



Before:

Judge

Registry:

Registrar:

Abena Kwakye-Berko

Background

1. This is the Applicant's application contesting the Under-Secretary-General for Management Strategy, Policy and Compliance's ("USG/DMSPC") decision to impose on her the disciplinary measures of written censure and demotion of one grade with deferment for two years for eligibility for consideration for promotion in accordance with

7. The contested decision was taken on 30 September 2019. Per the sanction letter¹, the decision was arrived at after the Applicant was informed through a memorandum, dated 28 May 2019, from the then Office of Human Resources Management, setting out allegations of misconduct against her, that she attempted to influence ITSS to hire one or more individuals, including her brother, having been

14. On 26 July 2021, the Tribunal issued Order No. 143 (NBI/2021) which, *inter alia*, ordered the Respondent to produce the minutes of the Headquarters Committee on Contracts (“HCC”) of 18 October 2017 by 31 August 2021 and directed the Applicant to file submissions on the relevance of the minutes and on whether they were before the Investigators and the Administration at the time the impugned

November 2017 from the Proposal Manager, ITSS, to the Applicant in which Mr. Haddadin, Chief Engineer, UNISFA, was copied, where Ms. Dadaa says to call on a particular number³. This indicates that there was a telephonic conversation/meeting on 8 November 2017.

d. An email she wrote on 10 November 2017 to the Proposal Manager, ITSS, with a copy to the CEO clearly indicates that there was a meeting and that during this meeting such a request was definitely made by ITSS. This claim has not been refuted by the Administration in the Sanction Letter nor in the reply.

e. After this email, there is no email from ITSS or any evidence which has emerged that ITSS was averse to this email request and denial by them that there was such a request made. When the Applicant sent the WhatsApp

could potentially be rewarded in a future procurement process or could otherwise be negatively affected if they offended and/or did not oblige her. This is merely a surmise drawn by the Respondent based on speculation. None of the witnesses from ITSS in their depositions have alluded to this benefit or threat.

18. On the ground that the established facts do not constitute misconduct, the Applicant submits:

a. She acted based on the request of the vendor, ITSS. Moreover, she was acting for the best interest of the Organization as she had witnessed the difficulty in obtaining skilled personnel and visas in Abyei.

b. It was known that the previous contract had been terminated because the Sudanese Government denied visas. In Abyei, labour which was skilled and experienced to carry out the obligations stated in the Contract was tough to find as indicated in the HCC minutes. She did not receive any gain in trying to facilitate the recruitment of individuals whom she considered had the right skill set and experience tha

brother's case, submitting his curriculum vitae ("CV") was bad judgment on her part but does not amount to misconduct.

19. The Applicant avers that her due process rights were not protected as evidenced by the following:

a. Records reveal that the Office of Internal Oversight Services ("OIOS") investigators had taken the deposition of two witnesses, namely, Mr. Al Armouti and Ms. Al Armouti together. This was a clear violation of due procedure. This issue goes to the crux of the confidentiality of the investigation proceedings. OIOS warns every witness at the end of deposition that they should not disclose about their testimony to other persons to avoid matching of depositions and improvisation as well to protect the integrity of the investigation. In the instant case, two important witnesses who were complainants were interviewed together whilst they were sitting side by side.

b. The perusal of the audio recording of the interview shows that throughout the depositions the witnesses were assisting each other in

charges were not proven. Many if not all the allegations, cannot be said to be proved by clear and convincing evidence or even by a preponderance of evidence. The Administration has failed to show private gain obtained by her or by a third party. It

The Applicant said that, with regards to Dr. Mekonnen, it was because he was already on the ground and he would be an asset for the Organization since he knew the area and did not need a visa.

26. The Respondent states that the Applicant violated staff regulations 1.2(b), 1.2(g), 1.2(m) and staff rule 1.2(k), amounting to serious misconduct. The Applicant violated staff regulation 1.2(b) in that she failed to uphold the highest standard of integrity. She was in a position of influence and authority by way of her position with the Organization, and she played a significant role in the awarding of the contract to ITSS, and by repeatedly suggesting and inquiring about the possibility () (i)1 po

Case No.: UNDT/NBI/2019/170

Judgment No.: UNDT/2022/002

have been aware that her actions were inappropriate in view of her position within the Organization and vis-à-vis ITSS, the power imbalance created by her position with the Organization as compared to that of ITSS, a company attempting to do business

established facts amount to misconduct; (iii) whether the sanction is proportionate to the offence; and (iv) whether the staff member's due process rights were respected.⁵

39. In a disciplinary matter where the sanction is not separation from service the standard of proof is one on a preponderance of the evidence. The Tribunal must ask itself whether it is more probable than not that the staff member committed the alleged acts of misconduct.⁶ This standard is lower than the standard of clear and convincing evidence required in disciplinary matters that result in separation from service. The Tribunal makes the following determinations on the four essential elements as found on the question before it:

Whether the facts on which the disciplinary measure is based have been established

40. The Respondent imposed on the Applicant the disciplinary measures of written censure and demotion 6(s)8(ur)-7(e)20 Tf 0.0 eo nation 6(s)8(ur)-7(e)20 Tf 0.0 eo natit

Case No.: UNDT/NBI/2019/170

Judgment No.: UNDT/2022/002

individuals. The Applicant has admitted that she made the requests and pleadings but disagrees with the Respondent that by so doing she acted without integrity.

50. The Tribunal agrees with the Respondent that the Applicant, failed t

privity to this request and the HCC minutes which shows that Mr. Haddadin was in attendance are not relevant either on the issue as they do not contain any express or implied request

of her brother and her acquaintances, including Dr. Mekonnen, in violation of regulation 1.2 (g)⁷.

Staff regulation 1.2(m)

57. A conflict of interest occurs when a staff member's personal interests interfere with the integrity, independence and impartiality required by the staff member's status as an international civil servant and that when an actual or possible conflict of interest does arise, the conflict shall be disclosed by staff members to their head of office, mitigated by the Organization and resolved in favor of the interests of the Organization.

58. The Tribunal agrees with the Respondent that advocating for the hiring of her brother and other acquaintances, the Applicant used her office for their private gain. This constituted a conflict of interest as described in regulation 1.2(m) because: (i) the Applicant was motivated by her personal interests in submitting her brother's and acquaintances' names to be considered for jobs; (ii) as found above, in doing so she
co

any third party in exchange for performing, failing to perform or delaying the performance of any official act.

60. In violation of the above provision, the Applicant in her own statements conceded that she submitted her brother's CV and those of her other acquaintances to ITSS so that ITSS can consider employing them. The perception is that she was calling in a favour in exchange for the role that she played in awarding ITSS the contract. It is clear that the Applicant through her position as OiC of the UNISFA Procurement Section and Buyer in this procurement process had performed an official act and she in turn sought favours for her personal benefit through her brother and her friends, contrary to the regulations.

Whether the sanction is proportionate to the offence

61. When the Tribunal is considering the proportionality of a sanction, the United Nations Appeals Tribunal ("UNAT") has reiterated that:

In the context of administrative law, the principle of proportionality means that administrative action should not be more excessive than is necessary for obtainorssary for o -20(r)12(t)-22(i)37(o)-2-301(a)3(r)-150(a) 0.0 rg 0.9981 C

discretion to terminate the Applicant's services¹¹,

the case and it took three months before one witness'

was lawful. The application is dismissed.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 10th day of January 2022

Entered in the Register on this 10th day of January 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi