

2024-UNAT-1490, John Gerald O'Brien

UNAT Held or UNDT Pronouncements

The UNAT noted that the UNDT had not erred when it established that the staff member had improperly used his employer-issued laptop to access sexually-explicit websites and engaged in multiple instances of unauthorized outside activities. The UNAT held that he had not obtained approval to continue being the majority shareholder and director of a company.

The UNAT was of the view that the UNDT had not erred when it found that the staff member's activity constituted misconduct. The UNAT found that his contributions to the overall running of the business were material. The UNAT agreed with the UNDT that he had been in a position of possible conflict of interest when he maintained his financial interests as a majority shareholder and director of the company, the activities of which would have been reasonably perceived as overlapping with his official functions. The UNAT found that his outside activity benefitted him financially due to his status as a staff member and it materialized the conflict of interest. With regard to him knowingly making a false statement and providing false documents to investigators, as established by the UNDT, the UNAT noted that he had committed an act of dishonesty.

The UNAT held that a partial disclosure of his interests with the company was not sufficient to outweigh the significant aggravating factors rightly affirmed by the UNDT, especially his involvement in the serious misconduct of dishonesty.

The UNAT found no proof of retaliation or disregard of the staff member's due process rights. The UNAT agreed with the UNDT that being a whistleblower was not an absolute shield against accountability.

The UNAT dismissed the appeal and affirmed the UNDT Judgment.

Decision Contested or Judgment/Order Appealed

A former staff member contested a disciplinary decision to separate him from service with compensation in lieu of notice and without termination indemnity for the following acts of misconduct: (i) improper use of his UNDP-issued laptop to access websites which contained pornography and other sexually explicit material and advertised escort services; (ii) engaging in multiple instances of unauthorized outside activities, (iii) not disclosing multiple instances of potential conflict of interest that arose due to the unauthorized outside activities; and (iv) knowingly making a false statement and providing false documents to investigators.

In Judgment No. UNDT/2023/110, the UNDT dismissed the application on the merits.

The staff member appealed.

Legal Principle(s)

An active investment would occur when the investor becomes involved in managing the business, whether it be by being director, employee, or the like. This is the case when the staff member fulfils an advisory role or provides material support to the functioning of the company. In such cases, the staff member could be held accountable for carrying out an outside activity.

The rules prohibiting conflicts of interest are a safeguard to the independence, impartiality, and integrity of international civil servants. The rules governing conflicts of interest can be construed as being concerned with any objectively perceived partiality. For misconduct of conflict of interest to be established, it is sufficient for the Administration to prove that the staff member was in a non-disclosed situation that gave rise, for a fair-minded and informed observer, to a possible conflict of interest.

Staff members must preclude themselves from entering situations where they entertain, or may be perceived to entertain, directly or indirectly, for their benefit, or for that of others, interests that compete with those of the Organization. When in doubt, the staff member must disclose the situation to the head of office, to be addressed and, eventually, resolved, in the ultimate interest of the Organization.

The Secretary-General has wide discretion to choose the most appropriate disciplinary measure amongst the various measures open to him. However, the exercise of that discretion is not unfettered, and the Tribunals have the authority to intervene when the sanction imposed is disproportionate or excessive. Rather than focusing solely on the misconduct, the test of proportionality is circumstantial, considering all relevant aggravating and mitigating factors.

Even a whistleblower engaging in a protected activity can, and must, be held accountable for his or her actions and omissions.

Outcome

Appeal dismissed on merits

Outcome Extra Text

N/A

Full judgment

[Full judgment](#)

Applicants/Appellants

John Gerald O'Brien

Entity

UNDP

Case Number(s)

2023-1876

Tribunal

UNAT

Registry

New York

Date of Judgement

4 Dec 2024

President Judge

Judge Sheha

Judge Gao

Judge Forbang

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Breach of duties of independence, neutrality, and impartiality

Fraud, misrepresentation and false certification

Misuse of information and communication technology resources

Proportionality of sanction

Unauthorised outside activities and conflict of interest

Right to comment/respond

Credibility assessment

Oral hearings

Disciplinary cases

Disciplinary cases

Disciplinary matters / misconduct

Due process

Evidence

Procedure (first instance and UNAT)

Standard of proof

Standard of review (judicial)

Applicable Law

Administrative Instructions

Related Judgments and Orders

UNDT/2023/110

2024-UNAT-1437

2019-UNAT-976

2011-UNAT-164

2013-UNAT-374

2010-UNAT-084

2022-UNAT-1259

2017-UNAT-781