documentation for VISION transaction processing by Finance Unit in Colombo."
- c. "Supervises drivers and manages the field office vehicle fleet."
- d. "Maintains, updates and transmits the inventory records of non-expendable equipment."

e. “Obtains quotations for local procurement purposes. Assures that appropriate documentation is maintained for goods received, and that the storage of incoming goods is in compliance with the organisational standards and systems.”

4. On 4 December 2013, the UNICEF Representative for Sri Lanka (“UNICEF Representative”) and her Deputy received an email signed by “Staffs-Kilinochchi Zone Office-UNICEF” which alleged the commission of “illegal activities” by the Applicant at the UNICEF Kilinochchi Office and in her previous position at the Jaffna Office. The email referred to, *inter alia*, irregularities committed by the Applicant at the Kilinochchi Office in the procurement of construction services and in her handling of petty cash, her misappropriation of items listed in UNICEF fixed-assets inventory and irregular overtime claims.

5. On 5 December 2013, the UNICEF Representative forwarded the email dated 4 December 2013 to UNICEF’s Office of Internal Audit and Investigations (“OIAI”), which, on 5 December 2013, opened a case on “Theft of UNICEF property with [the Applicant] as the subject”.

6. On 7 April 2014, the firm Ernst & Young issued a draft report, commissioned by the UNICEF Representative, examining whether the assets and procurement processes at the UNICEF Kilinochchi Office were carried out in accordance with the UNICEF rules, regulations and documented practices. Based on interviews conducted with UNICEF officers and suppliers, and on a review of documents provided by UNICEF, the report concluded, *inter alia*, that:

- a. A number of irregularities were committed in the procurement of construction services, including:
 - i. quotations from different suppliers being identical or appearing to have similar, if not identical, handwriting;
 - ii. suppliers denying having provided quotations that bore their name;

iii. formats of quotations and invoices supposedly from the same supplier being different;

iv. a contractor having carried out the work awarded to another one; and

v. the signature of a supplier being different on various quotations and invoices;

b. Petty cash payments were not sent for reimbursement in the period they were incurred; and

c. A number of items listed on the inventory of fixed assets could not be traced.

7. By letter dated 14 August 2014, the Chief of Investigations, OIAI, informed the Applicant that she was the subject of an investigation “into allegations of theft of assets, fraud and irregular procurement” conducted pursuant to CF/EXD/2012-005 (“Executive Directive on Disciplinary Process and Measures”, dated 30 November 2012). The Applicant was informed, *inter alia*, of her right to be interviewed in person, to be presumed innocent, to receive a copy of the final report and to provide comments thereto.

8. On 15 August 2014, the Applicant was placed on administrative leave with full pay for an initial period of three months taking effect immediately.

9. From 17 to 27 August 2014, an OIAI investigator conducted an on-site investigation into allegations that the Applicant “a) [e]ngaged in procurement irregularities; b) [m]isappropriated assets; c) [s]ubmitted irregular overtime claims; and d) submitted irregular petty cash claims”. In this process, the investigator searched the Applicant’s office, seized her laptop, mobile phone, flash drive and handwritten book; interviewed the Applicant, seven other staff members and a number of suppliers; and reviewed procurement files for eight procurement exercises flagged as irregular by Ernst & Young. Suppliers, who spoke Tamil, were interviewed “through the Ernst & Young auditor” who conducted the first investigation. A number of them were not interviewed, due to

their unwillingness or time constraints, so the OIAI investigator relied upon the information previously obtained by Ernst & Young.

10. The OIAI investigator issued his report in November 2014, reaching the following conclusions.

11. Firstly, that the Applicant engaged in misconduct by committing procurement irregularities as:

- she misrepresented to the Organization that it was getting valid and independent quotations;
- she favoured a certain supplier, Mr. R. of company R. E., in return for appearing to be efficient and capable in managing the [Kilinochchi Office]; and
- she certified for payment invoices from suppliers whom she knew were selected on false pretences and who did not carry out the work.

12. Most specifically, the OIAI investigator found that for each of the eight procurement processes under review, the Applicant submitted three quotations that were affected by the following irregularities:

- a. “Installation of met roofing sheet for container”: the Applicant recommended company T., whose representative submitted a quotation bearing the same address and business description as one of the two other quotations; the successful contractor admitted during an interview to having submitted a quotation along with his brother in order to increase his chances of getting the contract;
- b. “Installation of anti-climbing device”: the Applicant recommended company R. E. in circumstances where the price difference between the three quotations was of the exact same increment of RS10,000, and two quotations bore the same handwriting; the two unsuccessful bidders subsequently declared to the OIAI investigator that they signed the quotations at the request of Mr. R. and not on behalf of the company they represented;

c. “Purchase of office chairs”: the Applicant recommended to award the contract to company J. S. in circumstances where the three quotations bore the same handwriting and two of them had related names (i.e. J. S. and J. F.); the owner of J. S. subsequently admitted to the OIAI investigator that he also owns J. F., and that the two quotations bore his handwriting;

d. “Fixing of collapsible door”: the Applicant recommended awarding the contract to company R. E. although it was not the lowest bid, based on “the type of materials that would be used in the fabrication of the grill doors”; this justification to choose the second lowest bidder was found to be insufficient by the OIAI investigator on the basis that all suppliers were asked to present a quotation based on the same specifications; therefore, if the lowest bidder did not meet the specifications, his quotation should have been deemed not to meet the requirements and should have been formally discarded, which was not the case; furthermore, the third bidder declared to the OIAI investigator that her business does not engage in that type of work and was asked by Mr. R. to sign a quotation;

e. “Fixing of steel bars”: the Applicant recommended awarding the contract to company R. M. R. although its quotation bore the same handwriting as the one submitted by company R. E.; the OIAI investigation uncovered that the work had in fact been done by Mr. R., whose name was registered in the security log book; the representatives of company R. M. R. and the third bidder both declared that their enterprise was not engaged in that type of work but had signed the quotations at the request of Mr. R. or a person related to him;

f. “Extension of car park shed”: the Applicant recommended to award the contract to company R. E. although two quotations bore the same handwriting, and all three quotations listed the same items with the same terminology and in the same order and quoted amounts in round figures, with increments of RS5,000; the two unsuccessful bidders subsequently declared to the OIAI investigator that they did not provide a quotation for that job, and one of them admitted being Mr. R.’s father;

g. “Building of motor bike and additional security room”: the Applicant recommended to award the contract to company R. M. R. although i) two of the three quotations bore the same handwriting, misspelt the word “Quotation” as “Quatation”, and listed the same items with the same terminology and in the same order; ii) a fourth quotation from R. E. for a higher price was not included in the bid tabulation sheet and iii) only one of the bidders provided the right measurements for the quotation, but was not awarded the contract; the OIAI investigation subsequently uncovered that i) Mr. R. performed the work although he had not been awarded the contract; ii) R. M. R.’s owner did not prepare the quotation but signed it for Mr. R. and did not perform the contract; and iii) the second lowest bidder declared that she did not prepare the quotation nor sign it, but had in the past given blank quotations from her company to Mr. R.; and

h. “Building of vehicle service centre”: the Applicant recommended awarding the contract to company R. E. although i) two quotations listed the same items with the same terminology and in the same order and ii) the representative of the two other contractors, one of them being Mr. R.’s father, declared to the OIAI investigator that they did not submit the quotations.

13. Secondly, the OIAI investigator concluded that the Applicant engaged in misconduct by overstating her working hours for the purpose of overtime claims.

14. Thirdly, the OIAI investigation found that the allegations that the Applicant misappropriated items listed in the inventory—during the transfer of the office from Jaffna to Kilinochchi—could not be confirmed.

15. Lastly, the OIAI investigator found that the Applicant, using her position of authority, asked drivers to sign petty cash vouchers that included items that they did not purchase or pay for. However, this behaviour was not found to amount to misconduct as the investigator concluded that “[t]his concern appears to be more of a process issue whereby a system needs to be established to ensure that only the staff member who actually receives the cash signs as “Payee” on the petty cash voucher”. In this respect, the investigator reported that the Applicant explained

during her interview that out of efficiency, “she just collected the receipts and invoices, and when there was an opportunity to include them in a voucher that included other items purchased and paid for by the drivers, she asked them to sign the vouchers”. He also found that there was no evidence that the Applicant used petty cash to purchase personal items.

16. By letter of 19 December 2014, the Applicant was charged with misconduct pursuant to sec. 4.1 of CF/EXD/2012-005, on the following grounds:

- a. “[S]ubmission of false and fraudulent quotations for procurement of goods on behalf of UNICEF”;
- b. “[S]ubmission of false overtime claims for claiming hours that [she] did not actually work”;
- c. Not “exercis[ing] due care in the custody and management” of physical property and office assets at the Kilinochchi and Jaffna offices; and
- d. Abusing her authority by threatening drivers who she supervised to certify false petty cash claims.

17. The Applicant was invited to submit a response and “countervailing evidence” within 15 calendar days of the above charge letter, and was advised that she may be subject to disciplinary sanctions.

18. On 23 January 2015, the Applicant, through the Office of Staff Legal Assistance, responded to the allegations of misconduct against her.

19. On 6 April 2015, the Applicant was dismissed for misconduct, more specifically for:

- a. Gross negligence in the submission of false and fraudulent quotations for procurement of goods on behalf of UNICEF; and
- b. Committing irregularities in the handling of petty cash and abusing her authority by asking drivers, her supervisees, to certify false claims.

20. The above two grounds for dismissal were deemed to constitute violations of sec. 1.3 and 1.4 of CF/EXD/2012-005. The charges in respect of misappropriation of assets and irregularities in overtime claims were dismissed.

21. In respect of the first ground for dismissal (para. 19.a above), the contested decision more specifically found that the Applicant “was grossly negligent in her review of the bids and suppliers” for eight construction projects where “procurement irregularities” have been found. It informed the Applicant about the following conclusions:

35. It was your responsibility as the Operations Assistant to ensure the validity of the bids and suppliers. You had the responsibility to ensure that the bids were independent and not from related parties prior to submission of your recommendation to the Head of the Zone Office. You had the responsibility to perform due diligence on the background of the suppliers. You should have made telephone calls to the suppliers, visited the location of the suppliers’ companies, and requested references. If you had exercised due diligence, you would have determined that Mr. [R.] was the bidder behind most of the suppliers’ bids. If you had any doubts as to the lack of independence of the bidders, it was incumbent on you to report this to the Head of the Zone Office.
36. Your defence that you obtained approval from UNICEF Colombo on the contracts is misleading because the approval from UNICEF Colombo are at the pre-bid stage, i.e., approval to initiate the project. The UNICEF Colombo Office depended upon you to diligently select and verify the validity of the suppliers and the bids.
37. It is important to note that Mr. [R.] was either a bidder, directly or indirectly, or the selected supplier on most of the projects which have been investigated by OIAI. Based on an email submitted to OIAI, you have known the supplier, Mr. [R.], for a considerable period of time, including the time you were based in UNICEF Jaffna. Your previous supervisor, Mr. [M.], confirmed that he had warned you against the continued over-use of Mr. [R.] for UNICEF’s contracts. Therefore, you should have known that the continued use of the services of Mr. [R.] would be in contradiction to the UNICEF policy on competitive procurement.
38. You have been trained in UNICEF procurement procedures. The Guidelines on procurement is (sic.) in the UNICEF Supply Manual which can be found on the UNICEF intranet, in

particular Chapter 6 on “Procurement of Supplies, Equipment and Services” for procurement of miscellaneous supplies and services below USD2,500 per transaction. You took several workshops on procurement In 2014, the Supply Assistant visited UNICEF Kilinochchi Zone Office to give an Orientation on Supply Procurement to Operations and Programme Assistants. On 25 April 2012, the Chief of Supply visited Kilinochchi Zone Office to assist KZO in the day-to-day supply operations and Vision transactions. You have had sufficient training to be aware that your selection process was in violation of UNICEF procurement procedures.

22. As to the second ground for dismissal (para. 19.b above), the contested decision stated:

31. You were charged with committing irregularities as the Custodian for Petty Cash. You admitted that you had asked drivers to sign petty cash vouchers which included items which the drivers did not purchase or pay for.
32. Your defense was that your “unorthodox approach” regarding signatures was borne out of concern for efficiency rather than fraud or gain. Your actions should be considered a performance issue, rather than misconduct.
33. You admitted to requesting drivers to sign petty cash vouchers for items they did not purchase. This is not a performance issue. You committed fraud and abuse of authority by requesting drivers to sign petty cash vouchers for items they did not purchase.

23. The contested decision then concluded that the Applicant “committed irregularities as the Custodian for Petty Cash responsible for documentation related to petty cash reconciliation and [she] abused [her] authority by asking drivers, [her] supervisees, to certify false claims”.

24. On 6 June 2015, the Applicant submitted a request for management evaluation of the decision to dismiss her from her position of Operations Assistant.

25. On 9 June 2015, she was advised by the Chief, Policy and Administrative Law Section, that she may submit an application directly to the Dispute Tribunal.

26. On 16 June 2015, the Applicant emailed her application to the Tribunal and, on 23 June 2015, she filed it through the Tribunal's eFiling portal.

27. The Respondent filed his reply on 30 July 2015.

28. By Order No. 236 (GVA/2015) of 17 November 2015, the Tribunal ordered the parties to provide further information and evidence on two specific issues. The Respondent and the Applicant filed their submissions on 26 November 2015 and 1 December 2015, respectively.

29. On 19 January 2016, the Tribunal held a hearing on the merits of the case, with the participation of counsel for both parties.

Parties' submissions

30. The Applicant's principal contentions are:

Gross negligence in the submission of false and fraudulent quotations for procurement

a. The facts in support of the first ground for dismissal have not been established as the contested decision relies upon witnesses' statements that are not signed, a report prepared by Ernst & Young that is a "draft" document and is neither dated nor signed by its author(s), an anonymous email and "a controversial inadmissible Note for the Record" sent by the Applicant's former supervisor to the OAIA investigator via email; the contested decision also contains unsupported allegations in respect of the Applicant's training on procurement practices;

b. The irregularities in the quotations for procurement were not obvious, as evidenced by the fact that they were not detected by the Applicant's supervisors when they reviewed the quotations for their approval but only following investigations by an auditor and then an investigator; the Applicant should not be held accountable to a standard of performance similar to that of an investigator or an auditor;

c. Even if the facts had been established, they do not amount to misconduct as the UNICEF guidelines on procurement do not require to obtain three quotations for procurement of miscellaneous supplies and services below USD2,500, and all the concerned quotations were below this threshold;

Irregularities and abuse of authority in the handling of petty cash

d. Similarly, the Applicant submits that the facts in support of the second ground for dismissal have not been established as the contested decision misinterprets her statement as an admission of fraud and fails to consider her explanations to the effect that out of efficiency, her method for processing petty cash vouchers consisted of “collecting several of them and compiling them in one single voucher” such that “it is not only possible, but quite probable, that an item purchased by a particular driver being entered in a voucher that was signed by another driver”;

e. Furthermore, the OIAI investigator’s reliance upon the drivers’ testimonies is “imprudent” as their memory in respect of petty cash vouchers processed a month earlier may be inaccurate, and their witness statements are not signed;

f. The contested decision does not establish that the Applicant committed fraud nor that she abused her authority, as:

i. It is implausible that the drivers felt under pressure to sign vouchers submitted by the Applicant given her low rank and the requirement to obtain two additional signatures from higher ranking officers;

ii. The method of processing petty cash vouchers together has been an accepted practice since the Applicant worked in the Jaffna Office; and

iii. There is no evidence that the Applicant obtained any personal or financial gain;

