
Case No.: UNDT/NY/2011/013

Judgment No.: UNDT/2011/061

Date: 31 March 2011



Introduction

1. On 11 February 2011 the Applicant, a staff member of the Multi-Donor Trust Fund Office (“MDTF Office”) of the United Nations Development Programme (“UNDP”), filed an application contesting the imposition of the disciplinary measure of separation from service with notice and termination indemnity. The Applicant was notified of the imposed disciplinary measure on 5 December 2010.

2. The contested decision was based on the findings of an investigation conducted during December 2009 and January 2010 by the Office of Audit and Investigations (“OAI”) of UNDP, which established, *inter alia*, that the Applicant had submitted falsified information to the New York City Housing Development Corporation (“HDC”). The Applicant seeks rescission of the contested decision and reinstatement to her original post with full restoration of her employment benefits.

Procedural matters

3. On 11 February 2011 the Applicant filed a separate motion requesting that the matter be heard on an expedited basis and seeking confidentiality. In response to the Tribunal’s Order No. 43 (NY/2011), the Respondent filed a submission on 18 February 2011, consenting to an expedited hearing but objecting to the request for confidentiality.

4. On 22 February 2011 the Applicant filed and served an application for temporary relief pending the Tribunal’s final judgment in her case. The relief requested was either a suspension of action of

MDTF Office. The MDTF Office acts as the focal point and administrator of donor funds intended for multi-agency operations in which UNDP is appointed as the administrative agent. The donors include Member States, non-governmental agencies and private individuals. From the MDTF Office's website, its mission statement is: "To provide transparent and accountable fund management services to the United Nations system to enhance its coherence, effectiveness and efficiency". Whilst the MDTF has its own management board, the personnel are UN staff members subject to the Staff Regulations and Rules.

10. On 1 July 2008 the Applicant's contractual status with the MDTF changed to that of an Administrative Associate on a fixed-term contract at the G-6 level, step 6. Her contract was set to expire on 1 July 2011. On 1 November 2009 the Applicant and one of her relatives ("Relative No. 1") submitted a rental application form to the HDC for a two-bedroom apartment located in a new housing complex in New York City, with a rent of USD2,187 per month. This housing complex is financed by the HDC, a public benefit corporation and a corporate governmental agency of the State of New York. The HDC provides financing for affordable housing reserved for people with low to middle-income earnings. The mission of the HDC is identified on its website as follows: "[T]o increase the supply of [m]ulti-family housing, stimulate economic growth, and revitalize neighborhoods by financing the creation and preservation of affordable housing for low, moderate and middle income New Yorkers". Apartments financed by the HDC are rented out at below-market rates because of the low-cost mortgages provided to developers. To be eligible for an HDC-financed apartment, the Applicant and her Relative No. 1 were required to show a combined income not exceeding USD134,400.

11. On 9 December 2009, after detecting irregularities in the Applicant's rental application form, the HDC contacted the Office of Human Resources, Bureau of Management, UNDP. On 10 December 2009 the Office of Human Resources referred the matter to the OAI for investigation. The OAI issued its investigation report in January 2010, finding that the Applicant had (i) misrepresented her annual salary and

16. By letter dated 2 March 2010, the Legal Support Office, Bureau of Management, UNDP, transmitted to the Applicant a copy of the OAI investigation report and supporting material for her comments. The Applicant provided her comments on 16 March 2010.

17. By letter dated 26 May 2010 the Applicant was charged with misconduct. The Applicant, at the time already represented by the Office of Staff Legal Assistance (“OSLA”), replied to the charges on 28 June 2010, taking “full responsibility for [her] grievous mistake” and requesting UNDP to take into account a number of mitigating circumstances. Her letter stated, *inter alia* (emphasis in original):

2. [The Applicant] concedes to her culpability in the charges brought against her. She admits her mistake of (i) submitting a 1040 Form and rental application to HDC that misrepresented the amount of her annual income and earning; and (ii) writing a letter purporting to

14. [The Applicant] is currently, and has been for some time, in a financial crisis due to the medical

20. [The Applicant] sincerely urges the UNDP Administrator to consider that for her to lose her position with the Organization would be a disaster[,] both professionally and personally, from which it is unlikely she will be able to recover.

21. Therefore, [the Applicant] respectfully requests that she be subject to the following disciplinary measures pursuant to Staff Rule 10.2(a): (i) written censure and/or (ii) loss of one or more steps in grade.

...

18. By letter dated 1 December 2010 the Associate Administrator of UNDP imposed on the Applicant the disciplinary measure of separation from service with three months' notice and two weeks' termination indemnity, pursuant to Staff Rule 10.2(a)(viii). In this letter, the Associate Administrator referred to, *inter alia*, the mitigating factors offered by the Applicant, but found that the Applicant's misconduct warranted the disciplinary measure of separation from service. The Associate Administrator's letter stated, *inter alia*:

I [the Associate Administrator of UNDP] refer to the letter dated 2 May 2010, addressed to you by ... [the] Assistant Administrator and Director, Bureau of Management, charging you with misconduct ("the charge letter"). On 28 June 2010, the UN Office of Staff Legal Assistance (OSLA) submitted a written response to the charge letter ("the response") on your behalf.

Following a thorough review of all the evidence on record and having considered the matter carefully, I have come to the conclusion that your actions warrant the imposition of a disciplinary measure of separation from service with notice and termination indemnity.

My decision is based on evidence that you (i) misrepresented your annual salary and working hours in a rental application form ("the rental application form") for a two-bedroom apartment located in a newly constructed housing complex in New York City, which is financed by the New York City Housing Development Corporation (HDC) and (ii) forged a letter purportedly written by one of your colleagues in order to qualify to rent a HDC-subsidized apartment to which you were otherwise not entitled.

...

Given the gravity of your misconduct, I [the Associate Administrator of UNDP] have no alternative but to impose the

measure of separation from service with notice and termination indemnity, pursuant to Staff Rule 10.2[a](viii). Please note that the notice period is three months and that two weeks' termination indemnity will be granted to you, pursuant to Annex III of the Staff Regulations for cases involving misconduct.

In your response, you claimed mitigating circumstances in an effort to reduce the seriousness of the anticipated disciplinary measure. We thoroughly reviewed all of your statements in this respect. In summary, whilst we acknowledge that your otherwise long record of unblemished service with the United Nations constitutes a mitigating circumstance, the way your actions were planned as well as the fact that you implicated an innocent colleague in your scheme constitute aggravating factors in this case.

We have also considered the case law that you indicated and note that the cases cited are not comparable factually or, where exceptionally lenient disciplinary measures were imposed, they were inconsistent with the overwhelming tribunal jurisprudence. Our analysis of relevant precedents and cases of the Administrative Tribunals (i.e. the former UN Administrative Tribunal, as well as the current UN Dispute Tribunal and UN Appeals Tribunal), show that misrepresentation and/or forgery w

requirement to do justice. The principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result (Sanwidi2010-UNAT-084). Although reference is made to the mitigating circumstances in the letter from the UNDP Associate Administrator dated 1 December 2010, there is no indication or evidence that UNDP made any efforts to contact the Applicant's current supervisor or other colleagues or sought other information which would form the basis for the decision to separate the Applicant from service in the particular circumstances.

b. The following mitigating factors, when taken into account, warrant a lesser punishment: (i) the Applicant has been an excellent employee for approximately 30 years, often working in difficult and dangerous duty stations, thus exhibiting loyalty and professionalism; (ii) she acknowledged her improper conduct, accepted responsibility for it, withdrew her rental application form, and fully cooperated with the investigation; (iii) the act occurred only as a result of her extreme desperation to find affordable housing near her Relative No. 2, who suffers from a medical condition and to whom she provides support; (iv) the Organisation did not suffer any financial loss or harm to its reputation; (v) the Applicant did not retain any benefit from her improper conduct and "the evidence does not demonstrate that she acted in a strategic, intentional and calculated manner".

c. Further, the Applicant's poor decision was hastily made on account of the extreme pressure put on her by the Applicant's real estate agent who was advising her in applying for an apartment. Moreover, had the Applicant received adequate information and been properly advised about the application process, she would have understood that her real net income did in fact qualify her for renting the apartment she was applying for under this subsidised housing scheme.

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pressure” from a local real estate agent. There is, therefore, no mitigating factor in this respect.

d. Taking into account the Applicant’s long unblemished service with the United Nations, the Administration had determined that the disciplinary sanction of summary dismissal from service would have been too harsh in the present case, whilst a sanction of demotion would have been too lenient in view of the wilful misrepresentation and forgery. In light of the wide discretion afforded to the Organisation, the Administration considered the sanction of separation from service with three months’ notice and two weeks’ termination indemnity to be proportionate to the gravity of the Applicant’s misconduct.

e. The Respondent was not required to contact and consult the Applicant’s supervisors when making the decision concerning the appropriate disciplinary measure in her case.

Consideration

21. It is common cause that the Applicant committed misconduct as a result of which she was separated from service on three months’ notice and with two weeks’ termination indemnity. Both parties accept that the Applicant knowingly and wilfully misrepresented her and her Relative No. 1’s annual salary and working hours in the rental application form submitted to the HDC, supplementing it later with a fictitious letter on a United Nations letterhead, with the forged signature of another United Nations staff member. These acts were in breach of the Applicant’s obligations under staff regulation 1.2(b), which requires staff members to uphold the highest standards of integrity, including probity, honesty, and truthfulness in all matters affecting their work and status.

22. The Applicant’s case is that there is no evidence that UNDP took into account all the mitigating circumstances present in this case and, further, that it failed to

26. In Sanwidi2010-UNAT-084, the Appeals Tribunal elaborated on the role of the Dispute and Appeals Tribunals when reviewing the proportionality of disciplinary measures. The Appeals Tribunal stated:

Principle of proportionality

39. ... In the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective. This entails examining the balance struck by the decision-maker between competing considerations and priorities in deciding what action to take. However, courts also recognize that decision-makers have some latitude or margin of discretion to make legitimate choices between competing considerations and priorities in exercising their judgment about what action to take.

40. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him.

This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

...

47. Keeping in mind the matters outlined above, we hold that the UNDT, in exercising judicial review, may interfere with the exercise of the Secretary-General's discretion in disciplinary proceedings against a staff member on the ground that the disciplinary measure is not proportionate to the misconduct. The UNDT is not bound by the jurisprudence of the former Administrative Tribunal, although in appropriate cases its judgments concerning disciplinary proceedings may have non-binding persuasive value. However, while exercising judicial review, due deference must be shown to the Secretary-General's administrative decisions because Article 101(3) of the Charter requires the Secretary-General to hold staff members to the highest standards of integrity and he is accountable to the Member States of the United Nations in this regard.

27. As stated in *Sanwidj* in disciplinary matters due deference must be given to the decision-maker, and the Tribunal has limited powers with respect to its review of the severity of an imposed sanction (see also *Zoughy* UNDT/2010/204). However, whilst the determination of the appropriate sanction is largely within the discretion of the decision-maker, such discretion must be exercised fairly, properly and proportionately. When considering applications challenging the proportionality of the disciplinary measure imposed, the Tribunal will give due deference to the Secretary-General unless it is shown that the measure is manifestly disproportionate.

