

UNDT/2024/072, Vanshelboim

UNAT Held or UNDT Pronouncements

The Tribunal defined the overall issues of the present case as follows:

Whether the Applicant wilfully misled the Organization

While there were many factual disagreements between the parties, including with respect to the details of the financial gains and dealings the Applicant was involved with, the Tribunal found that it was not necessary to resolve all those disputes during this exercise of judicial review. The Applicant admitted his extensive financial relationships with Mr. David Kendrick and that he failed to disclose these relationships to the Organization. These admissions were effectively a concession that he committed blatant misconduct.

The Tribunal did not conduct a deep analysis of the substantial financial gains that the Applicant received from his undisclosed financial arrangements and outside activities with Mr. Kendrick and his entities. It was sufficient to note that the Applicant agreed that he engaged in undisclosed and unauthorized outside activities that entailed personal financial arrangements between Mr. Kendrick and himself (and/or his family) resulting in financial benefits of hundreds of thousands, if not millions, of dollars. The Applicant also conceded that this could amount to a conflict of interest.

The Tribunal found that, indeed, the Applicant committed fraud against the Organization by leading it into multiple business partnerships with the Kendrick entities, with which he engaged in undisclosed and unauthorized outside activities, and from which he received several financial and material benefits.

The Tribunal was convinced that the Applicant intentionally misrepresented the investment “opportunities” with the Kendrick entities to the Organization by, inter alia, creating an exaggerated sense of urgency and need, concealing relevant information and minimizing the concerns of others to expedite the internal process of approval.

Was there a causal link between the Applicant's actions and the financial loss of UNOPS?

The Tribunal determined that the Applicant's personal financial relationships with Mr. Kendrick clearly interfered with the performance of his official duties and the integrity, independence and impartiality required of him in evaluating and proposing the Kendrick deals to UNOPS.

The Tribunal found that the evidence clearly and convincingly shows that the Applicant's misconduct, including his conflicts of interest, caused the financial losses that UNOPS sustained. The failure to disclose the Applicant's conflict of interest with Mr. Kendrick prevented the Organization from being aware of these conflicts and taking appropriate steps to mitigate their impact on UNOPS. Thereafter, every action that the Applicant took on behalf of UNOPS regarding Kendrick entities was tainted by his first transgression.

Thus, the Tribunal determined that the Applicant cannot avoid his responsibility for the Kendrick deals by claiming that the EAC+ and the ED approved the deals since he did not disclose to them the essential fact of his conflict of interest. Moreover, the alleged and potential co-responsibility of others in the matter does not remove or reduce the Applicant's own liability.

As per the joint and several liability doctrine, the Applicant can be held responsible for the full amount of loss that UNOPS suffered, as he was. However, he may seek contribution elsewhere from any others deemed responsible as well.

What is the amount of the financial losses of UNOPS?

With respect to the amount of financial loss, the Tribunal found that the Applicant is to be held liable for the financial loss that the Organization suffered in connection with the Kendrick entities, and that the amount of loss attributable to him is USD58,800,000, which only consists of the principal capital that UNOPS gave to the Kendrick entities. This is the sum that UNOPS would not have allocated had the Applicant disclosed his conflict of interest with Mr. Kendrick.

Whether the disciplinary sanction was proportionate to the misconduct

The Tribunal agreed that the misconduct was unprecedented, causing enormous financial loss to UNOPS and tremendous damage to the reputation of UNOPS and the

United Nations. Dismissal or termination without indemnities alone would not serve to punish the wrongdoer or deter others from similar wrongdoing. Indeed, financial misconduct calls for financial penalties in the form of a fine. The size of the fine imposed is outweighed by the financial benefits that the Applicant received from Mr. Kendrick and dwarfed by the monies that UNOPS lost.

Therefore, the Tribunal considered that the disciplinary sanction, including the fine, was proportionate to the misconduct.

Whether the withholding of the PF.4 form was proper and reasonable

Withholding the release of the separation notification was essentially the Administration's last available effort to try to secure repayment. Given the amount of the Applicant's indebtedness to the Organization, it was objectively impossible for the Organization to recover this debt against the Applicant's salary and separation entitlements alone. Accordingly, the last resort test was sufficiently met, and the Tribunal considered that withholding the release of the separation notification in this case was a lawful exercise.

Whether there were any due process violations

The Tribunal found that the Applicant's allegations in this respect were either not supported by evidence or not significant enough to impact the Applicant's due process rights.

In view of the foregoing, the Tribunal decided that the amount of financial loss attributable to the Applicant was USD58,800,000 and rejected the application in its entirety as to all other claims.

Decision Contested or Judgment/Order Appealed

The Applicant, a former staff member of the United Nations Office for Project Services ("UNOPS"), contested the decision to impose on him the disciplinary measures of dismissal and a fine of twelve months' net base salary. He also contested the decision to recover from him the amount of USD63,626,806 and to withhold the release of the PF.4 form ("separation notification") to the United Nations Joint Staff Pension Fund ("UNJSPF") until such indebtedness is fully recovered.

Legal Principle(s)

The Appeals Tribunal has consistently held that “the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review”. The Appeals Tribunal further held that when defining the issues of a case, “the Dispute Tribunal may consider the application as a whole” (see Fasanella 2017-UNAT-765, para. 20; Cardwell 2018-UNAT-876, para. 23; and Barbulescu UNDT/2024/046).

The “joint and several liability” doctrine determines that each party is independently liable for the full extent of damages but may seek contribution from the other wrongdoers.

The mitigation of damages doctrine generally holds that a party cannot recover for losses that the party could have avoided by reasonable efforts. Failure to mitigate damages is an affirmative defense so the party raising it has the burden of showing such a failure.

In reviewing a disciplinary decision, the Tribunal shall, inter alia, determine “whether the disciplinary measure imposed was proportionate to the offence”.

The principle of proportionality has been described as meaning that the sanction “should not be more excessive than is necessary for obtaining the desired result”.

Outcome

Dismissed on merits

Full judgment

[Full judgment](#)

Applicants/Appellants

Vanshelboim

Entity

UNOPS

Case Number(s)

UNDT/GVA/2023/020

Tribunal

UNDT

Registry

Geneva

Date of Judgement

3 Oct 2024

Duty Judge

Judge Sun

Judge Adda

Judge Wallace

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary measure or sanction

Unauthorised outside activities and conflict of interest

Disciplinary matters / misconduct

Applicable Law

Laws of other entities (rules, regulations etc.)

- UNOPS Financial Rules

Staff Regulations

- Regulation 1.2(b)
- Regulation 1.2(e)
- Regulation 1.2(g)
- Regulation 1.2(l)
- Regulation 1.2(m)
- Regulation 1.2(o)
- Regulation 1.2(p)

Staff Rules

- Rule 1.2(k)
- Rule 1.2(q)
- Rule 1.2(s)
- Rule 1.5(a)
- Rule 1.7
- Rule 10.1(b)
- Rule 10.3(a)

Secretary-General's bulletins

- ST/SGB/2018/1/Rev.2

UNDT Statute

- Article 9.4

Related Judgments and Orders

2017-UNAT-765

2018-UNAT-876

UNDT/2024/046

2010-UNAT-084

2022-UNAT-1234

2015-UNAT-539

UNDT/2013/149

UNDT/2012/169

UNDT/2021/125