



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2023-UNAT-1376

**Samuel Bwalya
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge John Raymond Murphy Judge Martha Halfeld
Case No.:	2022-1710
Date of Decision:	30 June 2023
Date of Publication:	7 August 2023
Registrar:	Juliet Johnson

Counsel for Appellant:	Edwin Nhliziyo
Counsel for Respondent:	Amanda Stoltz

JUDGE SABINE KNIERIM, PRESIDING.

1. Before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), Mr. Samuel Bwalya, a former Country Director, United Nations Development Programme (UNDP), contested the disciplinary measure imposed on him of separation from service with compensation in lieu of notice and without termination indemnity.
2. By Judgment No. UNDT/2022/041 (impugned Judgment), the UNDT dismissed the application.
3. Mr. Bwalya filed an appeal against the impugned Judgment before the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).
4. For the following reasons, we dismiss the appeal and affirm the impugned Judgment.

Facts and Procedure

5. On 3 April 2011, Mr. Bwalya joined UNDP in Ethiopia as an Economics Advisor at the P-5 level. On 1 July 2013, he was appointed Country Director, UNDP Ethiopia, at the D-1 level. On 11 June 2017, he was appointed Country Director in the UNDP Country Office in Nigeria, also at the D-1 level. At the time of the events giving rise to this case, Mr. Bwalya was the UNDP Ethiopia Country Director.
6. On 9 April 2014, Ms. T, a Programme Specialist, UNDP Ethiopia, Mr. Bwalya, and the Ethiopian Minister of the Ministry of Agriculture (MOA) had a meeting to discuss renovating and refurbishing the National Soil Testing Center (NSTC). It was the understanding of both Mr. Bwalya and Ms. T that the Minister wanted the USD 1,000,000 contract to be awarded to Digata Industries Public Limited Company (Digata).
7. On 1 June 2014, Mr. S, the President of Digata wrote an e-mail to, *inter alia*, the Minister of the MOA, Ms. T, Mr. T (Team Leader, UNDP Economic Growth and Poverty Reduction and Ms. T's First Reporting Officer (Team Leader or FRO)) and Mr. Bwalya. The e-mail, which has the subject line "TOR/MOU between MOA and Digata Industries Inc." reads in relevant part as follows:

Hello Your Excellency,

Enclosed for your review and signature is the Contract Agreement to be signed between the Ministry of Agriculture and Digata Industries Inc. regarding the National Soil Testing Center (NSTC) Laboratory Renovation & Upgrade Project which is slated to be funded by UNDP as soon as the necessary signatures are secured. ...

8. On 30 July 2014, Ms. T sent the following e-mail to Mr. Bwalya and her FRO: “Dear Sam and [Mr. T], As discussed, please find attached the draft Terms of Reference and Consultancy Contract for the renovation and upgrading of the National Soil Testing Center for your review and comments.”

9. On the morning of 31 July 2014, Mr. Bwalya and Ms. T had a meeting. It is alleged that Mr. T also took part in this meeting and that Ms. T was instructed to draft a backdated Letter of Intent.

10. Ms. T prepared and transmitted the Letter of Intent to Mr. Bwalya by e-mail on 31 July 2014 with copy to Mr. T. The e-mail has the subject line reading “Letter of Intent – MoA and DIGATA” and states: “Dear Sam, As discussed this morning, I’ve prepared and attached a draft letter of Intent for your review and comment.” This Letter of Intent reads, *inter alia*: “The purpose of this Statement of Intent is to provide an overall framework of cooperation between Ministry of Agriculture and Digata Industries Inc. under National Agricultural-Products Quality Infrastructure (NAPQI) framework”. Just above the signature lines, it says: “Signed on this day, 11 October 2011, in Addis Ababa, Ethiopia.”

11. On 1 August 2014, Mr. Bwalya sent an e-mail to Ms. T with the subject line: “Renovation and Upgrading of the National Soil Testing Center – ToR and Consultancy Contract”. The e-mail reads in relevant part:¹

Dear [Ms. T],

I have browsed through the draft and looks ok by me. The only comment is that there are two contract amounts that are different, these should be harmonized. Then send it to procurement for them to put it in our UNDP format, and make it ready for sharing with the minister *but only after we have received the mou between them and digata*. [Mr. W] is already briefed on this contract and will provide the necessary assistance to ensure this is quickly rounded up.

¹ Emphasis added.

12. On 3 August 2014, Mr. S of Digata wrote an e-mail to the Minister of the MOA, with the subject line: “Letter of Intent”, copying Ms. T, which reads, in part: “Hello Your Excellency, enclosed for your review and approval is a ‘Letter of Intent’ prepared by UNDP in order to expedite the funding process by fulfilling the necessary internal funding requirements. We have reviewed and signed the letter believing that such a letter will indeed set a firm foundation for justifying the current and future funding requests by MOA.”

13. On 9 August 2014, the Minister of the MOA e-mailed Mr. S of Digata, with the subject line “MoU”, stating: “Dear [Mr. S], I am still waiting for your MoU. [Minister].”

14. On 10 August 2014, Mr. S responded as follows:²

Good morning Your Excellency,

I have attached MOU for your review and approval. I have signed it from here and if your approval is secured which I think it is, we can move forward by signing it. I will call you this morning to discuss this matter. Incidentally, this was sent to you as “Letter of Intent” from [Ms. T]. *I changed it to MOU because that is what is needed to pin down the on-going working framework so that this type of projects can proceed unhindered by the existing cumbersome procedures.*

15. Following that communication, a Memorandum of Understanding (MOU) between the MOA and Digata was signed by the Minister of the MOA and Mr. S of Digata. The text of the MOU is identical to the previous Letter of Intent including the phrase: “Signed on this day, 11 October 2011, in Addis Ababa, Ethiopia”.

16. On 14 August 2014, Mr. T was proceeding on leave and left handover notes to the UNDP Ethiopia Programme Staff. Item No. 10 of the handover notes instructed Ms. T to “follow up [on] the signing of MoU between DIGATA and MoA.”

17. Accordingly, Ms. T wrote to the Minister of the MOA on 15 August 2014 as follows:

Your Excellency,

Your Administrative Assistant informed me that the MOU between MoA and Digata is now signed. I would therefore like to follow-up by sending you a draft letter for MOA requesting UNDP to sub-contract Digata to undertake the renovation and upgrade of the NSTC. I am

² Emphasis added.

also attaching a draft Terms of Reference for your review. The Terms of Reference also includes points that we discussed during our meeting in your office a month ago. (...)

18. Ms. T attached the two documents as advised in her e-mail.

19. In a letter to Mr. Bwalya dated 25 August 2014, the Minister of the MOA says: “In 2011, Ministry of Agriculture signed a Memorandum of Understanding with Digata Industries INC to start implementing NAPQI”, that “the Ministry of Agriculture with the support of UNDP would like to continue implementing NAPQI by renovating & upgrading the [NSTC] Laboratory” and that “[g]iven that the Ministry of Agriculture has successfully worked with [Digata] in two other similar projects over the past four years ... it would like to continue working with [Digata] in this current project as well”. The letter further stated that the “Ministry of Agriculture would therefore like to request UNDP to arrange a contract for [Digata] to undertake the renovation and upgrade of NSTC”; attached were the MOU and the Terms of Reference.

20. Mr. Bwalya’s handwritten note to the then Deputy Country Director, UNDP Ethiopia (Deputy Country Director or Mr. W), dated 25 August 2014 indicates that Mr. Bwalya directed him to process the contract for Digata. It reads as follows: “Please process the contract for Digata as requested in the attached letter + MOU. TOR are also attached.”

21. On 27 August 2014, the then Head of Procurement, UNDP Ethiopia (Head of Procurement or Mr. G) addressed an e-mail to the then Deputy Country Director in which he expressed his reservations about the request from the MOA. He stated that he had discussed with the Programme Specialist (Ms. T) and reviewed the request from the MOA and that Ms. T saw several issues, *inter alia* the fact that the Ministry had entered an MOU with the private firm; that this was not a contract, but a promise to engage the firm in future projects, which, from a procurement point of view “violates all procurement principles”. The e-mail further stated that the fact that the TOR clearly mentioned the firm was not acceptable. The e-mail further stated that UNDP did not fulfil any of the factors required for direct contracting and it was therefore recommended that the MOA should handle this case.

22. By e-mail dated 18 September 2014, the then Head of Procurement followed up with Mr. Bwalya advising him that he was following an improper procurement process.

23. On 22 October 2014, Mr. Bwalya endorsed the consultancy contract between the MOA and Digata.

24. On 18 November 2015, the UNDP's Office of Audit and Investigations (OAI) received two complaints alleging corruption in the award of the NSTC project to Digata.

25. On 15 February 2017, OAI notified Mr. Bwalya that he was a subject of the investigation. On 9 August 2017, OAI sent Mr. Bwalya a copy of the draft investigation report. On 17 September 2017, Mr. Bwalya submitted his comments on the draft investigation report. OAI determined that they did not warrant changes to the investigation report, which was subsequently issued on 27 September 2017.

26. By letter of 12 July 2018 (charge letter), Mr. Bwalya was charged with misconduct for instructing a UNDP staff member (the Programme Specialist) to forge a backdated MOU and make a misrepresentation in a second document, intentionally acting to avoid or deviate from UNDP's Financial Regulations, Rules and Procedures through the creation of these documents, and demonstrating favouritism in the award of a contract.

27. On 16 and 17 August 2018, Mr. Bwalya provided his response to the charge letter.

28. By letter dated 8 January 2019 (sanction letter), UNDP concluded that the charges were substantiated and that the sanction of separation from the Organization with compensation in lieu of notice but without termination indemnity was proportionate to Mr. Bwalya's misconduct.

29. On 8 April 2019, Mr. Bwalya filed an application challenging the imposition of the disciplinary measure.

30. The Dispute Tribunal received oral evidence from Ms. T, the Programme Specialist; Mr. W, the then Deputy Country Director; Mr. G, the then Head of Procurement; and Mr. T, Ms. T's FRO and Team Leader.