General observations regarding mitigating and aggravating factors

29. Both aggravating and mitigating circumstances factors are looked at in assessing the appropriateness of a sanction. Mitigating circumstances may include long and satisfactory service with the Organisation; an unblemished disciplinary record; an employee's personal circumstances; sincere remorse; restitution of losses; voluntary disclosure of the misconduct committed; whether the disciplinary infraction was occasioned by coercion, including on the part of fellow staff members, especially one's superiors; and cooperation with the investigation. Aggravating factors may include repetition of the acts of misconduct; intent to derive financial or other personal benefit; misusing the name and logo of the Organisation and any of its entities; and the degree of financial loss and harm to the reputation of the

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37. It is a mitigating factor that the A

charges of misconduct and took the relevant facts and factors into account. In the present case, the Respondent submitted that the Administration, in light of the mitigating factors present in this case, had purposefully chosen the lesser measure of separation from service with notice and termination indemnity, and not dismissal, which was the harshest measure available. According to the Respondent, the nature of the Applicant's misconduct made it no longer possible for the employment relationship to continue.

40. A disciplinary measure should not be a knee-jerk reaction and there is much to be said for the corrective nature of progressive discipline. Therefore, ordinarily, separation from service or dismissal is not an appropriate sanction for a first offence. However, the gravity of the misconduct is an important factor in determining the appropriateness of separation or dismissal as a sanction. Each case must, of course, be decided on its own merits since there is no fixed rule regarding the degree of

statement as “provid[ing] transparent and accountable fund management services to the United Nations system”. The Applicant betrayed the high degree of trust reposed in her, and the Respondent’s expectations from a long serving loyal staff member were misplaced. Such a fundamental breach, coupled with the involvement of an innocent colleague, led to the irretrievable breakdown of the employment relationship. The Tribunal finds that the Applicant’s actions amounted to serious misconduct and it was reasonable for the Respondent to conclude that the relationship of trust and confidence between the parties was no longer present. The Tribunal finds that UNDP’s approach, in the light of all the circumstances with respect to the Applicant’s case, was 6 -1D.0005f0r5()]Tds 5

not disclose her misconduct voluntarily and her actions were of a significantly graver nature and were aimed at obtaining a personal pecuniary benefit. The facts in *Doleh* are also distinguishable from the facts in the present case, as, *inter alia*, the actions of the staff member in *Doleh* were not aimed at deriving a personal pecuniary benefit while misusing the official United Nations logo and did not cause any harm to the reputation of the Organisation. In *Smith*, the World Bank Administrative Tribunal found that the World Bank had failed to give sufficient weight to several significant mitigating factors, which is not the case in the present matter.

43. There is one other consideration in regards to the parity principle. In the imposition of a sanction, an employer may be justified in differentiating between employees guilty of the same offence, on the basis of differences in their personal circumstances or the merits of the case. However, in dealing with acts of gross dishonesty by staff, the Organisation must be conscious of the consequences of the particular infraction for the future good of the Organisation and the workplace example that is set. Even taking into account the Applicant's personal circumstances, it would not set a good workplace example if the Respondent were to condone the serious infractions committed by the Applicant.

44. It is unfortunate that the Applicant's previously unblemished career with the Organisation came to such regretful conclusion. The Tribunal is also sympathetic to her personal situation. However, in all the circumstances of this case, it cannot be said that the sanction of separation with notice and termination indemnity was disproportionate to the seriousness of the offence in this case.

45. The Tribunal notes the diligent efforts of both Counsel in the expedited disposal of this matter. As recalled above at para. 6, the Tribunal granted the Applicant's request for an expedited consideration of the matter on an exceptional basis. However, expedited consideration of cases disrupts the ordinary course of business of an extremely busy Tribunal and such applications must be discouraged.

Counsel should take a very considered and firm decision before moving applications of this nature.

Conclusion

46. In all the aforesaid circumstances, the Tribunal finds that the Respondent's discretion in imposing the contested disciplinary measure of separation from service with notice and termination indemnity was properly exercised and that the imposed disciplinary measure was not disproportionate.

47. The application is dismissed.

(Signed

Judge Ebrahim-Carstens

Dated this 31st day of March 2011

Entered in the Register on this 31st day of March 2011

(Signed

Santiago Villalpando, Registrar, New York