



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2023-UNAT-1339

**Marina Mancinelli
(Respondent/Appellant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

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| Before: | Judge Martha Halfeld, Presiding Judge Kanwaldeep Sandhu Judge Dimitrios Raikos |
| Cases Nos.: | 2022-1699 & 2022-1700 |
| Date of Decision: | 24 March 2023 |
| Date of Publication: | 5 May 2023 |
| Registrar: | Juliet Johnson |

Counsel for Ms. Mancinelli: Julia Kyung Min Lee, OSLA

Counsel for Secretary-General: Amanda Stoltz

shipping labels from a copy room; and (b) expressly elected to bill the charges for those personal packages to UN Women's corporate UPS account instead of paying directly by personal credit card at the time of shipment. y

8. On 13 December 2018, UNPFA's Chief, Legal Unit (LU), received an e-mail and referral from UN Women's Chief, Legal, referring from OIOS the investigation report regarding Ms. Mancinelli as the

12. On 18 March 2020, Ms. Mancinelli filed an application requesting that the UNDT vacate the finding of misconduct and rescind the imposed sanction or, in the alternative, substitute the imposed sanction with a lesser sanction in the form of a written censure, order her reinstatement or set a compensation in the amount of two years' net base salary in lieu of reinstatement, and award three months' net base salary in moral damages.

The Impugned Judgment

13. The UNDT allowed the application in part, ordering that the Secretary-General calculate and pay Ms. Mancinelli a termination indemnity, and dismissed the application in all other respects.

14. The UNDT noted that she had admitted her actions during the investigation and during a hearing before the Tribunal and that there was agreement on the substantive issue that she had used official UPS services without authority to mail personal packages to her relations and a friend.⁴⁰ The oral hearing also established that she did not return for duties in Guinea after being cleared by medical services because she had by the time of her clearance been separated from service on disciplinary grounds.

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of the opportunity to present its views on their relevancy. Furthermore, contrary to the UNDT's finding, misuse of the Organization's assets will attract a strict sanction, regardless of the monetary value of the misconduct.²¹

29. The Secretary-

Ms. Mancinelli's Appeal

33. Ms. Mancinelli requests that the Appeals Tribunal vacate the impugned Judgment, rescind the contested Decision and order her reinstatement or, in the alternative, payment of two years' net-based salary as compensation in lieu of reinstatement, based on her salary at the time of her separation, compensation for the moral damages caused by her separation and order the Administration to expunge from her personnel record all adverse materials relating to the disciplinary proceedings leading to her separation from service.

34. She submits that the UNDT erred in fact and in law in making findings of fact that were not supported by any evidence, therefore concluding that she was charged with serious misconduct. Contrary to the UNDT's finding, fraud was never "dropped from the charges" at the relevant time. Fraud was a charge at the time the sanction was imposed, given that, in the contested Decision, the Administration had alleged that she had used the name of a Ms. S. to send one of the parcels and had concluded that she had acted "willfully and in bad faith".

35. She adds that the UNDT's finding that she "did not return for duties in Guinea after being cleared by medical services because she had by the time of her clearance been separated from service on disciplinary grounds" is also incorrect. She was medically cleared to return to her post as Deputy Representative of UNFPA Guinea on 19 September 2019. However, she was placed on Administrative Leave With Pay (ALWP) without justification on 20 September 2019. She was separated from service on 19 December 2019, well after she was medically cleared to return to work.

36. Ms. Mancinelli argues that the UNDT erred in fact and in law by applying the standard of strict liability instead of the standard of clear and convincing evidence. Furthermore, the UNDT did not point to any evidence that supported its finding that she had acted dishonestly—there is no evidence that she ever lied to the Organization in sending the shipments.

37. She contends that the UNDT erred in fact and in law by finding that the sanction of separation from service with termination indemnity was appropriate. She did not commit fraud and was not dishonest. The UNDT failed to carry out a factual assessment of the elements of proportionality. A written censure and a fine would have

The Secretary-General's Answer

38. The Secretary-General requests that the Appeals Tribunal dismiss Ms. Mancinelli's appeal.

39. The Secretary-General submits that the UNDT correctly found that the facts on which the disciplinary measure was based were established by clear and convincing evidence. Ms. Mancinelli's assertions are unsubstantiated. She made no effort to inform UN Women of having used the UN Women's UPS account. The cost of shipping the packages was clearly detailed in the 30 January 2018 e-mails to her. Also, she made no meaningful effort to seek clarification until receiving notification of the OIOS investigation.

40. The Secretary-General maintains that the UNDT correctly found that the facts amounted to misconduct.

41. The Secretary-General argues that the sanction of separation from service was appropriate and proportionate. The 13 December 2019 sanction letter did not assert that Ms. Mancinelli had written Ms. S.'s name on one of the parcels, nor contained any reference to fraud. She has failed to demonstrate how any error in the UNDT's summary regarding the circumstances of her not returning to Guinea resulted in a manifestly unreasonable decision. It was not required to establish that she had lied to the Organization—such an allegation was not part of the charges.

Considerations

42. Although the acts attributed to Ms. Mancinelli happened when she was working at UN Women (from March 2012 until November 2018), at the time of separation, she was in the service of the UNFPA, to which she had been appointed since April 2009 and returned to in November 2018.

Ms. Mancinelli's appeal

43. The sanction letter reveals that Ms. Mancinelli was separated from service on account of the following two charges of misconduct having been established:²³

hence it was removed from the charges.²⁹

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much lesser amount of alcohol consumed and a

58. Both parties have filed appeals regarding the proportionality of the sanction. The Secretary-General maintains on appeal that the UNDT exceeded its jurisdiction and erred in law by substituting the Secretary-General's discretion with its own by ordering a lesser sanction and considering other mitigating factors, whereas in her appeal, Ms. Mancinelli contends that the UNDT should have imposed an even lesser sanction, arguing that separation even with termination indemnity was too severe. The issue here is thus whether the UNDT exceeded or failed to exercise its jurisdiction, or erred in law in considering the potentially aggravating and mitigating circumstances for determining the proportionate sanction.

59. The UNDT found that it had been inadequate for the Administration to consider a certain aggravating factor and not to consider certain mitigating elements in assessing the proportionality of the sanction. Specifically, the UNDT first found that the circumstance of Ms. Mancinelli's having previously not promptly paid an invoice of USD 473.41 (for the use of an official mobile phone for personal purposes) could not be used as an aggravating factor, since the incident had not been properly investigated with an opportunity for Ms. Mancinelli to be heard. For the UNDT, in using this element as an aggravating factor, the Administration violated Ms. Mancinelli's due process rights and the sanction was arbitrary, allowing it to interfere with the sanction. The UNDT also maintained that the Administration did not consider the mitigating factor of the amount involved and the fact that the Organization recovered it fully. Consequently, the UNDT imposed a lesser sanction, which only differed from the one imposed by the Administration in that it ordered the payment of a termination indemnity.³⁸

60. The discretionary authority of the Administration is not unfettered, as established by this Appeals Tribunal in its jurisprudence. The Administration has an obligation to act in good faith and comply with applicable laws. Mutual trust and confidence between the employer and the employee are implied in every contract of employment. Both parties must act reasonably and in good faith.³⁹ As established by the jurisprudence of the Appeals Tribunal:⁴⁰

(...) The matter of the degree of the sanction is usually reserved for the Administration, which has discretion to impose the measure that it considers adequate in the circumstances of the case and for the actions and conduct of the staff member involved. This appears as a

³⁸ Impugned Judgment, paras. 58–61.

³⁹ Sergio Baltazar Arvizú Trevino v. Secretary-General of the United Nations, Judgment No. 2022-

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8 63. The Appeals Tribunal has also recognized that the authority of a tribunal in the internal justice system to adjust disciplinary sanctions imposed by the Administration is highly controversial. The ju nichT597 (e3-8 f(-10.9

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and, as a result of the events o h 10.8 (th)8.-8.94 (a2 (r)10ss-0.004)Tj (ss-0.004 8.-8.94 ((h)8.9 .

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Judgment 12-02 (41 Nov 2012) 2.7.