Proportionality of sanction

g. In any event, dismissal is a disproportionate sanction in the present case considering that it is the Applicant's first offense, her "good past record as a staff member", the Kilinochchi Office's post-war situation, the fact that the first alleged offense solely involves negligence and each transaction was well below USD2,500, and that the value of all petty cash vouchers altogether amounts to less than USD500;

Procedural irregularities in the conduct of the investigation

h. The Applicant further alleges that the investigation is tainted by procedural and substantive irregularities, namely:

i. It was initiated by an anonymous email, which triggered a "knee jerk reaction" from the Organization, rather than a formal complaint;

ii. The interview conducted by the OIAI investigator was akin to an "interrogation", not professional, "bordering on harassment" and should have been conducted by a female investigator considering the Applicant's Hindu culture;

iii. The Applicant has not been treated with dignity as she was informed of the investigation against her after her supervisors were, which caused her embarrassment, and was escorted out of her office by security staff after her work equipment and belongings had been seized; and

iv. The Applicant did not receive copy of the transcripts of her interview, which impaired her ability to respond to the allegations against her;

Remedies

- i. Consequently, the Applicant requests:
 - i. That the disciplinary sanction against her be rescinded or lessened;
 - ii. To be reinstated in her post or in a similar position within the Organization; and
 - iii. To be paid “reasonable” compensation.

31. The Respondent’s principal contentions are:

Gross negligence in the submission of false and fraudulent quotations for procurement

- a. The facts established by an initial review conducted by Ernst & Young and a subsequent investigation by the OIAI show that:
 - i. The Applicant asked Mr. R. of company R. E., whom she knew, to get her three quotations for procurement of construction services;
 - ii. Mr. R. was “either a bidder, directly or indirectly, in the UNICEF KZO procurement”;
 - iii. “Mr. R. was awarded all the contracts either directly or indirectly and performed all the services”; and
 - iv. “The Applicant took no action to obtain competitive bids and falsely presented to her managers that the quotations were valid and (sic.) independent contractors”;
- b. The Applicant, who was responsible for obtaining valid quotations from independent contractors for procurement, and had been trained for that purpose, knew or should have known that the selection of a bidder who had submitted numerous quotations for the same project was in flagrant violation of UNICEF procurement procedures and practices; therefore, her

conduct amounts to gross negligence and constitutes misconduct pursuant to sec. 1.4(d) or (f) of CF/EXD/2012-005;

Irregularities and abuse of authority in the handling of petty cash

c. By her own admission, the Applicant, who was the petty cash custodian, “submitted irregular petty cash claims when she asked drivers, her supervisees, to sign and certify false petty cash vouchers for items they did not purchase”;

d. The Applicant’s actions contravene UNICEF Financial and Administrative Policy 4: Cash Management, Supplement 1 – Cash Accounts (“Policy on Cash Accounts”);

e. The Applicant engaged in misconduct by submitting fraudulent documents for petty cash reconciliation and abusing her authority in asking her supervisees to falsely certify these documents;

Proportionality of sanction

f. Dismissal was a proportionate disciplinary measure to sanction the Applicant’s gross negligence in the submission of fraudulent quotations for procurement as it is of the outmost importance to uphold the independence and impartiality in the UN procurement process, irrespective of the amount involved;

Procedural irregularities in the conduct of the investigation

g. As to the alleged irregularities of the investigation, the Respondent submits that:

i. According to the Chief of Investigation, OIAI, the original statement of the witnesses he interviewed are signed by the witnesses;

ii. The investigation into the Applicant’s alleged misconduct was legally initiated based on the independent findings of Ernst & Young commissioned by the UNICEF Representative, in accordance with

CF/EXD/2012-005 that provides that the Director, OIAI, has “the right to initiate an investigation into suspected misconduct whenever evidence is uncovered that suggests that there has been a breach of the standards of conduct”; and

iii. Contrary to the Applicant’s assertion, the evidence shows that she has been trained on procurement procedures.

h. Consequently, the Respondent asks the Tribunal to dismiss the application in its entirety.

Consideration

32. As regularly recalled by the Appeals Tribunal, it is settled jurisprudence (see e.g. *Walden* 2014-UNAT-436 and *Diabagate* 2014-UNAT-403) that when reviewing a disciplinary sanction imposed by the Administration, the role of the Tribunal is to examine whether:

- a. the facts on which the sanction is based have been established;
- b. the established facts qualify as misconduct; and
- c. the sanction is proportionate to the offence.

33. The Tribunal further recalls that staff regulation 1.2(b) provides:

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

34. Sec. 1.3 of CF/EXD/2012-005 provides:

Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the UN Staff Regulations and UN Staff 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 (see UN Staff Rule 10.1).

35. In turn, sec 1.4 of said executive directive provides that “[m]isconduct includes but is not limited to ... (c)... abuse of authority ...; ... (f) gross negligence resulting in losses to the Organization”.

36. Finally, sec. 1.5 provides that:

Unsatisfactory performance does not constitute misconduct and, therefore, does not fall within the scope of this directive. Departures from the standards of performance shall be addressed through procedures and mechanisms established for that purpose (including the performance assessment system).

37. The Tribunal will examine each of the two grounds for dismissal in turn, in light of the standard set by the jurisprudence (see para. 32 above) and by the above-quoted legal provisions.

Gross negligence in the submission of false and fraudulent claims for procurement

38. The main facts on which the first ground for dismissal was based are not in dispute. Indeed, it is not contested that the Applicant, in her role as Operations Assistant, submitted quotations for procurement of goods and services for UNICEF and of a value below USD2,500 that were later found to be false or fraudulent. A number of quotations allegedly from different suppliers bore the same handwriting or identical addresses, reproduced the same spelling mistake, contained identical wording, quoted prices with a difference of exactly the same amount, or were submitted under related names. Out of the eight procurement exercises under review, the Applicant directly recommended that four contracts be awarded to Mr. R. or his company, R. E.. It was uncovered that two additional contracts were ultimately awarded to Mr. R., but through quotations submitted under different names. There is also no doubt that the Applicant knew Mr. R..

39. The parties dispute the fact that the Applicant had been warned by her former supervisor when she worked at the Jaffna Office against “over-using Mr. R. to perform UNICEF’s contracts”. The only evidence on file in this respect is an email written by the Applicant’s former supervisor to the UNICEF representative on 24 April 2014, namely two years after he stopped supervising

the Applicant, for the purpose of the investigation by OIAI. The witness was not interviewed by the OIAI investigator.

40. The Tribunal considers that the exact nature and the basis for this warning, if any, are unclear. As more amply discussed below, the repetitive use of a specific contractor for low value procurement does not appear to violate any procurement rule (see para. 46 below). Furthermore, it is unclear what the Applicant's former supervisor meant by warning the Applicant against "over-using" Mr. R. whilst, according to his own statement, he was in fact the one responsible to award the contracts for procurement, upon recommendation from the Applicant and a National Officer. Finally, it is dubious that any formal warning was issued as it was not recorded in the Applicant's file, and it is not reflected in her performance appraisals for the relevant period, where her former supervisor consistently stated that she fully achieved her objectives in respect of procurement activities and was "very conversant with the financial guidelines and circulars". Therefore, the Tribunal does not find this alleged warning germane to the determination of the present application.

41. The Tribunal further notes that the Respondent alleges in his reply that the Applicant admitted to the OIAI investigator having asked Mr. R. to submit to her three quotations for eight of the procurement processes. However, since this alleged fact was not part of the contested decision and, therefore, not a fact upon which the sanction was based, it is not relevant to the Tribunal's review as per the standard set forth above (see para. 37 above).

42. With respect to the second issue to examine, i.e., whether the established facts do qualify as misconduct, the Tribunal notes that the Organization found in the contested decision that the Applicant's conduct amounted to gross negligence as she failed to exercise due diligence in the review of quotations for eight construction projects where irregularities had been found. On this basis, the Organization concluded that the Applicant "failed to uphold the highest standards of efficiency, competence and integrity expected from staff members, in accordance with [s]taff [r]egulation 1.2", which constitutes a violation of sec. 1.3

and 1.4 of CF/EXD/2012-005. In his reply, the Respondent relied more specifically on sec. 1.4(f) of CF/EXD/2012-005.

43. The question at issue is, therefore, whether the Applicant's lack of due diligence in the submission of quotations for procurement constitutes misconduct pursuant to sec. 1.3 and/or sec. 1.4(f) of CF/EXD/2012-005 quoted above, or whether it is a mere performance issue. To make that assessment, the Tribunal will examine, in turn:

- a. Whether the Applicant violated any applicable procurement rules or other obligations under the staff rules and regulations; and
- b. Whether her behaviour amounted to gross negligence and resulted in losses to the Organization.

44. At the outset, the Tribunal emphasises that the Applicant did not contravene "Chapter 6: Procurement of Supplies, Equipment and Services", of UNICEF "Supply Manual". Sec. 3.1 and 3.2 of said manual clearly state that "competitive tendering" is not required for procurement below USD2,500, and the value for each project in the present case was significantly below this threshold. Accordingly, the obligations for the "Supply Manager" to ensure, *inter alia*, "that the bidder is reputable and the offer is acceptable to UNICEF" (sec. 8.1(c) and 11.3.1 of the Supply Manual) and that "the procurement process has been carried out in a fair, transparent and proper manner" (sec. 11.3.1(d) of the Supply Manual) did not apply to the procurement exercises under review.

45. The Tribunal is aware that the UNICEF Sri Lanka Country Office has adopted a practice to obtain three quotations even for purchases below USD2,500. This practice, however, does not make the procurement rules governing contracts over USD2,500 applicable to those of a lower value. Furthermore, it has not been established that the Applicant, as an Operations Assistant (G-6), would have had the authority to conduct the review that a procurement process for a value of over USD2,500 involves in accordance with the Supply Manual, which is much more complex than that for a value below this threshold.

46. The Tribunal also notes that whereas the Organization stated in the contested decision that the over-use of a supplier would contravene UNICEF rules, it did not identify any specific provision in this respect. There is no rule in the Supply Manual preventing the use of the same contractor for several contracts, particularly for low value procurement. Rather, said manual provides that potential suppliers may be pre-qualified and placed on a list of pre-approved suppliers (sec. 5.0), therefore suggesting that a supplier may be used repeatedly.

47. Finally, it is noted that whereas the OIAI investigator identified six contracts that were ultimately awarded to Mr. R. upon the Applicant's recommendation, there is no indication as to what proportion of the total procurement work done by the Applicant these represented. It is recalled in this regard that only eight contracts for which Ernst & Young identified irregularities were investigated by OIAI.

48. Therefore, the Tribunal concludes that it has not been established that the Applicant breached any applicable procurement rule.

49. The Organization alleged in the contested decision that the Applicant's misconduct stems from a failure to uphold the highest standards of efficiency, competence and integrity. In this respect, the Tribunal notes that the Respondent did not demonstrate, or even allege, that the Applicant acted deliberately in submitting quotations for procurement that were ultimately found to be false or fraudulent, knew that the quotations were irregular, or that she gained any personal benefit. Hence, the Applicant's integrity is not at issue.

50. In turn, the Tribunal stresses that failure to observe the standards of efficiency and competence generally triggers issues of performance, which are not considered misconduct pursuant to sec. 1.5 of CF/EXD/2012-005. In the instant case, the Respondent argues that the Applicant's acts go beyond issues of performance as she was grossly negligent in her exercise of due diligence in her review of quotations for procurement. In this respect, the Tribunal notes that gross negligence is specifically envisaged in sec. 1.4(f) of CF/EXD/2012-005, which is indeed relied upon by the Respondent in his reply. The term gross negligence is not further defined in the executive directive.

51. It is, however, well established that gross negligence requires “negligence of a very high degree involving an extreme and wilful or reckless failure to act as a reasonable person in applying or failing to apply the regulations and rules of the Organization” (sec. 1.3 of ST/AI/2004/3 (Financial responsibility of staff members for gross negligence)) or in fulfilling assigned duties (see *Mwamsaku* UNDT/2011/163; *Mushema* UNDT/2011/162). It may also result from a failure to act as a reasonable person would with respect to a reasonably foreseeable risk, when such risk materialises (*Kamara* (UNDT/2012/169 confirmed by 2014-UNAT-398). Gross negligence must be distinguished from “an inadvertent error, oversight or simple negligence, or inability to foresee the negative consequences of a chosen course of action” (sec. 1.2(a) of ST/AI/2004/3; see also *Bertucci* UNDT/2010/094).

52. It has not been established that the Applicant in the instant case wilfully or recklessly failed to fulfil her duties or to act as a reasonable person would with respect to a foreseeable risk.

53. Firstly, there is no support for the Organization’s assertion that the Applicant had an obligation to ensure that the suppliers provided valid and independent bids and, for this purpose, to perform due diligence on the background of suppliers by making telephone calls to suppliers, visiting their location and requesting references. As recalled above, such obligation did not arise from the Supply Manual, which does not foresee competitive tendering for procurement below USD2,500. The Applicant’s terms of reference did not include such duty either; rather, they merely provided that the Applicant was responsible to “[o]btain quotations for local procurement purposes” and “[a]ssure that appropriate documentation is maintained for goods received” (emphasis added). Clearly, the Applicant’s responsibilities over procurement processes were of a limited scope and did not involve the duties of verifications and diligence that are, pursuant to the Supply Manual, incumbent upon supply officers, who are normally responsible for procurement of a higher value.

54. Secondly, the Tribunal finds that if the irregularities in the quotations were so obvious that a reasonable person would have foreseen a risk of them being

fraudulent, it remains unclear why these were not detected by the Applicant's supervisor, who was responsible for awarding the contracts. Indeed, it took an investigation from an audit firm, and then from OIAI, to establish the false and fraudulent character of such quotations. The Applicant is correct to say that as an Operations Assistant, she cannot be held to such a high standard.

55. Finally, the Organization's own conclusion that the Applicant "failed to exercise due diligence" falls short of a demonstration of gross negligence. Whilst it may raise an issue of performance, it does not meet the threshold for gross negligence described above.

56. Further, the Tribunal notes that pursuant to sec. 1.4(f) of CF/EXD/2012-005, gross negligence amounts to misconduct only if it resulted in losses for the Organization. In the instant case, the Respondent, although being explicitly invited by the Tribunal, has adduced no evidence that the Organization incurred any loss as a result of the alleged misconduct. The Respondent argues that gross negligence may be characterised as misconduct even if the Organization did not incur any loss. The Tribunal acknowledges that sec. 1.4 of CF/EXD/2012-005 does not contain an exhaustive list of acts that amount to misconduct. That being said, the Tribunal finds that since the Organization explicitly addressed the issue of gross negligence as misconduct in CF/EXD/2012-005, and required that it resulted in losses for the Organization, this last element is necessary to establish misconduct. Concluding otherwise would deprive sec. 1.4(f) of its meaning.

57. It follows from the above that neither of the two elements under sec. 1.4(f) of CF/EXD/2012-005 has been established, and the facts set forth in the contested decision do not amount to misconduct under this provision. Furthermore, in light of its considerations above, the Tribunal is equally satisfied that the Applicant's behaviour does not amount to misconduct under the terms of sec. 1.3 of CF/EXD/2012-005.

58. In view of the foregoing, the Tribunal finds that the facts upon which the first ground for dismissal was based do not amount to misconduct.

Irregularities in the handling of petty cash and abuse of authority in asking drivers to certify false claims

59. Again, the main facts on which the second ground for dismissal was based are not in dispute. The Applicant admitted that she asked drivers, her supervisees, to sign petty cash vouchers that included items that they did not purchase or pay for. The Applicant explained that out of efficiency, she collected several petty cash vouchers and compiled them into a single one, therefore, leading to drivers sometimes signing for items they did not purchase themselves. The OIAI investigator found that there is no evidence that the Applicant used petty cash to purchase personal items, and that “[t]his concern appears to be more of a process issue whereby a system needs to be established to ensure that only the staff member who actually receives the cash signs as ‘Payee’ on the petty cash voucher”.

60. The contentious issue is whether the established facts constitute misconduct. The Applicant argues that this should be considered as a performance issue given that she used this “unorthodox approach” out of efficiency rather than fraud or gain.

61. The Tribunal notes that pursuant to her terms of reference, the Applicant served as custodian/cashier for office petty cash “in accordance with financial rules and regulations” and had to “[assure] that vouchers are completed for each transaction”. The Policy on Cash Accounts requires that a petty cash voucher be prepared prior to any disbursement from the petty cash account, and the voucher be signed by the payee upon receipt of money from the petty cash custodian. It further provides that “the custodian of petty cash shall ensure that the petty cash issued (sic.) only for authorized purposes and will be held personally liable for the proper management and safekeeping of the funds.” The Applicant’s actions clearly contravened the Policy on Cash Accounts. In this respect, the Tribunal stresses that it is not for the Applicant to adopt practices that differ from the Organization’s financial rules, for reasons of efficiency or for any other reason.

62. The Tribunal finds that by failing to comply with her obligations under a relevant administrative issuance, the Applicant committed misconduct pursuant to sec. 1.3 of CF/EXD/2012-005 quoted above.

63. As to the Organization's finding that the Applicant also abused her authority, the Tribunal considers, in light of the conclusion reached by the OIAI investigator that the mishandling of petty cash was a "process issue", that the Applicant's misconduct lies in her failure to apply the relevant financial rules rather than an improper use of her position of influence. The mere fact that the Applicant's procedure for handling petty cash happened to involve her supervisees is not sufficient in the circumstances of the present case to establish that she abused her authority. Therefore, the Tribunal finds that the Applicant's acts do not constitute misconduct under sec. 1.4(c) of CF/EXD/2012-005 and that the reprehensible aspect of her behaviour is fully reflected by reference to sec. 1.3 of CF/EXD/2012-005 alone.

Proportionality of sanction

64. Pursuant to sec. 4.3 of CF/EXD/2012-005, disciplinary measures "shall be proportionate to the nature and gravity of the staff member's misconduct".

65. As consistently recalled by the Appeals Tribunal, "the degree of the sanction is usually reserved for the Administration, who has discretion to impose the measure that it considers adequate to the circumstances of the case and to the actions and behaviour of the staff member involved" (*Portillo Moya* 2015-UNAT-523). Therefore, "only if the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity, ... the judicial review would conclude in its unlawfulness and change the consequence (i.e., by imposing a different one)" (*Portillo Moya* 2015-UNAT-523).

66. In the instant case, the Tribunal's finding that only one of the two grounds for dismissing the Applicant constitutes misconduct is necessarily relevant when it comes to assessing the proportionality of the sanction. Counsel for the Respondent acknowledged during the hearing that if the first, more serious ground for

dismissal were not to stand, most probably the sanction would be too harsh in respect of the second ground alone. Similarly, the Respondent justified in his reply the proportionality of the sanction solely on the basis of his finding of gross negligence in procurement processes, without any reference to irregularities in the handling of petty cash.

67. The Tribunal finds that in the absence of any loss for the Organization, any personal advantage for the Applicant and, most importantly, in light of the OIAI's finding that the issue of petty cash is one of systemic practice requiring the implementation of better procedures, the offence related to the second ground for dismissal is to be considered as a minor one.

68. In this respect, the Tribunal notes that the practice of the Secretary-General in disciplinary matters, as exposed in his yearly information circulars, suggests that a written censure is generally imposed to sanction a failure to follow a procedure prescribed in administrative issuances where there is neither a loss for the Organization nor a personal benefit for the staff member. For example, a written censure was imposed in the following cases:

- a. A staff member failing to perform satisfactorily the duties of project supervisor by improperly certifying goods as having been delivered and work as having been satisfactorily completed without verifying (ST/IC/2008/041);
- b. A staff member failing to perform duties pursuant to correct procurement procedures, including by (a) failing to make efforts to ensure completion of procurement documentation in accordance with provisions of the Procurement Manual, (b) failing to ensure that construction works were completed in accordance with scope-of-work and bill-of-quantity documentation and (c) improperly certifying project completion reports, contractor performance reports and service certification reports (ST/IC/2008/041);
- c. A staff member who was head of the Contracts Unit, Procurement Section, and Acting Chief Procurement Officer in a peacekeeping mission

failing to perform duties pursuant to the correct procurement procedures, as demonstrated, *inter alia*, by poor file management practices and allowing brand-specific items to be included in scope-of-work and bill-of-quantity documentation (ST/IC/2008/041); and

d. A staff member negligently failing to properly supervise and monitor the activities of a major project and failing to comply with the Organization's procedures in respect of external funding (ST/IC/2004/28).

69. After reviewing all the facts and circumstances in the instant case, as well as the sanctions applied in similar cases, the Tribunal finds that dismissal, which is the most severe disciplinary measure listed in sec. 4.3 of CF/EXD/2012-005, is excessive and absurd in its severity with respect to the Applicant's misconduct for irregularities in the handling of petty cash alone.

70. The Tribunal concludes that although the Applicant's commission of irregularities in the handling of petty cash constitutes misconduct and warrants the imposition of a disciplinary measure, the contested decision is unlawful because dismissal is disproportionate to the gravity of the offense.

71. The Tribunal considers that the less severe disciplinary measure pursuant to sec. 4.3 of CF/EXD/2012-005, i.e. written censure, would be proportionate to the nature and gravity of the Applicant's misconduct. It would also achieve the purpose that a disciplinary measure seeks to attain in this case, which is to avoid repetition of the wrongdoing by ensuring that the Applicant duly complies with the Policy on Cash Accounts.

Remedies

72. Article 10.5 of the Statute of the Dispute Tribunal states:

As part of its judgement, the Dispute Tribunal may only order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of

compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation, and shall provide the reasons for that decision.

73. Having found that the contested decision is unlawful because dismissal is disproportionate to the gravity of the misconduct, the Tribunal rescinds it and substitutes the disciplinary measure imposed thereto with a written censure in accordance with art. 10.5(a) above (see e.g. *Portillo Moya* 2015-UNAT-523; *Abu Hamda* 2010-UNAT-022).

74. Pursuant to the same provision, the Tribunal shall set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission as the contested decision concerns termination.

75. In calculating the *quantum*, the Appeals Tribunal stressed that the determination of the “in lieu compensation” must be done on a case-by-case basis and carries a certain degree of empiricism (*Mwamsaku* 2011-UNAT-265). The Appeals Tribunal further held that in setting the amount of compensation in lieu of reintegration, the Tribunal may take into account the grounds on which the decision to dismiss was rescinded, the nature and the level of the post formerly occupied by the staff member (i.e., continuous, provisional, fixed term), the remaining time, chances of renewal and the two-year limit imposed by the Statute of the Dispute Tribunal, which constitutes a maximum and cannot be the average “in lieu compensation” established by the court (see e.g. *Mushema* 2012-UNAT-247; *Liyanarachchige* 2010-UNAT-087; *Cohen* 2011-UNAT-131; *Harding* 2011-UNAT-188).

76. Considering that the contested decision was rescinded on the basis that the Organization erred in finding that the Applicant's handling of procurement processes amounted to misconduct, and that the Applicant was employed under one year fixed-term appointments, the Tribunal finds that it would be adequate,

fair and reasonable in the present case to award compensation in lieu of rescission in an amount equal to one year net base salary, based on the Applicant's salary on the date of the termination of her fixed-term appointment, i.e., on 6 April 2015.

77. Turning to the Applicant's request to "be paid reasonable compensation as the UNDT considers reasonable", the Tribunal may, pursuant to art. 10.5(b) of its Statute, award compensation for harm suffered as a result of the contested decision if such harm has not been compensated by the rescission. For such compensation to be awarded, the applicant must identify the harm suffered and adduce evidence thereto.

78. In the instant case, the Applicant did not identify any specific damage, moral or material, for which she requests compensation. Obviously, the Applicant incurred material damages equivalent to the loss of her salary from the moment of her termination on 6 April 2015 until, at least, the expiry of her contract on 31 December 2015. In this respect, the Tribunal stresses that its decision above to rescind the contested decision fully compensates the Applicant's loss of salary as it either entails that the Applicant will be paid her salary retroactively from the moment of her termination until her reintegration or, if the Respondent elects to pay the amount of compensation in lieu of rescission, that she will be paid the equivalent of one year salary, which exceeds the period that has elapsed since her termination.

79. Absent any allegation and evidence of any additional harm that the Applicant may have suffered as a result of the contested decision, her request for compensation under art. 10.5(b) of the Tribunal's Statute must be rejected.

Conclusion

80. In view of the foregoing, the Tribunal DECIDES:

- a. The contested decision dismissing the Applicant from her position of Operations Assistant is hereby rescinded;
- b. The disciplinary measure of dismissal is substituted with a written censure, which shall be issued by the relevant authority;
- c. Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision, the Applicant shall be paid a sum equivalent to one year net base salary, based on her salary on 6 April 2015;
- d. The aforementioned compensation in lieu of rescission shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable; and
- e. All other claims are rejected.

(Signed)

Judge Thomas Laker

Dated this 9th day of March 2016

Entered in the Register on this 9th day of March 2016

(Signed)

René M. Vargas M., Registrar, Geneva