

UNDT/2019/015, Ganbold

UNAT Held or UNDT Pronouncements

Background for the examination of the issues in this case

The Tribunal found that the way in which the Office of Audit and Investigation Services (“OAIS”) conducted its investigation clearly led to great unfairness to the Applicant given the circumstances of this case.

Financial loss to UNFPA

Since a pivotal part of the scope of the investigation was to establish financial loss to the Organization and or financial benefit to the Applicant as a result of the UNFPA leases, it was surprising for the Tribunal to note that there was no certain finding of the actual financial loss that UNFPA incurred.

From the evidence on file and the testimony of the Applicant’s former FRO, which the Tribunal considered truthful and correct, especially considering that he incriminated himself in the process of his testimony, the Tribunal considered that the investigators had all the requisite information to conduct a comparative analysis between the rent paid by UNFPA Mongolia CO to the Applicant’s family and the then market price. However, they did not do it and the Tribunal found no support to the conclusion reached by the investigators that the Applicant benefitted improperly from her association with a company and Ms. N by reason of her position with the United Nations.

Have the facts upon which the decision is founded been properly established?

Most of the conclusions and recommendations made by OAIS in the investigation report were ill founded and simply not supported by the totality of the evidence. The decision maker clearly placed reliance upon the evidence presented in the report and the recommendation made at paragraph 94 of the investigation report where it was stated that “[b]ased on the foregoing, OAIS recommends that appropriate administrative and/or disciplinary action be taken against [the Applicant]”.

The Tribunal found that the decision maker was led into error as a consequence of the flaws in the investigation and the errors of law made which were contained in the investigation report.

The Tribunal considered that the decision-maker did not have available the evidence. The Applicant's conduct amounted, at best, to limited negligence insofar as the declarations made should have been more complete, as they failed to disclose a possible conflict of interest. The Tribunal noted inter alia that the arrangements were highly favourable to UNFPA. In respect to the execution of the renewal of contract in 2013, it is apparent that she took the lead from her FRO, her former supervisor, who was later found to have acted improperly and without delegated authority. The Applicant was technically negligent, but in no way corrupt, dishonest or fraudulent. She made no gain and did not seek to conceal any facts from her colleagues.

Whether the sanction is proportionate to the alleged misconduct?

The Tribunal found that highly relevant exculpatory matters and evidence corroborating the assertions of the Applicant were not ignored by the decision maker, they were simply not put before the decision maker due to errors on the part of the investigators.

The Tribunal also found that if the facts that led the Applicant's former FRO to decide to enter into an arrangement with [Company 1, LLC] and Ms. N for the storage of UNFPA procured items had been impartially and properly investigated and presented to the decision maker in the investigation report in an unbiased manner, it would have resulted in a different decision.

There was no evidence of fraud, deceit, corruption or dishonesty on the part of the Applicant. On the contrary, through her family there was an attempt to assist UNFPA in a time of particular need in 2007. The Applicant did not solicit or advance in any way whatsoever the use of the storage owned by her family. The Applicant had made no gain from the procurement and her family, and a company associated with them, who became UNFPA vendors as a consequence of the requests to use their storage, appear to also have made no financial gain over what would appear to be very basic overhead costs. It is apparent that in the provision of the storage, they have made a loss when comparing how much they actually charged versus the market value of the storage. Certainly, the UNFPA has saved hundreds of thousands

of dollars through not paying the commercial rate for storage for a period of seven years.

The Tribunal found that the decision-maker was led into error as a consequence of the incomplete and incompetent investigation and a failure of disclosure of relevant facts known to the investigator prior to the decision being made.

When taking the actual circumstances and findings into account and that this matter essentially concerns negligence in respect of meeting financial disclosure requirements the Tribunal found that there was demonstrable disproportionality in respect of the manner in which the Applicant was treated.

Remedies

The Tribunal ordered that the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity be rescinded and replaced by that of a loss of one step in grade and a written censure.

Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision, the Tribunal ordered that the Applicant shall be paid, as an alternative, 24 months of her net salary at the rate that she was paid at the time of her separation.

The Tribunal also directed that any person within the Organization who is asked to provide a reference for the Applicant, or from whom inquiries are made about the Applicant, shall not advise that she was separated from service due to procurement fraud or other misconduct.

The Tribunal further ordered to place a copy of its Judgment in the Applicant's status file.

Accountability referral:

The Tribunal referred this case to the Executive Director, UNFPA, in view of the errors in the investigation so as to question the ability of those involved to be associated with investigative tasks.

Decision Contested or Judgment/Order Appealed

The Applicant contests the decision to separate her from service with compensation in lieu of notice and without termination indemnity, following adverse findings in respect of the leasing by UNFPA of storage space from the Applicant, members of her family and associated entities.

Legal Principle(s)

The Administration bears the burden of establishing that alleged misconduct for which a disciplinary measure has been taken against a staff member occurred. Furthermore, when termination is a possible sanction, the “misconduct must be established by clear and convincing evidence,” which “means that the truth of the facts asserted is highly probable” (Nyambuza 2013-UNAT-364, Hallal 2012-UNAT-207); The investigators have a duty to work within the scope of the defined investigation when writing the investigative report. They must set out all relevant matters touching upon the issues, whether inculpatory or exculpatory, so as to produce a report providing a full, fair and clear picture of all the facts involving the alleged misconduct, within their context, noting that it is the Secretary-General who has the burden of proof in any disciplinary matter.; Administrative bodies and administrative officials shall act fairly, reasonably, and comply with the requirements imposed on them by law. As a normal rule, a reviewing Tribunal will not interfere in the exercise of a discretionary authority unless there is evidence of illegality, irrationality and procedural impropriety (Abu Hamda 2010-UNAT-022); It is also incumbent on the Tribunal to determine if any substantive or procedural irregularity occurred (Maslamani 2010-UNAT-028, Hallal 2012-UNAT-207), either during the conduct of the investigation or in the subsequent procedure.; In sanctioning staff members for alleged wrongdoing, it is paramount that the Organization adheres to the principle of proportionality (see Applicant 2013-UNAT-280). As such, the sanction should not be more excessive than is necessary. In Aqel 2010-UNAT-040, the Appeals Tribunal found that in cases of obvious absurdity or flagrant arbitrariness the sanction imposed can be reviewed by the Tribunal.

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

Judgment vacated by the Appeals Tribunal (Ganbold 2019-UNAT-976)

Full judgment

[Full judgment](#)

Applicants/Appellants

Ganbold

Entity

UNFPA

Case Number(s)

UNDT/GVA/2017/90

Tribunal

UNDT

Registry

Geneva

Date of Judgement

31 Jan 2019

Duty Judge

Judge Downing

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Referral for accountability

Applicable Law

Other UN issuances (guidelines, policies etc.)

- UNFPA Policies and Procedures Manual, Disciplinary Framework

UNDT Statute

- Article 10.5(a)

Related Judgments and Orders

2013-UNAT-364

2012-UNAT-207

2018-UNAT-819

2010-UNAT-024

2013-UNAT-302

2014-UNAT-398

2010-UNAT-022

2010-UNAT-028

2013-UNAT-280

2010-UNAT-040

2015-UNAT-532

2017-UNAT-738