
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/021

Judgment No.: UNDT/2021/002

Date: 13 January 2021

Original: English

Before:

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6. On 2 July 2020 the Applicant filed an amended application¹ contesting her separation from service pursuant to staff rule 10.2(a)(viii) for misconduct for the

UNDP Administrator determined that the evidence supported the charges against her and separated her from service of the Organization

Submissions

The Applicant

10. The charges were not proven by clear and convincing evidence. For the most part, the charges are vague and general. On the one hand, the Applicant is being criticised for interfering with the process of managing the property, and on the other hand she is being criticised for not interfering enough, for a lack of consultation and for a lack of decision making on her part.

11. These kinds of issues are raised in routine country management financial audits and are done all the time to see whether or not there are adequate records, whether there are adequate justifications for financial decisions, how to tighten up decision making and how to clarify roles. These are not matters of serious misconduct. At most, they

advice was to use commercial rent comparisons only when the property was owned and managed by UNDP. This was set out in an email dated 7 September 2016.

Mr. Tahsin Haque, Premises and Facilities Lead, UNDP/Headquarters & Ms. Binta

Sanneh, UNDP/Gambia's O/0 612 792 re W* 8fs92 re W* n BT 1 W* n BT /F1 12 Tf 1p1(da)a

22. The charge of improper use of staff resources is a general one with no specific identification of negligence or what personal expenses are at issue. Past practice was that services for cleaning and gardening, some electricity and lighting, disposal of garbage and other services had been routinely covered by UNDP. It was the job of the Operations Specialist, Finance Office and Deputy Resident Representative to sort this out. None of these individuals claimed that any undue influence was exerted on them by the Applicant. From April 2014, it was advised to cover some expenses under rent and the Applicant voluntarily agreed to pay the providers for garbage, water charges and internet. No audit before or during her tenure had raised this.

23. In respect to the issue of replacement of counter tops with which Coker expressed concern, these were done for the benefit of future occupants of the property and were not cosmetic improvements. They were part of the maintenance obligations of the Organisation because the counter tops had deteriorated. The Applicant brought this to the attention of the DRR as required under the lease. The DRR gave her tentative approval and asked the Operation's Manager to secure proposals which was done. If there had been serious reservations, there should have been a call for negotiations between the parties or advice from UNDP headquarters was not up to the Applicant to negotiate against herself.

24. Mr. Coker informed the Tribunal that he had raised the matter of the counter tops with the DRR at that time, Mr. Fernando Edjang. There is no record of any conversation or of any note that was made to the Applicant. There was also no follow-up; yet he submitted that complaint to OAI.

25. With respect to the charge that she failed to uphold the highest standards of efficiency, competence and integrity, the Applicant submits that she did not stand to gain in any of these transactions. She was advised that she was expected to occupy the residence and that the rent would be agreed upon. All the money went to keeping the premises in good habitable condition for the future. Payments were processed in accordance with UNDP procedures. All payments were certified, approved and

processed by the responsible officials. The record demonstrates that when concerns were brought to her attention, she tried to address them and resolve them. IOA arbitrarily determined what was justified or unjustified but did not give reasons for their opinions or ask for explanations, such as, issues over water or expenses for the Business Continuity Plan ("BCP") site. As a result of all of this, the property was maintained and enhanced. The surplus grew and the office meanwhile achieved great success.

26. The Applicant requests rescission of the contested decision, three months compensation *in lieu* of notice and compensation for material and moral damages. The

- g. Petty cash record for 2008;
- h. Photos of the RC/RR residence

61. Secondly, there was no evidence that the Applicant personally benefitted from the determined rent since the rent payable was more than sufficient to maintain the property thereby complying with the objective of the rent scheme under the principle of no gain, no loss

62. Thirdly, the Tribunal heard, and this was not contradicted, that adjustments in rent in subsequent years after 2013 were based on an objective criterion after a careful assessment of previous expenses and balances in the accounting income and expenditure spread sheet. The rent was set at an amount that ensured current and future sustainable maintenance of the property, in other words that the property should be self-financed. The spreadsheets disclosed that after monthly maintenance expenses, there was a credit balance carried over to the following month.

63. Fourthly, there was no evidence whatsoever that the so-called rental “market value” of the property entailed if the objective of the rent was not for profit generation (commercial purposes). Market value was an irrelevant factor under the circumstances of this case. Relying on it was therefore abuse of authority and unlawful, especially because this house was given for the use of UNDP gratuitously by the Gambian Government.

64. Finally, and above all, the one witness who acted as the state agent for the Responder in the lease agreement, Ms. Morota Alakija, was emphatic in her testimony that as the official representative of UNDP in management of the lease agreement between the Applicant and UNDP, he was never at any time coerced or unduly influenced or pressured by the Applicant to manipulate any term of the agreement for the benefit of the Applicant. The decisions relating to the agreement were mutually discussed and agreed upon and not unilaterally imposed as alleged.

Repairs, remodelling and renovations

65. It was alleged that the Applicant unilaterally renovated the kitchen counter in the house she rented using UNDP funds. That the renovation was uncalled for. The Applicant explained that the old kitchen counter top was worn out. At the material time,

it had not been maintained for over 12 years. The Respondent did not adduce any evidence to contradict the Applicant who at the time of the renovation had occupied the house for two years, that the countertop did not require replacement. Any maintenance to any permanent fixture of the house was for the long term benefit of the landlord and future tenants. The Respondent did not dispute these justifiable, reasonable and plausible assertions. He did not produce any evidence that any clause of the lease agreement was breached. As a matter of fact, clause 1 of the agreement placed the responsibility of carrying out structural maintenance and repairs on UNDP.

Procurement of light bulbs and other items using UNDP funds

66. The Respondent alleged that the Applicant used UNDP resources to procure light bulbs for her house and other items. This allegation was proved malicious by the Respondent's witness, Mr. Coker, who asked the Tribunal during hearing to strike out from the list of misused resources. The rest of the items were too general and not

was a purely managerial audit matter that ought to have been resolved internally as an irregular or abnormal request and rejected by the petty cash authorisation officer per petty cash guidelines

69. Further, there is no evidence from Mr. Coker that the Applicant interfered with his work by exerting pressure on him concerning petty cash authorisation and

Misusing staff resources

73. The Respondent alleged that the Applicant used staff to process and pay water bills on her behalf. The Applicant responded that water bills were in UNDR name as landlord and hence this understanding. No other incident of misuse of staff for personal errands was proved with specificity and no staff member was called to testify on the matter. This was a largely generic allegation that carries no weight as per UNAT jurisprudence cited above. Musiyah argued the UNDP was paying for water bills used at BCP site which was within the Applicant's compound and for the office, it makes absolute sense that instead of the maintenance of the United Nations RC/UNDP RR queuing at a water utility company (most probably during working time), a member of her staff responsible for paying UNDP water bills could take the Applicant's bill along for payment. The Tribunal is at pains to discern the motivation behind this allegation.

Process to arrive at impugned decision

74. Why the Respondent decided to treat these as disciplinary matters is beyond comprehension. The investigation report recommended one of two options: either to institute disciplinary process or administrative action. UNAT jurisprudence instructs this Tribunal to examine the process that Respondent followed to arrive at an impugned decision. This is because the Respondent exercises discretionary power to decide whether to institute disciplinary proceedings into allegations.¹²

75. The Tribunal agrees with the Applicant that the CAI "drew conclusions from very selective information. It never asked the essential questions such as what the prior practice was, what the appropriate policy for managing a government-owned property was and how authority was delegated for the decisions that were taken."¹³

76. It is indeed fair to conclude from the circumstances of this case that these kinds of issues are raised in routine country management financial audits done all the time to see whether or not there are adequate records, whether there are adequate justifications

¹² See generally Applicant 2020-UNAT-1001.

¹³ Applicant's submissions.

to the lease agreement or staff resources without first declaring a dispute and invoking the dispute settlement mechanism under clause 6 of the agreement.

Conclusion

81. Consequent upon the above findings, the applicable law and jurisprudence, the Tribunal finds the impugned decision illegal as Respondent abused its authority in exercise of its discretion to institute disciplinary proceedings in a matter where it could have and it indeed did institute managerial action by clarifying the lease terms with the Applicant and mutually agreeing with her to reimburse the organisation whatever had erroneously been paid on her behalf.

82. The Tribunal finds that the facts on which the disciplinary measure was based have not been established. It is not necessary to address the other requirements of whether the established facts amount to misconduct; whether the staff member's due process rights were respected and whether the sanction is proportionate.

83. In arriving at this decision, the Tribunal has considered and in relevant parts applied the jurisprudence cited by

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