31. On 9 April 2022, the UNDT issued Judgment No. 2022/041 dismissing the application in its entirety.

32. The UNDT concluded that the facts on which the disciplinary measure was based had been established by clear and convincing evidence. The UNDT dismissed Mr. Bwalya's main argument that the Secretary-General's witness, the Programme Specialist, lied to the investigators that she had been instructed by Mr. Bwalya to forge an MOU. Throughout the hearing the UNDT found that Ms. T was reliable and credible and that "her testimony was coherent, consistent and

corroborated by evidence pointing to a systematic plot that ensured that procurement rules and regulations were circumvented in favour of direct contracting of Digata”.³ The UNDT found that the witness was firm during the hearing that it was Mr. Bwalya who verbally instructed her to forge a document to satisfy the Minister’s wishes to work with Digata. In compliance with the instruction, she drafted the impugned MOU in the form of a Letter of Intent and shared it with Mr. Bwalya in an e-mail dated 31 July 2014 for his information. When Mr. Bwalya discussed with the Head of Procurement about the direct sourcing of Digata, he was advised that it could not be done as it was against the rules and regulations. Evidence was produced in the form of a handwritten note dated 25 August 2014, from Mr. Bwalya to the then Deputy Country Director directing him to process the contract for Digata, but the Deputy Country Director refused to follow the directive because according to him, it was against procurement procedures to offer Digata a contract without a competitive bidding process. The UNDT stated that Mr. Bwalya did not offer any contradictory evidence or challenge the authenticity of the above documentary evidence which directly connected him to the irregular activity. Instead, he opted not to offer any evidence, whether in the form of a written or verbal statement, and to remain silent.

33. The UNDT found that, according to the evidence from Ms. T, the Programme Specialist, in order to directly contract Digata, it was necessary to prove that Digata had an existing continuing working relationship with the MOA dating back to 2011; and that to procure this proof, there was need for an agreement signed in 2011. This proof did not exist because there was no such continuing project between Digata and the MOA. Mr. Bwalya instructed Ms. T to create this document by forging the date. Since Mr. G and Mr. W, then Head of Procurement and Deputy Country Director, respectively, were not going to support this irregular procurement process, Mr. Bwalya instructed Ms. T to advise Digata and the MOA how the contract could be awarded to Digata. Ms. T asserted that her communication with the two interested parties was on the advice of, and sanctioned by, her supervisors.

34. The UNDT quoted e-mails which Ms. T confirmed during the hearing concerned the fraudulent MOU which she had prepared under the direction of Mr. Bwalya as a Letter of Intent. The UNDT concluded that there was clear and convincing evidence not undermined by any evidence to the contrary that Mr. Bwalya instructed his junior officer to commit fraud and that he favoured Digata through direct sourcing.

³ Impugned Judgment, para. 30.

35. The UNDT was satisfied that the established facts amounted to misconduct.

36. Turning to due process, the UNDT found unsubstantiated Mr. Bwalya's allegations that "the investigators were unprofessional, incompetent, inexperienced and liars". The UNDT found that it emerged from the witnesses' testimonies that interviewing the Minister of the MOA and Chief Executive Officer of Digata to verify whether they signed a fraudulent MOU would not alter the charges of instructing a staff member to forge a document or favouritism; neither would corroborating evidence that Digata had successfully completed prior projects with the MOA; nor that Mr. Bwalya sought and took advice from procurement; nor that the Government of Ethiopia wished to work with Digata and Mr. Bwalya was only implementing those wishes or indeed that the UNDP Country Office in Ethiopia had, prior to Mr. Bwalya's assuming his position, considered sole sourcing of Digata. Further, the UNDT found that it transpired from the evidence that the fact that procurement was not Mr. Bwalya's area of expertise or that he was a novice having just assumed the position of Country Director was contradicted by the oversight responsibility he held to oversee management of the procurement of Digata, to approve the formal request from the Ministry and endorse the MOU.

37. While the UNDT found that Mr. Bwalya had initially not been specifically mentioned by Ms. T to have issued the instruction to forge a document, during trial, she was particular that Mr. Bwalya had issued the instruction, and this was corroborated by circumstantial evidence namely through e-mail exchanges with the staff member, through his endorsement of the fraudulent MOU and through his approval of the misrepresented formal request both of which contained a 2011 date. The UNDT concluded that in this case Mr. Bwalya's due process rights had been respected because he understood the charges against him, had ample opportunity to seek clarification, responded to the charges and gave his comments after what the record shows to be thorough consultations with his duly designated Counsel.

38. Finally, the UNDT held that the sanction imposed by the Administration was proportionate to the offence and dismissed his application.

