
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/043

Judgment No.: UNDT/2022/041

Date: 9 May 2022

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BWALYA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Edwin Nhliziyo

Counsel for the Respondent:

Esther Shamash, UNDP

creation of such documents, and demonstrating favouritism in the award of a contract.¹²

16. The Applicant provided his response to the charges on 16 August 2018, and additional supporting documents on 17 August 2018.¹³

17. Following a review of the evidence, on 8 January 2019, UNDP concluded that the charges were substantiated. On 8 January 2019, the Applicant was imposed with the sanction of separation from the Organization with compensation *in lieu* of notice but without termination indemnity.¹⁴

Submissions

The Applicant's case

18. The Applicant's case is summarized below.

a. The charge that he instructed a UNDP staff member to forge and backdate an MOU to avoid the UNDP procurement process is defective on the face of it and cannot be sustained. The staff member in question, Ms. Tadesse, never made that claim against him. She said it was either the Applicant or her Supervisor, Dr. Tesfaye, who gave her the instruction.

b. No good reason was given as to why a backdated MOU was needed and by whom. The possibility that Ms. Tadesse might have misunderstood what was intended was never considered by the investigators. This is consistent with the fact that: Ms. Tadesse could not remember which of her two Supervisors gave her the instruction; there was no logical reason why the MOU needed to be backdated because a current date would have served the purpose; and both the Applicant and Dr. Tesfaye have denied that Ms.

¹² Ibid, Annex 5.

¹³ Ibid., Annex 6(B).

¹⁴ Ibid.

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h. The UNDP office in Addis Ababa, like the Government, looked forward to working with Digata on the NSTC renovations even before the Applicant's involvement as far back as May 2014. Some key emails between Ms. Tadesse and the President of Digata were not copied to the Applicant, contrary to office procedures. The investigators either failed to notice these discrepancies as red flags or chose not to address them.

i. The investigation report and interview statements are replete with inconsistencies, distortions and outright fabrications. The investigators invented facts.

19. The Applicant prays for rescission of contested decision, reinstatement and compensation for public humiliation.

The Respondent's case

20. The Respondent submits that there is clear and convincing evidence that the Applicant engaged in misconduct by instructing Ms. Tadesse to fraudulently backdate an MOU.

a. On 31 July 2014, in a meeting with the Applicant and her Team Leader, Dr. Tesfaye, Ms. Tadesse was instructed to draft two documents: an MOU backdated to 2011, to be signed by the Ethiopian MOA and Digata and a fraudulent Formal Request which would misrepresent that the MOU had indeed been signed in 2011. While Ms. Tadesse could not remember whether it was the Applicant or Dr. Tesfaye who had uttered the instruction, she understood that the Applicant, who was the most senior staff member present, at least endorsed this instruction.

b. Following the 31 July 2014 meeting in which she was instructed to prepare the two documents, Ms. Tadesse sent the Applicant the backdated MOU for his review. Had Ms. Tadesse backdated the MOU of her own accord

b. In his arrangement, the documents being copied on the [first] email and might have opened it on the morning of 31 July 2014 but he has no recollection of browsing through the "Vj g" Cr r kcpv' y cu" pqv' lwuv" ðeqr kgf "qp"]vj cv_ "go ckö. "j qy gxgt < "k' y cu" cf f tguugf "vq" j ko . "wukpi "j ku" hktuv" name.

c. His current claim, that he read the draft contract but not the MOU, contradicts his earlier claim that he read the MOU.

d. T

f. On 23 April 2016, a report in the local media published allegations about the misuse of UNDP funds in connection with Digata and the NSTC renovation. Had the Applicant truly been ignorant of the backdated MOU, this would surely have prompted him to go back and read the documents. Had he done so, he would have seen that an MOU prepared by a UNDP staff member under his supervision was backdated, and he would have been obliged to report this. The Applicant took no such action. It is not credible that the Applicant could have remained unaware of the fraudulent MOU after that date, and the fact that he took no action then supports that he was aware that the MOU was fraudulent all along.

g. The Applicant claims in his arraignment that [he] had reviewed the template and failed to detect that it was backdated, that by itself would not constitute misconduct, unless it was shown that the Applicant had been grossly negligent. However, the evidence indicates that the Applicant was not grossly negligent, but that he was acting intentionally and was well aware

b. The Applicant questions whether there was any fraud at all. However, the Applicant himself admitted that the MoU was fraudulent. In his Response to the *Request for Information* [Ms. Tadesse] was backdated to 2011. This is the only crime that has been established in this case.

23. The Applicant instructed Ms. Tadesse to misrepresent in the Formal Request.

a. Ms. Tadesse claimed that in the meeting with the Applicant and Dr. Tesfaye in which she was tasked to draft the backdated MOU, she was also instructed to draft the fraudulent Formal Request from the MOA to UNDP, which would misrepresent that the MOU had been signed in 2011. In his application, the Applicant implies that Ms. Tadesse drafted the Formal Request of her own accord, but this is contradicted by the Applicant's comments on the draft investigation report. He also claims that the first time he read the Formal Request was when it was presented to him in his interview with OAI, but this is contradicted by the interview transcript, which shows that, before OAI Investigators offered to send him the Formal Request, the Applicant was able to describe it to them.

b. Taken together, the evidence that the Applicant instructed Ms. Tadesse to backdate the MOU, Ms. Tadesse's statement that she was instructed to misrepresent in the Formal Request and the Applicant's false statements of fact relating to that Formal Request amount to clear and convincing evidence that the Applicant also instructed Ms. Tadesse to misrepresent in the Formal Request, or that as Country Director, he endorsed that instruction.

24. The Applicant acted to avoid or deviate from the Financial Rules.

a. The fraudulent MOU and Formal Request which the Applicant instructed Ms. Tadesse to prepare were intended to justify the procurement of Digata and avoid the competitive bidding exercise required by Rule 121.03 of the UNDP Regulations and Rules. Paragraph 25(g) (formerly 24(g)) of the UNDP Legal Framework

- a. Instructed the Programme Specialist to draft a backdated MOU and to misrepresent, in a second document, the date on which that MOU had been signed.
- b. Acted to avoid or deviate from UPFR's Financial Regulations, Rules and Procedures as the fraudulent MOU he instructed the Programme Specialist to prepare was intended to justify the direct procurement of Digata by UNDP and avoid a competitive bidding exercise as required by UPFR's Financial Regulations and Rules.
- c. Demonstrated favouritism to Digata in the award of a contract.

29. The Respondent concluded that the Applicant's actions constituted misconduct under:

- a. Staff rule 10.1 which provides that:
 - (a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.
- b. Paragraph 23 of the UNDP Legal Framework providing that:
 - í such a failure could be deliberate (intentional or wilful act), or result from an extreme or aggravated failure to exercise the standard of care that a reasonable person would have exercised with respect to a reasonably foreseeable risk (gross negligence) or from a complete disregard of a risk which is likely to cause harm (recklessness).
- c. Staff regulation 1.2(b) provides:

Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

questioning was irrelevant as the contract sum was not an issue in the present proceedings but the date of the MOU. Through the hearing the Tribunal found not only that Ms. Tadesse was a reliable and credible witness but 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 as follows:

- a. Ms. Tadesse was firm during hearing that it was the Applicant who verbally instructed her, on 21 July 2014 after their meeting with the Minister of MOA, to forge a document to satisfy the Minister's wishes to work with Digata.
- b. In compliance with the instruction, Ms. Tadesse drafted the impugned MOU in the form

fraudulent documents:

From: Helina Tadesse []

Sent: Friday, August 15, 2014 5:19 AM

To: getasil_69@yahoo.com

Subject: Draft letter and Terms of Reference - National Soil Testing Center

Attachments: ToR - Renovation and Upgrade of NSTC Laboratory.docx; Letter MoA - NSTC.docx

Your Excellency,

Your Administrative Assistant informed me that the MOU between MoA and Digata is now signed. I would therefore like to sending you a draft letter for MOA requesting UNDP Digata to undertake the renovation and upgrade of the NSTC. I am 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. Please let me know if I could be of further assistance to help in moving this process forward.

Sincerely,

Helina Tadesse []

Sent: Tuesday, August 19, 2014 3:19 AM

To: Girma Selassie

Subject: RE: MoU

Attachments: MoU MoA&DIGATA INDUSTRIES.PDF

Good Morning,

All is well here.

The MoU was signed by MoA last Friday. I got a copy yesterday (attached). I am now awaiting a letter from MoA requesting UNDP to prepare a contract for Digata. The letter should be sent either today or latest tomorrow.

Best regards,

Helina

From: Girma Selassie [mailto:amrig@pacbell.net]

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(iv) Whether the sanction is proportionate to the offence

46. The Tribunal reminds itself that the Administration has a broad discretion in determining the disciplinary measure imposed on staff members because of wrongdoing. It is best suited to select an adequate sanction within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance. Thus, in determining the proportionality of a sanction, the Dispute Tribunal should observe a measure of deference, but more importantly, it must not be swayed by irrelevant factors or ignore relevant considerations²⁹.

47. The record shows that the Applicant as Country Director was responsible for applying UNDP's financial regulations and rules and implementing adequate internal controls to ensure the integrity of financial transactions and that as the second highest ranking official in UNDP Ethiopia, he was expected to be exemplary. The Respondent also considered the reputational damage suffered by UNDP Ethiopia. In mitigation the Respondent considered that the Applicant did not enjoy any monetary benefit from his actions. The misconduct was serious. The Respondent took relevant considerations and arrived at a proportionate sanction. The Tribunal is not convinced that the sanction may be interfered with.

Judgment

48. The Respondent having proved its case through clear and convincing evidence that the Applicant breached his terms and conditions of appointment, the

(Signed)

Judge Rachel Sophie Sikwese

Dated this 9th day of May 2022

Entered in the Register on this 9th day of May 2022

(Signed)

Eric Muli, Legal Offi