



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/020

Judgment No.: UNDT/2021/105

Date: 13 September 2021

Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

SPECKER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Angela Arroyo, UNDP

Introduction

1. The Applicant, a former staff member of the United Nations Development Programme (“UNDP”) in Ankara, Turkey, contests the Administration’s decision to impose the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity equivalent to four months’ salary.

2. For the reasons stated below, the application is rejected.

Facts

3. The Applicant joined UNDP in 2010. At the relevant time, the Applicant was a Technical Specialist at the P-4 level in the UNDP Country Office in Turkey. Prior to her separation, she held a Senior Resilience Advisor post at the P-5 level.

4. AA (name redacted) commenced employment with the UNDP Country Office in Turkey under a service contract in July 2014. The Applicant and AA got married on 1 September 2017.

5. On 12 January 2017, AA was notified by the United Nations Children’s Fund Turkey Country Office (“UNICEF Turkey”) by email that he had been shortlisted for a national professional officer position and was invited to a written test on 17 January 2017. On the same day, AA forwarded the email from his UNDP e-mail account to the Applicant’s UNDP e-mail account. In his email to the Applicant, AA wrote that he was shortlisted for a position in UNICEF and that “there will be an exam, can we make it together?” The Applicant responded that “Of course, we will work on this together!”.

6. On 17 January 2017, AA received an email from UNICEF Turkey with a written test comprised of two questions to be completed in two hours. AA immediately forwarded the test to the Applicant’s UNDP email account. In turn, the Applicant provided AA with responses that she drafted, which AA used with minor modifications when submitting his response to UNICEF Turkey.

7. On 17 January 2017, AA received an email from UNICEF Turkey informing him that he had been shortlisted for another national professional officer position and was invited to a written test on 20 January 2017.

8. On 20 January 2017, AA received an email from UNICEF Turkey with a written test comprised of three questions, which he forwarded to the Applicant's UNDP email account immediately.

9. The Applicant drafted responses to the written test and provided them to AA in several emails. She also reviewed and corrected AA's draft response.

10. In his submission of responses to the written test to UNICEF, AA used the responses the Applicant drafted with minor modifications.

11. On 4 May 2018, the Applicant was interviewed by UNDP Office of Audit and Investigations ("OAI") who was investigating, among other things, allegations that the Applicant assisted AA during his participation in a competitive recruitment process for two positions at UNICEF Turkey. During the interview, the Applicant stated:

... As a UN staff member, I'm well aware that that's against the rules so just to state that, I mean it happened. In terms of why, I think there's a long story behind it in terms of the history in this office and the opportunities that are provided to different people. I did help him simply because we were together at that time already, not married, but we were together and I think he deserved a fair chance. The full story is that he was not hired for this position and also afterwards for the second application, I think he withdrew his application in the end. ... it's not a justification but I have a long list of people that have done much worse in these types of situations. So, in this case I admit I helped the person that I was with. I know I have the capacity to write quickly and he doesn't. I know he's very good in what he does but I know in the written test sometimes he doesn't come through but I know in an interview he would be great and I know as a staff member he is really good in what he does so I wanted to give him an opportunity to get at least to the interview.

12. On 30 April 2019, OAI sent the Applicant a copy of the draft investigation report and asked her to submit her comments by 13 May 2019.

13. On 13 May 2019, the Applicant sent an email to OAI stating that she had no comments to the draft investigation report.

14. On 14 May 2019, OAI issued an investigation report in which it concluded that the allegations were substantiated.

15. By letter dated 25 July 2019 (“charge letter”), the Applicant was charged with misconduct for “misrepresenting information to a [United Nations] agency by preparing answers to two competitive recruitment exercises that [AA] was to undertake” and for “misus[ing] official UNDP resources by using [her] UNDP email account to assist [AA] in cheating on a UNICEF recruitment exercise”.

16. On 13 August 2019, the Applicant provided her comments in response to the charge letter. In her response, the Applicant wrote that “[her] wrongdoing on both charges represents a one-off lapse of judgment for which [she] take[s] full responsibility” and asked that mitigating factors be considered.

17. By letter dated 5 December 2019 (“sanction letter”), the Applicant was imposed the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity equivalent to four months’ salary.

18. On 4 March 2020, the Applicant filed the present application.

Consideration

Standard of review in disciplinary cases

19. The general standard of judicial review in disciplinary cases requires the Dispute Tribunal to ascertain: (a) whether the facts on which the disciplinary measure was based have been established; (b) whether the established facts legally amount to misconduct; and (c) whether the disciplinary measure applied was proportionate to the offence (see, for example, *Abu Hamda* 2010-UNAT-022, *Haniya* 2010-UNAT-024, *Portillo Moya* 2015-UNAT-523, *Wishah* 2015-UNAT-537, *Turkey* 2019-UNAT-955, *Ladu* 2019-UNAT-956, *Nyawa* 2020-UNAT-1024). When termination is a possible outcome, misconduct must be established by clear and convincing evidence, which

means that the truth of the facts asserted is highly probable (see, for instance, *Molari* 2011-UNAT-164, and *Ibrahim* 2017-UNAT-776).

Whether the facts on which the disciplinary measure was based have been established

20. The Tribunal notes that the facts on which the disciplinary measure is based, namely, that the Applicant prepared answers to two competitive recruitment exercises that AA undertook and that she used her UNDP email account to assist AA in cheating, are not in dispute. Accordingly, the Tribunal concludes that these facts have been established by clear and convincing evidence.

Whether the established facts legally amount to misconduct

21. Staff regulation 1.2(b) provides that “[s]taff 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”.

22. Staff regulation 1.2(q) provides that “[s]taff members shall use the property and assets of the Organization only for official purposes and shall exercise reasonable care when utilizing such property and assets”.

23. UNDP Legal Framework for Addressing Non-Compliance with United Nations Standards of Conduct provides that:

... Misconduct may include, but is not limited to, the following categories whether wilful, reckless or grossly negligent:

(a) Acts or omissions in conflict with the general obligations of staff members set forth in Article I of the Staff Regulations, Chapter I of the Staff Rules and other administrative issuances as applicable; failure to comply with the standards of conduct expected from international civil servants;

...

(e) Misrepresentation, forgery, or false certification, such as, but not limited to, in connection with any official claim or benefit, including failure to disclose a fact material to that claim or benefit;

(f) Misuse or mishandling of official property, assets, equipment or files, including electronic files or data;

24. UNDP determined that the Applicant engaged in two counts of misconduct: (a) by assisting AA to misrepresent his answers on a competitive written exam in violation of her duties as a UNDP staff member, and (b) by misusing her UNDP email account to assist AA in cheating on a UNICEF recruitment exercise.

25. The Applicant does not contest that her conduct amounts to misconduct. However, she contests the second charge of misuse of UNDP resources, claiming that this charge is duplicative of the first charge of misrepresentation as using her UNDP email account is entirely encompassed by the act of cheating. She argues that the second count was only added to justify a higher sanction.

26. The Tribunal finds that the Applicant's claim is without merit. Staff regulation 1.2(q) requires staff members to use the Organization's resources only for official purpose and UNDP Legal Framework considers misuse of official assets as misconduct. The Applicant undeniably used the Organization's resources, i.e., work email account, for improper purposes and thus violated the relevant legal norms.

27. Moreover, the act of cheating in which the Applicant engaged did not necessitate the use of her UNDP email address. Therefore, the use of the UNDP email address is a distinct and separate from assisting AA in cheating.

28. Therefore, the Tribunal concludes that the established facts legally amount to misconduct as charged by UNDP.

Whether the disciplinary measure applied was proportionate to the offence

29. The principle of proportionality in a disciplinary matter is set forth in the staff rule 10.3(b), which provides that "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct".

30. The Administration has discretion to impose the disciplinary measure that it considers adequate to the circumstances of a case and to the actions and behavior of the staff member involved, and the Tribunal should not interfere with administrative

discretion unless “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” (see, *Portillo Moya* 2015-UNAT-523, paras. 19-21; and also *Sall* 2018-UNAT-889, *Nyawa* 2020-UNAT-1024).

31. The Appeals Tribunal held that “the Secretary-General also has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose” (*Toukolon* 2014-UNAT-407).

32. The Appeals Tribunal has further stated, “But due deference does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair”. The Appeals Tribunal further explains that this means that the Dispute Tribunal should “objectively assess the basis, purpose and effects of any relevant administrative decision” (*Samandarov* 2018-UNAT-859, para. 24).

33. In this case, UNDP imposed the disciplinary measure of separation from service with compensation *in lieu* of notice and with termination indemnity. In doing so, UNDP considered a number of aggravating and mitigating factors. In particular, UNDP noted that the Applicant assisted AA in cheating on two separate occasions and she “used [her] seniority and knowledge gained in [her] policy related functions to accord [AA] a significant advantage over the other candidates”. UNDP further noted that while the Applicant had a previously unblemished record, “[her] actions were in complete disregard of fairness or transparency, two core values expected of UN staff members”. UNDP also noted that her dishonest conduct “placed UNDP in a position of suffering significant reputational harm *vis-à-vis* UNICEF”. UNDP determined that the Applicant’s actions “displayed a serious lack of the core values required of international civil servants, are inconsistent with [her] continued service with the Organization and therefore warrant the imposition of the disciplinary measure of separation from service with compensation in lieu of notice”. UNDP decided to grant her four months of termination indemnities in light of the mitigating factors in her case.

34. The Applicant argues that the imposed sanction is disproportionate to the offense. She claims that the practice of the Secretary-General in similar cases shows that no staff member who committed similar conduct was separated.

35. The Applicant points out that in *Yapa* 2011-UNAT-168, a staff member was imposed the sanctions of written censure and demotion by one grade without the possibility of promotion for two years for attempting to cheat. The Applicant also points out that in *Bhatia* UNDT/2019/119, a staff member was imposed the sanctions of loss of three steps in grade and deferment, for a period of two years, of eligibility for consideration for promotion for cheating on official exams. The Tribunal notes that the Dispute Tribunal in *Bhatia* wrote that “the sanctions imposed on him were actually quite lenient”.

36. The Applicant further presents the practice of the United Nations High Commissioner for Refugees (“UNHCR”) in disciplinary matters in 2020 and the practice of UNDP in 2016 and 2018, claiming that staff members were imposed the less severe disciplinary sanctions than separation for similar misconduct. The Tribunal notes that these reports only provide partial data and do not provide a complete picture of the past practice of UNHCR and UNDP, respectively.

37. The practice of UNHCR in 2020 shows that a P-5 staff member was imposed the sanctions of demotion and deferment for a period of two years of eligibility for consideration for promotion for using “unauthorized reference materials in contravention of the test instructions”. A G-6 staff member was imposed the sanctions of loss of two steps in grade and deferment, for a period of two years, of eligibility for consideration for promotion for copying and pasting information from a separate file containing answers to past examinations during a written test.

38. The practice of UNDP in 2016 and 2018 shows that a P-4 staff member was imposed the sanctions of written censure and loss of one step for providing improper assistance to an external applicant in preparing answers to a written recruitment test. A P-3 staff member was imposed the sanction of demotion for providing a copy of their own test and test answers to a friend who was taking the same test.

39. The Tribunal notes that the compendium of disciplinary measures from 1 July 2009–31 December 2019 was published by the Assistant Secretary-General for Human Resources in August 2020, which provides all disciplinary measures imposed by the Secretary-General from 2009 to 2019.

40. The past practice of the Secretary-General shows that a staff member was imposed the sanction of demotion of one grade, with deferment of three years in eligibility for consideration for promotion, for cheating on a written test by submitting the model answers prepared by others for the test. A subordinate staff member, who assisted another staff member in cheating on two written tests in the course of recruitment exercise, was imposed the sanction of demotion of one grade with deferment of two years in eligibility for consideration for promotion. The fact that the staff member derived no personal benefit was considered a mitigating factor. A senior staff member, who cheated on two written tests in the course of official recruitment exercises by soliciting the assistance of another staff member, was separated from service with compensation *in lieu* of notice and with termination indemnity. The fact that the staff member served at the management level with oversight responsibilities over human resources matters was considered an aggravating factor, and the staff member's long service and prompt admission was considered mitigating factors.

41. The past practice described above shows that the disciplinary measures imposed for cheating or providing assistance to another person in cheating include one or more of the following measures: (a) loss of one or more steps in grade, (b) deferment, for a specified period, of eligibility for consideration for promotion, (c) demotion, with deferment, for a specified period, of eligibility or consideration for promotion, and (d) separation from service, with notice or compensation *in lieu* of notice, and with or without termination indemnity.

42. Considering that the Applicant was a senior staff member, that she had a personal interest in the outcome of the tests in that the person she assisted was her partner, and that the assistance that she provided was significant as she provided AA with full written answers to the test questions, which he then almost completely copied and submitted, the nature and gravity of the Applicant's misconduct is serious.

Therefore, the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity imposed in this case is in line with the past practice of the Organization.

43. The Applicant argues that the contested sanction is unreasonable and absurd because AA only received a written reprimand while she was imposed the sanction of separation from service. The Tribunal notes that the sanction imposed on AA is not under review in this case. Moreover, AA is not a staff member and any accountability for his actions is therefore governed by a different legal framework.

44. The Tribunal further notes that the Administration considered a number of aggravating factors. In particular, the Administration considered that the Applicant assisted AA in cheating on two separate occasions, that she used her seniority and knowledge gained in her position to accord AA a significant advantage, and that her actions were in complete disregard of the core values expected of UN staff members. The Administration considered that her conduct is inconsistent with her continued service with the Organization. The Administration also considered the Applicant's previously unblemished record as a mitigating factor and determined to grant her termination indemnity on that basis.

45. The Applicant argues that the Administration failed to consider the fact that she was cooperative and forthcoming throughout the investigation and that she was remorseful and made apologies for her behavior.

46. However, as stated above, the Administration has wide discretion to weigh aggravating and mitigating factors when deciding upon the appropriate sanction. The Tribunal finds that the consideration of the above aggravating and mitigating factors in imposing the contested sanction was proper and falls within the Secretary-General's discretion in this case.

47. Considering the nature and gravity of the Applicant's misconduct as well as aggravating and mitigating circumstances, the Tribunal finds that the imposed measure was adequate and there is no basis to interfere with the Administration's exercise of discretion in this matter.

Whether the staff member's due process rights have been respected

48. The Applicant does not make any submission that her due process rights were not respected. The Tribunal notes that the Applicant was notified of the formal allegations in the charge letter, was given the opportunity to respond to those allegations, and was informed of the right to seek the assistance of counsel in her defense.

49. Therefore, the Tribunal is satisfied that the Applicant's due process rights were respected in this case.

50. In light of the above, the Tribunal upholds the disciplinary measures imposed on the Applicant.

Conclusion

51. In light of the foregoing, the Tribunal rejects the application.

(Signed)

Judge Joelle Adda

Dated this 13th day of September 2021

Entered in the Register on this 13th day of September 2021

(Signed)

Nerea Suero Fontecha, Registrar, New York