39. Mr. Bwalya filed an appeal on 8 July 2022, and the Secretary-General filed an answer on 19 September 2022.

Submissions

Mr. Bwalya's Appeal

40. As a preliminary matter, Mr. Bwalya asks that the UNAT hold an oral hearing.

41. Mr. Bwalya contends that the UNDT erred in law and in fact by failing to recognize that the facts upon which the decision to terminate Mr. Bwalya's appointment was based had not been established. In particular, the UNDT erred in relying on the testimony of the primary witness, the Programme Specialist, who changed her testimony from first stating that her two supervisors had instructed her to backdate the document, to saying that she could not remember which of the two supervisors had given her the instruction, to saying – following leading questions by counsel – that Mr. Bwalya gave the instruction. Her testimony is directly refuted by Mr. Bwalya as well as the Team Leader, who was the other person in the meeting. Mr. Bwalya identifies a number of additional facts that he maintains the Administration and the UNDT "should have established". In particular, he says that there was direct evidence that he did not give such instruction to Ms. T and that there was no evidence that he actually saw the draft document. He further submits that e-mail correspondence from August 2014 reveals that the Programme Specialist "was operating solo". The facts were therefore not established by clear and convincing evidence.

42. Mr. Bwalya further identifies other possible explanations for the events in question, in particular that Ms. T either lied or had misunderstood his instructions, or that Digata drafted the Letter of Intent and that Ms. T added the 2011 date, and that Digata and Ms. T had an arrangement. He seeks to distinguish between the Letter of Intent and the MOU, maintaining that even if he had instructed the Programme Specialist to prepare a backdated Letter of Intent he was not responsible for the MOU that was ultimately signed and that the charge was therefore "defective on its face". He furthermore maintains that the forged documents were ultimately not relied upon.

43. Mr. Bwalya alleges that the charges against him were "invalid", that the UNDT erred by upholding a sanction based on "invalid charges", and that the UNDT "knew [the allegations] to be false". Specifically, he says that he was pursuing a legitimate request from the MOA to contract Digata on a sole source basis, that the decision to contract Digata was made jointly by UNDP and the Government of Ethiopia and that that "decision" predated his assumption of the post of Country Director. Furthermore, UNDP procurement officials testified that Mr. Bwalya did not

violate any rules and therefore that he could not have acted to deviate from UNDP's Financial Rules and Regulations or to favour Digata.

44. Mr. Bwalya alleges "investigator malfeasance" saying that there were "many irregularities, missteps and outright dishonesty with the UNDP investigators", that they "put words [in the Programme Specialist's] mouth to create the story they wanted to tell" and withheld potentially exculpatory evidence. The way the investigation was conducted offers prima facie evidence that there was a conspiracy against Mr. Bwalya between the Administration and the investigators. The UNDT Judge was made aware of the apparent violations by the investigators, but chose to either ignore or downplay them.

45. Mr. Bwalya complains that in its discussion at paragraph 40 of the impugned Judgment, the UNDT failed to exercise jurisdiction and erred on a question of law by not intervening after it had become apparent that the Secretary-General had fraudulently concealed potentially exculpatory evidence from him (OAI interview with Mr. S, President of Digata, 2 February 2017). He points to Judgment No. UNDT/2011/106 which requires that all materials gathered in the course of investigating a case ought to be placed before the Tribunal.

46. Finally, Mr. Bwalya submits that the evidence of fraudulent concealment of evidence and a conspiracy between the investigators who are supposed to act independently, and the UNDP Administration is conclusive. Neither could have acted alone. The UNDT Judge's failure to report this misconduct under Article 10(8) of the UNDT Statute amounts to a tacit endorsement of the "unlawful tactic of withholding exculpatory evidence in disciplinary proceedings" before the UNDT which undermines the whole internal justice system that relies on investigation reports to establish the facts.

47. Mr. Bwalya asks that the UNAT reverse the impugned Judgment. He asks that the decision to separate him from service be rescinded, that any compensation damages awarded be based on the length of time it is taking to resolve the issue and not on the basis of his contractual status when the case was "fabricated". Mr. Bwalya had already passed the UNDP Resident Representative Assessment examinations and was rated outstanding overall, and on all competencies, and but for the unjust termination of his contract there was no reason why he would not have been appointed to this senior role. Mr. Bwalya asks that the UNAT award commensurate compensation and damages for violation of his due process rights and moral damages.

The Secretary-General's Answer

48. The Secretary-General avers that Mr. Bwalya has failed to establish that the facts were not established. His arguments on appeal, as they were before the UNDT, are both meritless and irrelevant to the charges against him. First, as to Mr. Bwalya's contention that he had identified additional facts that the Administration and the UNDT "should have established", the Secretary-General contends that neither the Administration nor the UNDT were obliged to establish these additional facts. The UNDT is not tasked with investigating facts on which the disciplinary sanction has not been based. Second, Mr. Bwalya's arguments regarding other possible explanations for the events were considered, but the UNDT determined that they were unsupported by the evidence. Third, contrary to Mr. Bwalya's contention that even if he had instructed the Programme Specialist to prepare a backdated Letter of Intent he was not responsible for the MOU that was ultimately signed, the Letter of Intent and the MOU were essentially the same document and the UNDT correctly referred to the fact that the Letter of Intent was subsequently adapted into the MOU. Forth, turning to Mr. Bwalya's reference to the testimony of the Team Leader, who he suggests provided "direct evidence" that no such instruction was given to the Programme Specialist, the Secretary-General submits that the Team Leader was the subject of parallel disciplinary proceedings and he had denied that he was present at any meeting concerning the contracting of Digata.

