

UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D

Judgment No. 2022-UNAT-1281



Counsel for Ms. Temu:

Julia Kyung Min Lee, OSLA

Counsel for Secretary-General:

Noam Wiener

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. Before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), Ms. Hoyce Temu challenged the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity. By Judgment No. UNDT/2021/090 dated 28 July 2021, the UNDT dismissed the application and upheld the disciplinary decision. It, however, found unlawful the decision that in light of Ms. Temu's separation from service, she was no longer eligible for maternity leave, and referred the matter to the Secretary-General for actoon5 (r)-11.4 (a)0(vi)2.5 (c)1-3.5 2t3u.4 (f)1.5 (n)7.816 (h)b.8 (2)11.3 1 (a) ()11

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9. On 1 April 2019, the UNDP Assistant Administrator and Director of Bureau

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(i) Staff members shall exercise the utmost discretion with regard to all matters of official business. They shall not communicate to any Government, entity, person or any other source any information known to them by reason of their official position that they know or ought to have known has not been made public, except as appropriate in the normal course of their du or xce4b B|TJO 13 oee 13ixz23 79.10 13 of co-11.4 (o)-3.1 (f t)-4.4 (h)3.7 (S-1.4

17. It was not disputed before the UNDT that Ms. Temu maintained her ownership interest in Anderson PR. She in fact admitted to having a continued interest in the performance of Anderson PR's business while she worked at UNDP. Moreover, she continued business activities in support of Anderson PR by using her UNDP e-mail account, including sending e-mails from it to the Head of the European Union (EU) delegation to Tanzania who awarded an EU contract to Anderson PR. Ms. Temu also received a representative of a UNDP partner and vendor in her UNDP office shortly before e-mailing him (using her official UNDP e-mail) regarding Anderson PR business. She was later provided with privileged information concerning a tender that was later awarded to Anderson PR by that UNDP partner and vendor. The UNDT was thus persuaded that Ms. Temu improperly used her position to solicit business for Anderson PR and that this more serious charge had been proved by clear and convincing evidence.

18. This misconduct alone in the opinion of the UNDT was of such a nature and order that continued employment with the UNDP had become untenable. Although it did not expressly state as much, the UNDT clearly considered the disciplinary measure of termination to be proportional in the circumstances. It accordingly refused to grant the application for rescission of the disciplinary decision.

19. However, the UNDT puzzlingly directed its attention again to the maternity leave decision, the application in relation to which it had dismissed as not receivable a year earlier. It had regard to *The International Labour Organization Maternity Protection Convention No 183* (the ILO Convention). This instrument prohibits employers from terminating the employment of a woman during pregnancy or absence on maternity leave, except on grounds unrelated to pregnancy, childbirth and its consequences, or nursing. The UNDT expressly disapproved the decision to separate Ms. Temu during maternity leave and maintained that the Administration's argument that having been separated she was no longer eligible for any benefits conflicted with the clear social benefit of maternity leave, not only to Ms. Temu but also to the child. While noting that the ILO Convention permitted the "dismissal" of a woman on maternity leave on grounds unrelated to pregnancy and that

relied on the ILO Convention as persuasive authority and an applicable standard to determine the lawfulness of the maternity leave decision.

26. Ms. Temu requests this Tribunal to: i) vacate the Judgment of the UNDT to the extent that it imposes the sanction of separation from service; ii) substitute the imposed sanction with a lesser sanction; iii) award her three months' net base salary as moral damages for the harm, anxiety and stress; and ~~to award her three months' net base salary as moral damages for the harm, anxiety and stress; and~~

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from “the conflict of interest” charge, the charges were either not established by clear and convincing evidence or were of a nature that did not attract “dismissal”.

40. We hold that Ms. Temu’s submissions are not sustainable and that the UNDT properly exercised its discretion holding that the disciplinary measure was proportional to her misconduct. The disciplinary measure imposed in the instant case correctly reflects the severity of Ms. Temu’s impropriety. She violated Staff Regulation 1.2(o) by continuously, over a period, engaging in an outside activity, as the owner and manager of a public relations firm, without seeking or receiving permission. She also violated Staff Regulation 1.2(m) when she engaged in a conflict of interest and used her position with UNDP for her own personal profit, when on numerous occasions she conducted business, on behalf of Anderson PR, with the European Union, and another partner of UNDP in Tanzania.

41. Ms. Temu’s stated grounds for mitigation are not convincing. The mere fact that a staff member has adhered to her obligations in the past does not lessen the gravity of her misconduct in this instance. A clean record can be mitigating in some instances, but certain acts of impropriety are so damaging to the trust relationship that the continuation of employment may become untenable, even intolerable, by one act. Moreover, one should not lose sight of the fact that Ms. Temu commenced with her improper course of conduct a mere six months after she commenced service with the Organization. She commenced service in January 2014 and in July 2014 started to engage in unauthorized outside activity as the Managing Director of Anderson PR, which continued throughout her tenure with the Organization. Two years after her recruitment, on 9 February 2016, Ms. Temu further misconducted herself by disclosing confidential information from a procurement exercise to her sister to use in f-1.9 (i)0.6 (a)(o)-3.5 5 (us)9s.9 (ph)-8.5.217 Td[()]TJ-0.008 T.9 (t)-1.5 (a)5 (t)-1.9.008

43. Furthermore, the UNDT most likely erred by finding that Ms. Temu's disclosure of confidential information from a procurement exercise did not amount to misconduct. The charge against Ms. Temu was that she disclosed to her sister, who was an executive at Ramada, information from the commercial bids submitted by hotel chain vendors pursuant to a procurement exercise. Ms. Temu did not challenge the factual basis for this allegation and the UNDT did not find that the facts were not established by the evidence. Instead, the UNDT held that Ms. Temu's actions did not constitute misconduct because the disclosed information was

exercises, as set forth in the United Nations Procurement Manual, expect that their commercial ^{sortp cdatioint} bids will be kept confidential to maintain their ability to effectively compete in future solicitations. Competitive bids submitted by vendors in the context of a procurement exercise are considered confidential information in terms of ST/SGB/2007/6 (I9 (e)f o(i ter.006 Tw 00 Tc 0 Tw 9.1843

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49. The appeal of the Secretary-General (2021-1611) is granted and the appeal of Ms. Temu (2021-1614) is dismissed. Judgment No. UNDT/2021/090 is modified to set aside the referral of the matter to the Secretary-General for action on accountability and is otherwise affirmed.

Original and Authoritative Version: English

Decision dated this 28th day of October 2022 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Sandhu

(Signed)

Judge Halfeld

Judgment published and entered into the Register on this 7th day of December 2022 in New York, United States.

(Signed)

Juliet Johnson, Registrar