

UNDT/2021/127, KC

UNAT Held or UNDT Pronouncements

Whether the facts on which the disciplinary measure was based have been established With respect to Count One, the Tribunal finds that there is clear and convincing evidence that the Applicant did not disclose his spouse's and his father in law's involvement with two UNICEF implementing partners, of which the Applicant was the responsible Programme Manager on behalf of UNICEF. In his application, the Applicant does not dispute this fact either. Turning to Count Two, the Tribunal is convinced that the Applicant received a spouse dependency allowance to which he was not entitled. Moreover, the Applicant does not dispute that he did not inform UNICEF that his spouse's earnings exceeded the relevant income threshold in the year 2016, 2017 and 2018, but rather alleges that the total employment gains of his spouse did not exceed the total salary gain of the entry-level GS staff in Nepal during the period of 2013 to 2018. The Tribunal finds that this allegation is without merit. Indeed, in accordance with para. 1(b) of CF/AI/2000-025 and para. 15.1 of DHR/PROCEDURE/2017/001, entitlement to a spouse dependency allowance is based on the dependent spouse's earnings for the specific year of claim, not the cumulative earnings for different periods, i.e., 2013 to 2018 when the Applicant was paid spouse dependency allowance. In addition, during the CMD and in his closing submission, the Applicant raised a new argument: that he had never claimed the spouse allowance. Even assuming that the new argument is admissible, the Tribunal is not persuaded by it. The Tribunal fails to see how a Status Report and Request Form signed in 2013, even if it is authentic, could be used to prove that the Applicant did not claim the spouse dependency allowance for the years of 2016, 2017, and 2018. Further, it is undisputed that payment of dependency allowances is not automatic and that staff members must claim for payment of allowances to which they may be entitled. Therefore, there is clear and convincing evidence that the Applicant claimed spouse dependency allowance that he was not entitled to. Accordingly, the facts on which the disciplinary measure at issue was based have been established by clear and convincing evidence. Whether the established facts legally amount to misconduct Conflict of interest The Applicant was the Programme

Manager and Certifying Officer of UNICEF's PCA with Lifeline Nepal and Golden Community, both of which received substantial funding from UNICEF. Lifeline Nepal paid the Applicant's spouse approximately USD21,000 as a Consultant for a UNICEF sponsored programme that the Applicant managed. As Programme Manager, the Applicant engaged professionally with his spouse, who acted as a Board Member of Golden Community, and with his father-in-law in his capacity as Managing Director of Golden Community. Given the substantial amount of money the Applicant's spouse received as a consultant for a UNICEF-sponsored programme, she directly benefitted from her engagement with Lifeline Nepal. It was, therefore, clearly in her interest that Lifeline Nepal continued to be paid by UNICEF. It was also in the interest of the Applicant's father-in-law and the Applicant's spouse that Golden Community was contracted and paid by UNICEF as an implementing partner. The Applicant's allegation that his father-in-law did not gain any financial benefit from the partnership agreement has no merit. Indeed, proof of personal gain or financial benefit is not a requisite element to establishing whether a staff member engaged in conflict of interest (see, e.g., Ganbold 2019-UNAT-976, paras. 32-34). Therefore, the Applicant's personal interests directly interfered with his role as the person in charge of managing the implementing partners on behalf of UNICEF. Accordingly, the Tribunal finds that the Applicant engaged in conflict of interest in the present case. As a staff member, he was thus obliged to disclose his conflict of interest under staff regulation 1.2(m), staff rule 1.2(q) and para. 23 of the Standards of Conduct for the International Civil Service. However, the Applicant failed to do so and did not formally excuse himself from any involvement in that matter, which might give rise to a conflict of interest situation. The Tribunal is not convinced by the Applicant's allegation that his failure to disclose the conflict of interest was a bona fide act of omission because he had not completed the mandatory course on Ethics and Fraud awareness. It is the Applicant's responsibility to complete all mandatory courses including the mandatory course on Ethics and Fraud awareness. Moreover, the Applicant's disclosure of conflict of interest regarding his spouse's and father-in-law's involvement with two UNICEF implementing partners at the early stage of the investigation does not remedy his failure to comply with his obligation to disclose conflict of interest. Notably, staff regulation 1.2(m) explicitly requires a staff member to disclose (possible) conflict of interest when it arises. Admission of conflict of interest during the investigation proceedings thus does not bring a violation of obligation to disclose conflict of interest into compliance. Accordingly, the Applicant's failure to disclose his conflict of interest regarding his spouse's and father-in-law's involvement with two UNICEF implementing partners is in violation of

staff regulation 1.2(m), staff rule 1.2(q) and para. 23 of the Standards of Conduct for the International Civil Service, and thus amounts to misconduct pursuant to staff rule 10.1(a) and para.1.4 of CF/EXD/2012-005. Unlawful receipt of spouse dependency allowance The Applicant does not dispute that he did not inform UNICEF that his spouse's earnings exceeded the relevant income threshold in the years 2016, 2017 and 2018. Such failure shows an inherent lack of integrity in violation of staff regulation 1.2(b). Further, under para. 7 of DHR/PROCEDURE/2017/01, the staff member is obliged to attest that he/she meets the eligibility and conditions for payment, including correctness of the information provided in his/her application for a dependency allowance. The Applicant's failure to inform UNICEF that his spouse's earnings exceeded the relevant income threshold in the years 2017 and 2018 is thus in violation of para. 7 of DHR/PROCEDURE/2017/01. Moreover, under para. 1.4(d) of CF/EXD/2012-005, misrepresentation, forgery, or false certification in connection with any official claim or benefit, including failure to disclose a fact material to that claim or benefit, amounts to misconduct. Therefore, the Applicant's unlawful receipt of spouse dependency allowance in the period of 2016 to 2018 amounts to misconduct pursuant to staff rule 10.1(a) and para. 1.4 of CF/EXD/2012-005. Accordingly, the Tribunal finds that the Applicant's actions in relation to both conflict of interest and spouse dependency allowance amount to misconduct under staff rule 10.1(a) and para. 1.4 of CF/EXD/2012-005. Whether the disciplinary measure applied was proportionate to the offence Whether the Administration duly considered the totality of the circumstances of the case The Tribunal must determine whether the Administration's imposition of separation from service with compensation in lieu of notice and with termination indemnities was after giving due consideration to the entire circumstances of the case. UNICEF imposed the sanction on two counts: a. Count One: The Applicant failed to disclose a serious conflict of interest involving his spouse and father-in-law; and b. Count Two: He claimed a spouse allowance whilst his spouse earned more than the stipulated salary threshold in the period of 2016 to 2018. Under para. 11 of DHR/PROCEDURE/2017/01, failure to report changes or falsification of the information provided in relation to dependency allowances may result in, inter alia, disciplinary measures in accordance with staff rule 10.2, including dismissal for misconduct. Moreover, the evidence on record shows that in determining the appropriate sanction to impose, UNICEF took into account the fact that its reputation was harmed by the Applicant's misconduct, as government officials discussed his spouse's involvement with Lifeline Nepal. As mitigating factors, UNICEF considered, inter alia, the Applicant's strong and dedicated performance, his limited remorse, and the lengthy investigation that lasted for over

a period of one year whilst the Applicant was placed on administrative leave without pay. The Applicant was thus not separated without receiving a termination indemnity, a harsher measure than the one that was ultimately imposed. The Applicant contested that the DED did not take into account, inter alia: a. That he was never investigated prior to the incident under appeal; and b. That he never sought any personal gain or to create prejudice to the organization. However, such behaviours constitute a minimum level of compliance with staff rules and regulations that do not in themselves constitute a mitigating factor. Therefore, in determining the appropriate sanction, the Administration duly considered the nature and gravity of the Applicant's misconduct as well as all the aggravating and mitigating factors. Accordingly, the Administration's imposition of the sanction was after giving due consideration to the totality of the circumstances of the case. Whether the sanction applied is consistent with those applied in similar cases The Tribunal is not convinced by the Applicant's allegation that the sanction applied in the present case is inconsistent with those applied in similar cases. Indeed, the circumstances of the cases cited by the Applicant are not comparable to his case. In Baidya, the applicant was sanctioned with a written censure plus a fine of one month's net base salary for failing to disclose the nature of his relationship with a candidate for employment (see Baidya UNDT/2014/106). In Vedel, the applicant was sanctioned with the loss of two steps within grade for failing to formally disclose a potential conflict of interest. In that case, there was informal disclosure by the staff member, i.e., her husband's employment in the transportation business with UNICEF vendors was informally known among her colleagues (see Vedel UNDT/2019/110). In his closing submission, the Applicant referenced three cases concerning unauthorized outside activities which normally attract less severe sanctions. Notably, the Appeals Tribunal has confirmed that separation from service is not excessive, abusive, discriminatory or absurd in cases relating to a serious conflict of interest (see Ganbold 2019-UNAT-976, para. 59). Further, failure to inform changes or falsification of the information in relation to dependency allowances may, on its own, result in dismissal for misconduct pursuant to para. 11 of DHR/PROCEDURE/2017/01. Therefore, the decision to separate the Applicant from service with compensation in lieu of notice and with termination indemnity cannot be regarded as excessive, abusive, discriminatory or absurd. Accordingly, the disciplinary measure applied is proportionate to the offence in the present case and that 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 The key elements of the Applicant's right to due process were met in the present case. The Applicant was

fully informed of the charges against him, was given the opportunity to respond to those allegations, and was informed of the right to seek the assistance of counsel in his defence. Turning to other alleged procedural irregularities, other than making the allegations, the Applicant has not provided evidence that the Organization failed to take reasonable measures to protect the confidentiality of individuals who are under investigation. He also failed to substantiate how utilizing professionals within the UNICEF Country Office to assist with the investigations negatively impacted the investigation and/or the disciplinary process, considering also that the Applicant does not dispute core facts in the present case. Although the Tribunal agrees with the Applicant that the investigation that lasted 14 months was lengthy, the Applicant has not demonstrated that this is a procedural error that negatively affected the outcome of the case. Further, UNICEF considered the protracted investigation as a mitigating factor in determining the sanction imposed. Moreover, the Tribunal finds that the alleged procedural irregularities are of no consequence given the kind and amount of evidence proving the Applicant's misconduct. Accordingly, the Applicant has failed to substantiate his claim that his right to due process during the investigation and disciplinary proceedings were violated. In light of the above, the Tribunal upholds the disciplinary measure imposed on the Applicant. Remedies Having upheld the disciplinary measure, the Tribunal rejects the Applicant's claim for compensation. In relation to the alleged moral damages, other than making the allegations, the Applicant has not provided any evidence supporting that he suffered a molar injury. He also failed to show that the molar injury was directly caused by the protracted investigation. Moreover, the Applicant has not demonstrated how the delay in investigating supports his claim for compensation for the alleged professional and personal reputational damage. He has not established a causal link between the delay and the impact on his professional and personal reputation. In fact, the alleged professional and personal reputational damages were caused directly by the Applicant's misconduct itself instead of the investigation. Accordingly, the Applicant's request for the award of compensation for moral damage is denied.

Decision Contested or Judgment/Order Appealed

The Applicant contested the disciplinary measure of separation from service, with termination indemnity and compensation in lieu of notice, imposed on him on 31 January 2020.

Legal Principle(s)

In disciplinary cases, the role of the Dispute Tribunal is established by the consistent jurisprudence of the Appeals Tribunal (see, e.g., Haniya 2010 UNAT 024, Wishah 2015-UNAT-537, Ladu 2019-UNAT-956; Nyawa 2020 UNAT 1024). The general standard of judicial review 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; c) Whether the disciplinary measure applied was proportionate to the offence; and d) Whether the Applicant's due process rights were respected during the investigation and the disciplinary process. When the disciplinary process results in separation from service, the alleged misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable (see, e.g., Molari 2011-UNAT-164, Ibrahim 2017-UNAT-776). The matter of the degree of the sanction is usually reserved for the Administration, who has the discretion to impose the measure that it considers adequate to the circumstances of the case, and to the actions and behavior of the staff member involved. The Tribunal should not interfere with this administrative discretion unless "the sanction imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity" (see Nyawa 2020-UNAT-1024, para. 89; see also Portillo Moya 2015-UNAT-523, paras. 19-21). Nevertheless, due deference does not entail uncritical acquiescence (Samandarov 2018-UNAT-859, para. 24). The Appeals Tribunal held that misconduct "must be viewed in terms of the nature of the mission, purpose, and principles of the United Nations, and the impact [that the] type of misconduct can have on the Organization's reputation, credibility and integrity" (see Ogorodnikov 2015-UNAT-549, para. 32). The Secretary-General has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose (see Nyawa 2020-UNAT-1024; Ladu 2019-UNAT-956). The principles of equality and consistency of treatment in the workplace, which apply to all United Nations employees, dictate that where staff members commit the same or broadly similar offences, the penalty, in general, should be comparable (see Sow UNDT/2011/086, para. 58; see also Baidya UNDT/2014/106, para. 66; Applicant UNDT/2017/039, para. 126). Regarding the right to due process during the investigation and disciplinary proceedings, the Appeals Tribunal has consistently held that only substantial procedural irregularities can render a disciplinary sanction unlawful (see, e.g., Abu

Osba 2020-UNAT-1061, para. 66; Muindi 2017-UNAT-782). The onus is on the Applicant to provide proof of the lack of due process and how it negatively impacted the investigation and/or the disciplinary process (see Pappachan UNDT/2019/118 Corr.1, para 78). Art. 10.5(b) of its Statute, as amended by General Assembly resolution 69/203 adopted on 18 December 2014, provides that compensation for harm may only be awarded where supported by evidence. Furthermore, the case law requires that “the harm be shown to be directly caused by the administrative decision in question” (see Kebede 2018- UNAT-874, para. 20; see also Ashour 2019-UNAT-899, para. 31).

Outcome

Dismissed on merits

Outcome Extra Text

Full judgment

[Full judgment](#)

Applicants/Appellants

KC

Entity

UNICEF

Case Number(s)

UNDT/GVA/2020/22

Tribunal

UNDT

Registry

Geneva

Date of Judgement

1 Nov 2021

Duty Judge

Judge Bravo

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Disciplinary measure or sanction

Dismissal/separation

Investigation (see category: Investigation)

Investigation

Due process

Applicable Law

GA Resolutions

- A/RES/69/203

Laws of other entities (rules, regulations etc.)

- UNICEF DHR/PROCEDURE/2017/001 (UNICEF Procedure on dependency allowances)

Other UN issuances (guidelines, policies etc.)

- Standards of Conduct for the International Civil Service

Staff Regulations

- Regulation 1.2(b)
- Regulation 1.2(m)
- Regulation 1.2(q)

Staff Rules

- Rule 10.1(a)
- Rule 10.2
- Rule 10.3(a)
- Rule 10.3(b)

UNDT Statute

- Article 10.5(b)

UNICEF Administrative Instructions

- CF/AI/2000-025

UNICEF Executive Directives

- CF/EXD/2012-005

Related Judgments and Orders

2010-UNAT-024

2015-UNAT-537

2011-UNAT-164

2017-UNAT-776

2019-UNAT-976

2016-UNAT-699

2014-UNAT-470

2015-UNAT-523

2018-UNAT-859

2015-UNAT-549

2019-UNAT-956

UNDT/2011/086

UNDT/2014/106

UNDT/2017/039

UNDT/2019/110
2020-UNAT-1061
2017-UNAT-782
2017-UNAT-761
2019-UNAT-899