49. The Secretary-General says that Mr. Bwalya's claim that none of the fraudulently prepared documents were ever used to contract Digata is irrelevant and fails to establish any error on appeal. It was Mr. Bwalya's conduct, not its consequences, which were at issue. The fact that the backdated Letter of Intent/MOU was ultimately not relied upon to contract Digata did not alter the fact that Mr. Bwalya gave the instruction to prepare the fraudulent documents, that he acted to avoid or deviate from UNDP's Financial Regulations, Rules and Procedures, and that he favoured Digata.

50. The Secretary-General submits that Mr. Bwalya has not established that the UNDT erred in relying on the "changed" testimony of the Programme Specialist. As stated by the UNDT, she was firm during the hearing that it was Mr. Bwalya who verbally instructed her after their meeting with the Minister of the MOA, to forge a document to satisfy the Minister's wishes to work with Digata. This was corroborated by circumstantial evidence. The Programme Specialist was examined and cross-examined at length and there were no inconsistencies in her testimony or any other factors that might diminish her credibility. In contrast, Mr. Bwalya declined to testify and

offered no evidence to the contrary. The UNDT thus did not err in its reliance on the Programme Specialist's testimony.

51. In any event, the Administration did not rely on this explicit confirmation when it determined that Mr. Bwalya had committed misconduct, but rather considered that the totality of the evidence provided clear and convincing evidence that he instructed the Programme Specialist to forge the Letter of Intent/MOU. This evidence, as set out in the Sanction Letter, remains sufficient to establish by clear and convincing evidence that Mr. Bwalya instructed Ms. T to forge the Letter of Intent/MOU.

52. The Secretary-General submits that Mr. Bwalya has failed to establish that the UNDT erred in fact and law by upholding a sanction based on "invalid charges". As correctly found by the UNDT, it was irrelevant to the charges against him whether Digata had previously worked with the MOA, whether the MOA wished to work with Digata, and whether the UNDP Country Office had considered the sole sourcing of Digata prior to Mr. Bwalya assuming his position. None of these circumstances would have justified the fraudulent backdating of the impugned documents nor were they capable of providing any exception to UNDP's Financial Rules and Regulations, and accordingly, did not have any bearing on the lawfulness of Mr. Bwalya's conduct or on the validity of the charges against him.

53. The Secretary-General maintains that contrary to Mr. Bwalya's allegations, the testimony of the Deputy Country Director and the Head of Procurement in the UNDP Country Office did not support the conclusion that Mr. Bwalya could not have sought to favour the contractors. The Deputy Country Director testified that Mr. Bwalya must have known competitive bidding was a requirement when he instructed him to issue a contract to Digata. Further, the Head of Procurement testified that Mr. Bwalya had told him that he had already promised the Minister of the MOA that UNDP would contract Digata. Mr. Bwalya sought to avoid UNDP's procurement rules on the basis of a backdated and fraudulent MOU and accompanying Letter of Request and by further continuing to insist that this be done even after procurement colleagues advised that it was not possible.

54. The Secretary-General avers that OAI's decision not to include the transcript of the interview with the President of Digata in the list of exhibits annexed to its investigation report was not improper and did not prejudice Mr. Bwalya in any way. The transcript in question was neither exculpatory nor inculpatory. Moreover, Mr. Bwalya was provided with the transcript and was

specifically afforded the opportunity to provide observations. In addition, Mr. Bwalya's speculations on the potential relevance of the testimony from the former Minister of the MoA or from the President of Digata also do not demonstrate any error on appeal. Not only did the UNDT not err when it concluded that interviewing these two individuals would "not alter the charges", but Mr. Bwalya was specifically invited to file a motion indicating whether he wished to call these two individuals and he elected not to do so. He is therefore estopped from alleging any error on behalf of the UNDT in this regard.

55. Finally, Mr. Bwalya has failed to establish that the UNDT erred in failing to refer the alleged misconduct by the investigators and UNDP officials for accountability under Article 10(8) of the UNDT Statute. The UNDT was under no obligation to refer the conduct of the investigators and the UNDP officials for accountability and did not err in declining to do so, especially in circumstances where there was no impropriety.

56. The Secretary-General asks that the UNAT dismiss the appeal.

Considerations

Oral hearing

57. As a preliminary matter, the Appeals Tribunal addresses the request for an oral hearing. Oral hearings are governed by Article 8(2) and (3) of the Appeals Tribunal's Statute and Article 18(1) of the Appeals Tribunal's Rules of Procedure (Rules). The Statute provides that the Appeals Tribunal shall decide whether the personal appearance of the appellant or any other person is required at oral proceedings and the appropriate means to achieve that purpose; and that the judges assigned to a case will determine whether to hold oral proceedings. In turn, the Rules stipulate that the judges hearing a case may hold oral hearings on the written application of a party or on their own initiative if such hearings would assist in the expeditious and fair disposal of the case.

58. Under these provisions, the oral hearing before the UNAT does not aim to provide any further oral evidence or otherwise, but to discuss elements of fact and of law which are already on the record.⁴ In this sense, Mr. Bwalya's argument that a hearing should be required because "the Judge misunderstood the case and as a result, her reasoning conflates the facts" is not

⁴ *Wissam Zeid v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1235, para. 21.

persuasive so as to justify an oral hearing about the issues raised in the appeal. The factual and legal issues arising from the appeal have already been clearly defined by the parties and there is no need for further clarification. All elements for discussion are already on the record. Moreover, we do not find that an oral hearing would “assist in the expeditious and fair disposal of the case”, as required by Article 18(1) of the Rules. Mr. Bwalya’s request for an oral hearing is therefore denied.

Clear and convincing evidence

59. In disciplinary cases, the Dispute Tribunal must establish whether the facts on which the sanction is based have been established by clear and convincing evidence when termination is a possible outcome. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt; it means that the truth of the facts asserted is highly probable.

60. Mr. Bwalya contends that the UNDT erred in law and in fact by failing to recognize that the facts upon which the decision to terminate his appointment was based had not been established. In particular, the UNDT erred in relying on the testimony of the primary witness, the Programme Specialist, who changed her testimony from first stating that her two supervisors had instructed her to backdate the document, to saying that she could not remember which of the two supervisors had given her the instruction, to saying – following leading questions by counsel – that Mr. Bwalya gave the instruction. Her testimony is directly refuted by Mr. Bwalya as well as the Team Leader, who was the other person in the meeting. Mr. Bwalya identifies a number of additional facts that he maintains the Administration and the UNDT “should have established” in order to find that he saw the draft. He further submits that e-mail correspondence from August 2014 reveals that the Programme Specialist “was operating solo”. The facts were therefore not established by clear and convincing evidence. Mr. Bwalya further identifies other possible explanations for the events in question. He seeks to distinguish between the Letter of Intent and the MOU, maintaining that even if he had instructed the Programme Specialist to prepare a backdated Letter of Intent he was not responsible for the MOU that was ultimately signed and that the charge was therefore “defective on its face”. He furthermore maintains that the forged documents were ultimately not relied upon.

61. We find that Mr. Bwalya’s arguments are without merit.

62. Article 18(1) of the UNDT Rules of Procedure provides that the Dispute Tribunal shall determine the admissibility of any evidence. Under our consistent jurisprudence,⁵

the Dispute Tribunal has broad discretion under Article 18(1) of its Rules of Procedure to determine the admissibility of any evidence and the weight to be attached to such evidence. The findings of fact made by the UNDT can only be disturbed under Article 2(1)(e) of the Appeals Tribunal Statute when there is an error of fact resulting in a manifestly unreasonable decision. This Tribunal is mindful that the Judge hearing the case has an appreciation of all the issues for determination and the evidence before it.

63. In the present case, the UNDT's conclusion is consistent with the evidence and without error. Mr. Bwalya has not put forward any persuasive grounds to warrant interference by this Tribunal.

64. On 23 August 2021 and 24 January 2022, Ms. T testified before the UNDT that, in an informal meeting on 31 July 2014 between her, Mr. Bwalya and her FRO and Team Leader, Mr. T, she was asked to draft a backdated MOU which could be signed between the MOA and Digata. The purpose was to avoid procurement requirements, specifically a competitive process, by showing that there was an existing long-term agreement between the MOA and Digata for renovating laboratories. In order to do this, the MOU had to be backdated to 2011, and it was Mr. Bwalya who indicated this date. Although she was not comfortable with the request, she complied with it because it came from her supervisor. Accordingly, she drafted the MOU and e-mailed it to Mr. Bwalya copying Mr. T. Mr. Bwalya responded, approved the Letter of Intent, and she sent it to Digata.

65. Despite very extensive and aggressive cross-examination by Mr. Bwalya's counsel, Ms. T stood her ground and confirmed her previous narrative.

66. Her testimony is in complete accordance with her 5 March 2021 written witness statement to the UNDT where she *inter alia* wrote:⁶

⁵ *Yasin v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-915, para. 56, citing *He v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-825, para. 59; *Verma v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-829, para. 29, citing *Lemonnier v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-762, para. 37; *Kacan v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-582, para. 25, citing *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-546, para. 35 and citation therein.

⁶ Ms. T's written witness statement dated 5 March 2021, paras 4 to 7.

... The discussion on 31 July 2014 was not a formal meeting with a formal agenda, more of an informal discussion. I do not remember exactly who said what during the meeting, but I do remember that Mr. Bwalya spoke more, and that Mr. [T] was more passive. The discussion focused on how best to respond to the Minister's request. The Minister, in his meeting with Mr. Bwalya, had mentioned the work on two other labs that UNDP had funded, that had been done by Digata, and had suggested that based on that, Digata might also renovate the NSTC. I recall that, during the discussion of 31 July 2014, there was an agreement that we had to find a way to see how we could best support and respond to the Minister's request, given the way the Minister had presented that request. It was agreed that, if the renovation was presented rather as a package than a single request, it would be easier to process the consultancy, because the Minister had been quite clear that he wanted Digata to work on the NSTC lab as well. Coming out of the discussion, it was clear to me both that I was being asked to draft the request for the renovation of the NSTC in a way that would present it as a package, and that Digata was the vendor that was to support all the labs. It was clear to me at the time that we were trying to find a way to facilitate the Minister's request to quickly sign an agreement.

... I also remember that there was a discussion with the Head of Procurement and with the DCD (Operations) and Procurement that we had to have a competitive process. The purpose of the discussion on 31 July 2014 was clearly that we were trying to find other options on how we can move forward. The understanding was that having that document signed by the Minister and Digata would help in directly contracting Digata without going through a competitive process. It was clear in that discussion that the Memorandum of Understanding (MoU) had to be backdated in order to achieve that. At the time, I was focused on how we could respond to the Minister's request. I did not think of it as a fraudulent activity – more of finding a solution. I was not 100 % comfortable with this, but this request was coming from the Country Director, Mr. Bwalya, and I was following his instructions.

... After preparing the backdated MoU, I sent it to Mr. Bwalya and copied Mr. [T] for their comments. The purpose of the email was to follow up on the discussion we had had earlier. I had prepared the draft MoU based on our discussion and I shared it to make sure that this was what Mr. Bwalya wanted, and what had been agreed. I copied Mr. [T] because he was my direct supervisor – anything I did went through him.

... I do not remember how Mr. Bwalya responded to that email, but I know I would not have moved forward and sent it to Mr. [S] without a go-ahead. Although I don't recall when or how he gave me the go-ahead, I'm certain that he – not Mr. [T] – told me to send it. Later, when I sent the MoU to Mr. [S], I copied Mr. Bwalya to show him that I had followed up based on his agreement. I do not recall why I did not copy Mr. [T] on that email – possibly because he hadn't given me any comments.

67. The statement is also in accordance with her 24 January 2017 interview during the investigation procedure:⁷

... HT: I prepared the draft and I was asked to backdate it, yes.

... LG:⁸ Who asked you to backdate that document?

... HT: My supervisors. It was during that meeting, so both my supervisors were there.

... LG: But who specifically mentioned to you to backdate the Memorandum of Understanding?

... HT: I don't remember which one exactly said it, but it was just the three of us in that meeting. I can't say who exactly said it, and who confirmed. I don't remember exactly, I'm sorry.

... LG: Even if you don't remember who exactly told you to backdate that Memorandum of Understanding, your understanding was that both supervisors were in the same line?

... HT: They were in agreement.

... LG: They were in agreement to the [inaudible]?

... HT: Yes...

... LG: That was your understanding?

... HT: That was my understanding.

... LG: And why 2011?

... HT: Because that was the first Addis Ababa laboratory. That was when it was renovated.

...

... LG: So both documents were intended to justify the direct procurement of Digata?

... HT: Yes.

... LG: I'm going to show you now Document D. An email from Samuel Bwalya to you, and it says, dated 1 August: "Dear [Ms. T], I have browsed through the draft and it looks ok by me. The only comment is that there are two contract amounts that are different. They should be harmonized. Then send it to procurement for them to put it

⁷ OAI Transcript, UNDP, 24 January 2017, paras. 356-368 and 373 to 380. HT is Ms. T, the Programme Specialist.

⁸ Investigations Specialist.

in our UNDP format and make it ready for sharing with the Minister but only after we have received the MOU between them and Digata.” What MOU is the Country Director referring here?

... HT: He is referring to the same MOU that we just discussed.

... LG: Do you mean the one that was backdated in 2011?

... HT: Yes.

... LG: So the Country Director was requesting you to follow up on the backdated MOU between Digata and the Ministry of Agriculture?

... HT: Yes.

68. Ms. T’s statement is further corroborated by documentary evidence, particularly Mr. Bwalya’s 1 August 2014 follow-up e-mail where he specifically referred to an MOU between the MOA and Digata, and Mr. T’s 14 August 2014 handover notes where he instructed Ms. T to follow up on the signing of the MOU between the MOA and Digata. These documents show that, as described by Ms. T, both her supervisors knew about the MOU to be signed by the Minister of the MOA and Digata.

69. The fact that the document was originally drafted as a Letter of Intent and only later (by Digata on request of the MOA) changed to an MOU, is of no legal relevance. A comparison between the (draft) Letter of Intent and the (signed) MOU shows that the text of both documents is identical. In particular, both documents end with the phrase “Signed on this day, 11 October 2011, in Addis Ababa, Ethiopia”. The above-mentioned e-mail and handover notes demonstrate that the terms “Letter of Intent” and “Memorandum of Understanding” were used interchangeably, and that both supervisors knew about the backdated MOU eventually signed by the MOA and Digata.

70. Finally, there is no reason to assume that Ms. T would have given false testimony about these incidents. When testifying before the UNDT, she had already been disciplined for the incident and been demoted from P-3 to P-2. Mr. T’s 24 January 2022 oral testimony before the UNDT, on the other hand, that he was not present during the 31 July 2014 meeting and did not have any knowledge about an MOU between the MOA and Digata, is not credible. Mr. Bwalya himself, in his appeal, asserts that Mr. T was present during the 31 July 2014 meeting. As shown by his 14 August 2014 handover notes, Mr. T was well aware that such an MOU existed. The UNDT considered Mr. Bwalya’s alternative explanations for the events,

including that Ms. T either lied or had misunderstood his instructions and that Digata and Ms. T had an arrangement, but correctly found that they were unsupported by the evidence.

Invalid charges

71. Mr. Bwalya alleges that the charges against him were “invalid”, that the UNDT erred by upholding a sanction based on “invalid charges”, and that the UNDT “knew [the allegations] to be false”. Specifically, he says that he was pursuing a legitimate request from the MOA to contract Digata on a sole source basis, that the decision to contract Digata was made jointly by UNDP and the Government of Ethiopia and that that “decision” predated his assumption of the post of Country Director for UNDP in Ethiopia. Furthermore, UNDP procurement officials testified that Mr. Bwalya did not violate any rules and therefore that he could not have deviated from UNDP’s Financial Rules and Regulations or to favour Digata.

72. This argument is also without merit. Both Mr. W, at the time Deputy Country Director, and Mr. G, the then Head of Procurement, testified before the UNDT that a direct contracting on a “sole source basis” was not possible and that a proper procurement process including competitive bidding was necessary. There is clear and convincing evidence that the backdated MOU between the MOA and Digata had the purpose of circumventing the regular procurement process. Apart from Ms. T’s testimony in this regard, the 10 August 2014 e-mail by Mr. S from Digata to the MOA confirms that the Letter of Intent was changed “to MOU because that is what is needed to pin down the on-going working framework so that this type of projects can proceed unhindered by the existing cumbersome procedures”.⁹

Investigator Malfeasance

73. Mr. Bwalya alleges “investigator malfeasance” saying that there were “many irregularities, missteps and outright dishonesty with the UNDP investigators”, that they “put words [in the Programme Specialist’s] mouth to create the story they wanted to tell” and withheld potentially exculpatory evidence. The way the investigation was conducted offers *prima facie* evidence that there was a conspiracy against Mr. Bwalya between the Administration and the investigators. The UNDT Judge was made aware of the apparent violations by the investigators, but chose to either ignore or downplay them.

⁹ Emphasis added.

74. These arguments do not put the UNDT Judgment into doubt. As shown above, there is clear and convincing evidence that Mr. Bwalya instructed Ms. T to draft a backdated Letter of Intent/MOU demonstrating a long-term contractual relationship between MOA and Digata in order to justify the direct conclusion of a USD 1,000,000 contract between MOA and Digata and to avoid a competitive bidding exercise as required by UNDP's Financial Regulations and Rules. Mr. Bwalya has not shown that there were any due process violations during the investigation procedure.

Failure to follow precedent

75. Mr. Bwalya complains that the UNDT failed to exercise its jurisdiction and erred on a question of law by not intervening after it had become apparent that the Secretary-General had fraudulently concealed potentially exculpatory evidence from him, i.e. the OAI interview of Mr. S of 2 February 2017. Mr. Bwalya points to Judgment No. UNDT/2011/106 which requires that all materials gathered in the course of investigating a case ought to be placed before the Tribunal. He then cites paragraph 40 of the impugned Judgment where the UNDT explains why it did not find it necessary to order Mr. S to appear at the oral hearing.

76. This allegation has no merit. A review of the UNDT hearing transcript of 24 January 2022, pages 52 ff., shows that the investigation interview transcript was before the UNDT. As to paragraph 40 of the impugned Judgment, it deals with a different question, namely whether Mr. S should have been heard as a witness before the UNDT. Further, Mr. S' statement has no exculpatory value. His statement in this interview, that he realized that the date on the MOU was incorrect and pointed this out immediately, is not credible. During the interview, and confronted with the 3 and 10 August 2014 e-mails he sent to the MOA, he could not at all explain why he signed the MOU and also asked the MOA to sign it despite its wrong date.

Failure to report misconduct under Article 10(8) of the UNDT Statute

77. Finally, Mr. Bwalya submits that the evidence of fraudulent concealment of evidence and a conspiracy between the investigators who are supposed to act independently, and the UNDP Administration is conclusive. Neither could have acted alone. The UNDT Judge's failure to report this misconduct under Article 10(8) of the UNDT Statute amounts to a tacit endorsement of the "unlawful tactic of withholding exculpatory evidence in disciplinary proceedings" before the UNDT

which undermines the whole internal justice system that relies on investigation reports to establish the facts.

78. As shown above, there was no misconduct by the investigators or the UNDP Administration. Therefore, there was no need for the UNDT to proceed under Article 10(8) UNDT Statute.

Judgment

79. The appeal is dismissed, and Judgment No. UNDT/2022/041 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 30th day of June 2023 in New York, United States.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Halfeld

Judgment published and entered into the Register on this 7th day of August 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar