



UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2023-UNAT-1376

Counsel for Appellant: Edwin Nhliyo

Counsel for Respondent: Amanda Stoltz

JUDGE SABINE KNIERIM , PRESIDING .

1. Before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), Mr. Samuel Bwalya, a former Country Director, United Nations Development Programme (UNDP), contested the disciplinary measure imposed on him of separation from service with compensation in lieu of notice and without termination indemnity.
2. By Judgment No. UNDT/2022/041 (impugned Judgment), the UNDT dismissed the application.
3. Mr. Bwalya filed an appeal against the impugned Judgment before the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).
4. For the following reasons, we dismiss the appeal and affirm the impugned Judgment.

Facts and Procedure

5. On 3 April 2011, Mr. Bwalya joined UNDP in Ethiopia as an Economics Advisor at the P-5 level. On 1 July 2013, he was appointed Country Director, UNDP Ethiopia, at the D-1 level. On 11 June 2017, he was appointed Country Director in the UNDP Country Office in Nigeria, also at the D-1 level. At the time of the events giving rise to this case, Mr. Bwalya was the UNDP Ethiopia Country Director.
6. On 9 April 2014, Ms. T, a Programme Specialist, UNDP Ethiopia, Mr. Bwalya, and the Ethiopian Minister of the Ministry of Agriculture (MOA) had a meeting to discuss renovating and refurbishing the National Soil Testing Center (NSTC). It was the understanding of both Mr. Bwalya and Ms. T that the Minister wanted the USD 1,000,000 contract to be awarded to Digata Industries Public Limited Company (Digata).
7. On 1 June 2014, Mr. S, the President of Digata wrote an e-mail to, *inter alia*, the Minister of the MOA, Ms. T, Mr. T (Team Leader, UNDP Economic Growth and Poverty Reduction and Ms. T's First Reporting Officer (Team Leader or FRO)) and Mr. Bwalya. The e-mail, which has the subject line

Hello Your Excellency,

Enclosed for your review and signature is the Contract Agreement to be signed between the Ministry of Agriculture and Digata Industries Inc. regarding the National Soil Testing Center (NSTC) Laboratory Renovation & Upgrade Project which is slated to be funded by UNDP as soon as the necessary signatures are secured. ...

8. On 30 July 2014, Ms. T sent the following e-mail to Mr. Bwalya and her FRO:
“Dear Sam and [Mr. T], As discussed, please find attached the draft Terms of Reference and Consultancy Contract for the renovation and upgrading of the National Soil Testing Center for your review and comments.”

12. On 3 August 2014, Mr. S of Digata wrote an e-mail to the Minister of the MOA, with the subject line: Letter of Intent,” copying Ms. T, which reads, in part: Hello Your Excellency, enclosed for your review and approval is a Letter of Intent prepared by UNDP in order to expedite the funding process by fulfilling the necessary internal funding requirements. We have reviewed and signed the letter believing that such a letter will indeed set a firm foundation for justifying the current and future funding requests by MOA.”

13. On 9 August 2014, the Minister of the MOA e-mailed Mr. S of Digata, with the subject line M oU”, stating: Dear [Mr. S], I am still waiting for your MoU. [Minister].”

14. On 10 August 2014, Mr. S responded as follows:²

Good morning Your Excellency,

I have attached MOU for your review and approval. I have signed it from here and if your approval is secured which I think it is, we can move forward by signing it. I will call you this morning to discuss this matter. Incidentally, this was sent to you as Letter of Intent from [Ms. T]. *I changed it to MOU because that is what is needed to pin down the on-going working framework so that this type of projects can proceed unhindered by the existing cumbersome procedures.*

15. Following that communication, a Memorandum of Understanding (MOU) between the MOA and Digata was signed by the Minister of the MOA and Mr. S of Digata. The text of the MOU is identical to the previous Letter of Intent including the phrase: “Signed on this day, 11 October 2011, in Addis Ababa, Ethiopia”.

16. On 14 August 2014, Mr. T was proceeding on leave and left handover notes to the UNDP Ethiopia Programme Staff. Item No. 10 of the handover notes instructed Ms. T to “follow up [on] the signing of MoU between DIGATA and MoA.”

17. Accordingly, v3rd E DC -0.0 Tc -0wrobfrase:

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24.

corroborated by evidence pointing to a systematic plot that ensured that procurement rules and regulations were circumvented in favour of direct contracting of Digata.”³ The UNDT found that the witness was firm during the hearing that it was Mr. Bwalya who verbally insd[(13)17 (e)-3.58 (g)-1o1EMC /10.9 (

Submissions

Mr. Bwalya's Appeal

40. As a preliminary matter, Mr. Bwalya asks that the UNAT hold an oral hearing.

41. Mr. Bwalya contends that the UNDT erred in law and in fact by failing to recognize that the facts upon which the decision to terminate Mr. Bwalya's appointment was based had not been established. In particular, the UNDT erred in relying on the testimony of the primary witness, the Programme Specialist, who changed her testimony from first stating that her two supervisors had instructed her to backdate the document, to saying that she could not remember which of the two supervisors had given her the instruction, to saying – following leading questions by counsel – that Mr. Bwalya gave the instruction. Her testimony is directly refuted by Mr. Bwalya as well as the Team Leader, who was the other person in the meeting. Mr. Bwalya identifies a number of additional facts that he maintains the Administration and the UNDT should have established." In particular, he says that there was direct evidence that he did not give such instruction to Ms. T and that there was no evidence that he actually saw the draft document. He further submits that e-mail correspondence from August 2014 reveals that the Programme Specialist was operating solo." The facts were therefore not established by clear and convincing evidence.

42. Mr. Bwalya further identifies other possible explanations for the events in question, in particular that Ms. T either lied or had misunderstood his instructions(d)-10.2 (m)3.u26 (n)6.8 (314 BD1.3 (o)4.8

violate any rules and therefore that he could not have acted to deviate from UNDP's Financial Rules and Regulations or to favour Digata.

44. Mr. Bwalya alleges investigator malfeasance "saying that there were many irregularities, missteps and outright dishonesty with the UNDP investigators," that they put words [in the Programme Specialist's] mouth to create the story they wanted to tell" and withheld potentially exculpatory evidence. The way the investigation was conducted offers prima facie evidence that there was a conspiracy against Mr. Bwalya between the Administration and the investigators. The UNDT Judge was made aware of the apparent violations by the investigators, but chose to either ignore or downplay them.

45. Mr. Bwalya complains that in its discussion at paragraph 40 of the impugned Judgment, the UNDT failed to exercise jurisdiction and erred on a question of law by not intervening after it had become apparent that the Secretary-General had fraudulently concealed potentially exculpatory evidence from him (OAI interview with Mr. S, President of Digata, 2 February 2017). He points to Judgment No. UNDT/2011/106 which requires that all materials gathered in the course of investigating a case ought to be placed before the Tribunal.

46. Finally, Mr. Bwalya submits that the evidence of fraudulent concealment of evidence and a conspiracy between the investigators who are supposed to act independently, and the UNDP Administration is conclusive. Neither could have acted alone. The UNDT Judge's failure to report this misconduct under Article 10(8) of the UNDT Statute amounts to a tacit endorsement of the unlawful tactic of withholding exculpatory evidence in disciplinary proceedings before the UNDT

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persuasive so as to justify an oral hearing about the issues raised in the appeal. The factual and legal issues arising from the appeal have already been clearly defined by the parties and there is no need for further clarification. All elements for discussion are already on the record. Moreover, we do not find that an oral hearing would “assist in the expeditious and fair disposal of the case,” as required by Article 18(1) of the Rules . Mr. Bwalya’s request for an oral hearing is therefore denied.

Clear and convincing evidence

59. In disciplinary cases, the Dispute Tribunal must establish whether the facts on which the sanction is based have been established by clear and convincing evidence when termination is a possible outcome. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt; it means that the truth of 9L71v1a1.9 (1.9 (hBrf

... The discussion on 31 July 2014 was not a formal meeting with a formal agenda, more of an informal discussion. I do not remember exactly who said what during the meeting, but I do remember that Mr. Bwalya spoke more, and that m.actly w t m 213 a,uir mui n001 Tc 0.044 Tw

67. The statement is also in accordance with her 24 January 2017 interview during the investigation procedure:⁷

in our UNDP format and make it ready for sharing with the Minister but only after we
have received the MOU between them and Digata."Iharne?c 0 Tw 2.434 0 6.614 05j0.003 Tcc 0.004 Tw 1.098 0 3

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which undermines the whole internal justice system that relies on investigation reports to establish the facts.

78. As shown above, there was no misconduct by the investigators or the UNDP Administration. Therefore, there was no need for the UNDT to proceed under Article 10(8) UNDT Statute.

Judgment

79. The appeal is dismissed, and Judgment No. UNDT/2022/041 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 30th day of June 2023 in New York, United States.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Halfeld

Judgment published and entered into the Register on this 7th day of August 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar