

Judgment No. 2019-UNAT-976



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JUDGE SABINE KNIERIM , PRESIDING .

1. Ms. Enkhjargal Ganbold, a former staff member at the United Nations Population Fund (UNFPA) in Mongolia, was separated from service with compensation in lieu of notice and without termination indemnity, as a disciplinary measure for several misconduct violations related to UNFPA's procurement of property that was owned by her relatives. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) found there had been several flaws in the investigation into her alleged misconduct and conducted a de novo review. The UNDT rendered Judgment No. UNDT/2019/015 in Geneva on 31 January 2019 wherein it ordered inter alia the rescission of her disciplinary measure on grounds it was disproportionate and replaced it with a loss of one step in grade and a written censure. In lieu of rescission, the UNDT awarded 24 months' net base salary. The Secretary-General appealed before this Tribunal. For the reasons set forth below, the Appeals Tribunal upholds the Secretary-General's appeal and vacates the UNDT's Judgment.

Facts and Procedure

2. On 21 March 2014, the Representative of the UNFPA Mongolia Country Office (UNFPA Mongolia CO) reported to the Office of Audit and Investigation Services (OAI) an allegation of fraud against Ms. Ganbold, a UNFPA staff member who served at the time as a Finance and Administrative Associate at the G-7 level. The allegation indicated that Ms. Ganbold's first reporting officer (FRO) had entered into lease agreements on behalf of UNFPA for the lease of a storage building that belonged to, or was co-owned by, Ms. Ganbold. 77

4. OAS concluded that Ms. Ganbold: (i) had failed to disclose to the proper management level that her spouse and mother were actively associated with Company 1 and Ms. N., who were UNFPA suppliers of rental space that had received USD 22,178.23 in UNFPA payments; (ii) had failed to disclose that Company 1 was owned by he

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spoiling in the harsh Mongolian winter. Ms. Ganbold's former FRO, Mr. B., who was then the Operations Manager, testified before the UNDT that due to this emergent need he had asked Ms. Ganbold if it was possible for UNFPA to use her family's available storage space. Because the price to rent the storage was offered even lower than the overhead cost for space that the UNFPA Mongolia CO paid to the Government of Mongolia for its "free" office space, he believed that UNFPA did not suffer any losses in the process and accordingly he made the decision to lease the storage space from Ms. Ganbold's family with the full knowledge that her relatives owned the property. He testified that, contrary to the findings of the investigation report, he, and not Ms. Ganbold, had signed and had decided to enter into the lease agreements.

9. Mr. B. testified that he had told all of this to the investigator, yet it had not been included in the investigation report and was contrary to the findings of the decision-maker. The investigation provided only a summary of the former FRO's interview with OAS, not an actual transcript. When the UNDT requested the audio recording of the interview, OAS admitted that the recording had been lost. The former FRO testified that he had also told investigators how he had conducted a cost analysis and had compared the rental costs to conclude it was financially beneficial to UNFPA to lease the storage garages. The UNDT learned that the former FRO had been interviewed in February 2016 regarding investigations into his own misconduct around the lease of the storage garages, but the investigator had not mentioned them when testifying before the UNDT in Ms. Ganbold's case despite being the same interviewer. The interview of Mr. B. contained the critical information he had provided to the UNDT. The UNDT determined this was exculpatory evidence supporting that Ms. Ganbold had not been involved in the decision to lease the storage garages. Rather this evidence supported that it was Mr. B. who had decided to lease the property and had done so fully aware her relatives owned the property.

10. The UNDT in its de novo review determined, with regard to Count 1, that Ms. Ganbold had not awarded or signed binding contracts with a UNFPA vendor, save for a contract renewal in 2013, but that it had been her former FRO who had initiated, authorised, and signed such contracts.

11. With regard to Ms. Ganbold's alleged failure to recuse herself from certain procurement transactions and to disclose her association with two UNFPA vendors (Count 2), the UNDT found: (i) there was no evidence that her spouse had been "actively" associated with Company 1; (ii) prior to the change of the UNFPA Rules in 2012 which required the disclosure of any association be made to the Head of Mission, Ms Ganbold had disclosed her relatives' ownership

of the procured property to her supervisor and to the Ethics Office as had been required; (iii) Ms. Ganbold had not been associated with procurement transactions, apart from one renewal of an existing contractual relationship and her processing of invoices in the ordinary course of her responsibilities; and (iv) there was no proof that Ms. Ganbold had received any benefit from her relatives' ownership of the storage garages that had been leased by UNFPA and that no advantage to Ms. Ganbold had been demonstrated. Ms. Ganbold had not awarded any contracts and had not been involved in procurement contracts. The analysis of the costing rather shows a significant advantage had been received by UNFPA as it had received storage space significantly below the market rate.

12. With regard to the charge that Ms. Ganbold had made misrepresentations in the financial disclosure forms (Count 3), the UNDT found that she had not complied with the requirements following the 2012 policy change. The UNDT found, however, that her testimony was truthful and credible in that she had not known that her husband had shares in Company 1, and instead she had thought the shares had been in her father-in-law's name. She testified without any contradictory evidence that she had been unaware that her husband had been involved in the management of Company 1. The forms asked "to the best of your knowledge" and thus the UNDT found that her responses thereto had been to the best of her knowledge.

13. Ultimately the UNDT concluded that due to the flaws in the investigation the facts upon which the decision had been founded had not been properly established by clear and convincing evidence. The investigation's conclusions were not supported by evidence and the decision-maker did not have the whole context including exculpatory information, which the UNDT considered was compelling. The UNDT further concluded that there had been no intent to defraud and that Ms. Ganbold's failure to make disclosures on all of the forms throughout the years in question had been on account of her negligence.

14. As a result, the UNDT determined that the disciplinary measure was disproportionate. The UNDT noted that Ms. Ganbold's former FRO who had entered into the lease agreements had only been sanctioned with a written censure and the loss of one step in grade. Accordingly, the UNDT ordered the rescission of her disciplinary measure and replaced it with that of a loss of one step in grade and a written censure (the same disciplinary measure received by her former FRO).

fraud or other misconduct. A copy of the impugned Judgment was ordered to be placed in her official status file.

15. The Secretary-General filed an appeal on 1 April 2019, and Ms. Ganbold filed her answer on 30 May 2019.

Submissions

The Secretary-General's Appeal

16. The Secretary-General requests the Appeals Tribunal to vacate the impugned Judgment in its entirety. He argues that the facts on which the sanction was based had been established by Ms. Ganbold's own admissions. She had suggested that UNFPA lease garage and storage facilities from two vendors, Ms. N., her mother, and from Company 1, owned by her husband. The garage facilities were located in a complex of two buildings, one owned by Ms. Ganbold and the other by her husband. She had never disclosed her husband's interest in the Company on any financial disclosure forms. She had also taken steps to facilitate the leasing by drafting notes to the file and submitting transaction requests. She was also listed as the buyer on two purchase order transaction payments to Ms. N., her mother. Ms. Ganbold did not deny these facts to the investigators nor in her submissions before the UNDT.

17. These facts establish misconduct in violation of Staff Regulation 1.2 and Staff Rule 1.2 as Ms. Ganbold should have recused herself from participating in any matter that was a conflict. The Rules also obliged her to disclose any indirect or direct financial interests that might have risen to a conflict of interest. UNFPA's procurement policies also imposed disclosure obligations when a possible conflict existed, which were required to be in writing and required her recusal from impacting the outcome. Her breach of these Rules was not mitigated by her former FRO's knowledge that her relatives owned the property. She had failed to recuse herself and had failed to make written disclosures, which constituted clear and convincing evidence of her misconduct.

18. The UNDT erred in law as its requirement that the investigation prove corrupt, fraudulent or dishonest intent was at odds with the jurisprudence. In addition, the UNDT erred

directly to Ms. Ganbold did not mitigate the existence of a conflict of interest for which proper written disclosure was required. Even assuming her excuse as true that she did not know her mother had transferred the property to her name, this did not obviate her obligation to provide a written disclosure because the standard is for direct or indirect benefit. Likewise, the UNDT erred in fact in finding that she had complied with her obligations to file accurate financial disclosure forms on the notion that it only asked for responses “to the best of her knowledge” and thus she had not been obliged to make inquiries about her husband’s business affairs. The UNDT erred in finding her testimony was credible in th

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had prior to the interview which contained exculpatory information and had not disclosed the subsequent interview of her former FRO which had exculpatory information, even though it had been taken two months before the investigation report had been finalized.

23. The UNDT did not err when it considered Ms. Ganbold's intent and the context within which she had carried out her duties, when it reached the conclusion that she had had no fraudulent intent, and when it held that there was no evidence of an actual conflict of interest within the meaning of Staff Regulation 1.4(m) as her personal interests had not interfered with the performance of her duties. The investigation sought three things, one of which was whether she had "benefitted improperly, directly or indirectly, from her association with the vendors by reason of her position". It was thus proper for the UNDT to review whether there was financial loss in light of the investigation's failure to assess this. The Secretary-General has not demonstrated any error in the UNDT's approach.

dishonest intent. She disclosed her family's ownership to her FRO who entered into the agreements fully aware of this. Her failure to disclose information on the financial disclosure form had also not been intentional but negligent at best, as the UNDT correctly determined. It was accurate for the UNDT to compare her sanction to that of her FRO. In light of this, the UNDT's replacement sanction was proportionate to the misconduct of a negligent nature. The UNDT correctly balanced her misconduct due to negligence over fraud taking into account the length of her unblemished service record with the Organization and the exculpatory evidence. The Secretary-General has not demonstrated any error in respect of the UNDT's sanction.

Considerations

Whether the UNDT committed errors of law, fact, or procedure

26. Under Article 2(1) of the Appeals Tribunal's Statute

The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:

- (a) Exceeded its jurisdiction or competence;
- (b) Failed to exercise jurisdiction vested in it;
- (c) Erred on a question of law;
- (d) Committed an error in procedure, such as to affect the decision of the case; or
- (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

27. We find that the UNDT committed various errors of law, fact, and procedure.

28. The UNDT erred in law and procedure in the way it conducted its review de novo. As this Tribunal stated most recently in *Nadasan*:⁵

... There may be instances, where the UNDT will come to the conclusion that the facts on which the disciplinary measure was based have been established, where necessary by clear and convincing evidence during the investigation proceedings. In such cases, the UNDT will normally undertake an oral hearing as provided for in

⁵ *Nadasan v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-918, paras. 39 and 40 (internal citations omitted) citing to *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. UNDT/2017/051.

consider the undisputed facts in the record that the lease did not start in 2007 (storage facilities) but had already commenced in 2006 (garage). From Ms. Ganbold's own statements during the investigation and before the UNDT, it is apparent that she originally suggested that UNFPA lease the storage garage. During her testimony before the UNDT, Ms. Ganbold explained that with regard to the 2006 need for a garage to store a vehicle, she had a conversation about an emergent need for storage space and in turn suggested to the administrative assistant and her former FRO, Mr. B., that UNFPA rent space from her family. Her testimony is revealing on this point in relevant part as follows:

... The administrative assistant, I think said that the she- we no longer have space, the current existing vendor is no longer able to provide garage space to the UNFPA and, therefore, we need to find anew space, a new garage for our vehicle—and at the time, I said that there's one option, but they can consider it—consider it—they could consider it, but based on the comparison of the prices they can select, which was the garage owned by Vertical Company.

... After that suggestion, [Mr. B.] told me that we'll –we'll draw a contract and basically the contract was established between Vertical [C]ompany and UNFPA.

31. The UNDT erred in law when requiring proof of dishonest or fraudulent intent on the part of Ms. Ganbold. We note that under our consistent jurisprudence, dishonest or fraudulent intent is not required.⁶ Although her intent had been investigated, the result of the investigation was that no proof of fraudulent intent could be found, and, consequently, the 17 July 2017 separation letter did not charge Ms. Ganbold with having fraudulent intent. Fraudulent intent is not a requisite element of the of3eb2.9(l)-.017()30e

33. Thus, the analysis as to whether UNFPA suffered loss is irrelevant and constitutes an error.

34. The UNDT also erred in law in requiring proof of personal gain on the part of Ms. Ganbold. Neither do the relevant legal provisions require nor does the 17 July 2017 separation letter refer to such a personal gain. The relevant legal question is whether Ms. Ganbold provided an advantage to her family because rental contracts were concluded between UNFPA Mongolia, Vertical LLC and Ms. N., and because payments of USD 22,178.23 were transferred by UNFPA to Vertical LLC and Ms. N. between 2006 and 2013.

35. Due to these errors, the whole reasoning of the UNDT is misconstrued. In fact, the UNDT did not properly examine the lawfulness of the 17 July 2017 disciplinary sanction but created its own case, possibly because it was misled by the fact that the issues of fraudulent intent, personal gain, and financial loss to the Organization had been part of the disciplinary investigation. However, they are not part of the 17 July 2017 disciplinary sanction which

and 15.2 (revision for year 2014) and Financial Rule 114.12 (revision of year 2010), UNFPA's Procurement Procedures for 2008, paragraph C.1, UNFPA's Procurement Procedures for 2012, paragraph 6.3.1.1 and the Standards of Conduct for the International Civil Service (year 2013), paragraph 5.

38. There is clear and convincing evidence that Ms. Ganbold, on 30 March 2012, awarded and signed a contract on behalf of UNFPA with Vertical LLC for the lease of a garage for the purpose of parking a vehicle from 1 April 2012, until the end of 31 August 2012, for MNT 6,500 respectively MNT 2,500 per day. The contract is part of our case file, Ms. Ganbold's signature is on it and Ms. Ganbold confirmed, before the investigators and the UNDT, that she had signed this contract. There is also clear and convincing evidence that Ms. Ganbold did not conduct any market research or considered other potential suppliers before awarding and signing the contract. Ms. Ganbold herself does not claim that she undertook any market research. Mr. B. testified before the UNDT that the only time he had conducted market research was in 2006 when the garage was rented by UNFPA for the first time.

39. Further, there is clear and convincing evidence that Ms. Ganbold had no authority to sign this contract. Ms. Kitahara, the Head of Office and UNFPA Representative, testified before the UNDT that contracts both over and under USD 5,000 had to be signed by the head of office and could not be signed by any staff member. This testimony is in full accord with UNFPA Policies and Procedures Manual (PPM), Internal Control Framework (for year 2009) which reads, in relevant parts:⁸

- i. Ensure segregation of responsibilities

iv. Sign contracts/agreements, create posts, and assign Atlas profiles

...

When the head of office is away, he/she must formally delegate these authorities to another staff member—i.e. the officer in charge. This delegation, which must be in writing and to an individual, maybe done once by the head of office and then referred to each time the officer in charge is appointed. ...

40. There is also clear and convincing evidence that Ms. Ganbold was involved in procurement activities in relation to Ms. N., an other UNFPA vendor. Ms. Ganbold conceded that she processed payments to Ms. N. and the UNDT itself held that “it is apparent that the Applicant was also involved in the processing of some payments, which were made under the contracts entered into by her former FRO”.⁹

41. Ms. Ganbold’s actions amount to misconduct under the legal provisions cited in the separation letter, particularly Staff Regulation 1.2{

the award of contracts by the UNFPA Mongolia CO, thus violating Staff Regulations 1.2(b), (g) and (m), Staff Rules 1.2(p) and (q) and the Standards of Conduct for the International Civil Service, paragraphs 5 and 23.

44. As already noted above, there is clear and convincing evidence that Ms. Ganbold participated in procurement transactions with Vertical LLC and Ms. N., by awarding and signing a contract, dated 30 March 2012 and by processing payments to Ms. N. There is also clear and convincing evidence that Ms. Ganbold did not inform the Representative of the UNFPA Mongolia CO about her association with the UNFPA vendors, Vertical LLC and Ms. N., although she knew that her mother held shares in Vertical LLC and thought that her mother was the owner of the storage facilities rented by UNFPA (it later became apparent that Ms. Ganbold herself owned the storage facilities). Neither before the investigators nor before the UNDT did Ms. Ganbold allege that she had informed the Representatives about her connections with Vertical LLC or Ms. N. To the contrary, before the investigator, she explicitly stated that she had not informed them. Only her former FRO, Mr. B., had been orally informed by her about the family relationship. This is confirmed by Mr. B. who testified before the UNDT that although he had himself told the Representative (Ms. Barcelona) in 2007 when UNFPA had first rented the storage facilities, he did not recall that later the Representatives (Ms. Matavel acted as Representative for UNFPA Mongolia CO from December 2009 to July 2013 and Ms. Kitahara became Representative in July 2013) had been so informed.

45. Finally, there is clear and convincing evidence that Ms. Ganbold provided a financial advantage to her family. It is undisputed that, between 2006 and 2013, payments amounting to USD 22,178.23 were transferred from UNFPA to UNFPA vendors, Vertical LLC and Ms. N. This serves as prima facie evidence of a financial advantage. Mr. B.'s statements before the investigators and the UNDT that the rent for the properties provided by Vertical LLC and Ms. N. had only been USD 1 per square meter per month, while even the "free" properties provided by the Mongolian government were charged at USD 11 per square meter per month for heating, electricity, security, cleaning, etc., do not place this finding into doubt. Although both Ms. Ganbold and Mr. B. stated during the investigation proceedings and before the UNDT that they felt the rent was to the advantage of UNFPA and that Ms. Ganbold was doing UNFPA a favour in providing those properties, neither of them alluded that the costs for heating, electricity, security and cleaning equaled or even exceeded the payments Vertical LLC and Ms. N. received from UNFPA for the rent of the garage and storage facilities. Thus, the investigators did not have

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the Secretary-General and, except as otherwise authorized by the Secretary-General, either dispose of that financial interest or formally excuse himself or herself from participating with regard to any involvement in that matter which gives rise to the conflict of interest situation.

Staff Rule 1.2(p) (in effect 2009, 2010, 2011 and 2012):

A staff member who has occasion to deal in his or her official capacity with any matter involving a profit-making business or other concern, including a concern in which he or she holds a financial interest, directly or indirectly, shall disclose that interest to the Secretary-General and, except as otherwise authorized by the Secretary General, either dispose of that financial interest or formally excuse himself or herself from participating with regard to any involvement in that matter which might give rise to the conflict of interest situation.

Staff Rule 1.2(q) (in effect 2013 and 2014)

A staff member whose personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member's status as an international civil servant shall disclose any such actual or possible interest to the head of office and, except as otherwise authorized by the Secretary-General, formally excuse himself or herself from participating with regard to any involvement in that matter which might give rise to a conflict of interest situation.

Staff Rule 101.2(p) in effect 2002-2008; Staff Rule 1.2(q) in effect 2009, 2010, 2011 and 2012; and Staff Rule 1.2(r) in effect 2013 and 2014)

[T]he Secretary-General shall establish procedures for the filing and utilization of financial disclosure statements.

addressed and resolved in the best interest of the organization. Questions entailing a conflict of interest can be very sensitive and need to be treated with care.

47. It is apparent that Ms. Ganbold violated these provisions. In offering the garage and storage facilities to UNFPA from 2006 until 2013, Ms. Ganbold used her office and knowledge from her official functions for her family's private gain. She also failed to disclose her conflict of interest and did not formally excuse herself from any involvement in that matter which might give rise to the conflict of interest situation. Instead, she actively participated in the dealings between UNFPA and UNFPA vendors, Vertical LLC and Ms. N. by awarding and signing a contract on 30 March 2012 and by processing payments to Ms. N.

48.

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respective norms, excessive, abusive, discriminatory or absurd in its severity. This rationale is followed in the jurisprudence of this Tribunal. ¹⁰

59. In the present case, we are satisfied that the Secretary-General's decision to separate Ms. Ganbold from service with compensation in lieu of notice and without termination indemnity cannot be regarded as excessive, abusive, discriminatory or absurd but is within the discretion of the Organization. The Secretary-General has expressly considered, as a mitigating factor, Ms. Ganbold's unblemished disciplinary record, and as an aggravating factor, the fact that she had been working with UNFPA since 2003 encumbering positions involving procurement and administrative and financial responsibilities. We can find no fault in this approach. Particularly, the Administration was under no obligation to impose the same sanction on Ms. Ganbold as on Ms. Ganbold from sers decisiGa9TJ 2. G(lly.5.5(r .322 Tf -20.36014 1 2[(a)6(h)-31d as ex)]TJcisiDusfi0 J]TJ)1T

Judgment

61. The appeal is upheld and Judgment No. UNDT/2019/015 is hereby vacated.

Original and Authoritative Version: English

Dated this 25th day of October 2019 in New York, United States.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Sandhu

Entered in the Register on this 30th day of December 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar