



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

Judgment No. 2022-UNAT-1254

**Francois Xavier Nsabimana
(Appellant)**
v.
**President of the
International Fund for Agricultural Development
(Respondent)**

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge Dimitrios Raikos Judge Sabine Knierim
Case No.:	2021-1596
Date of Decision:	1 July 2022
Date of Publication:	12 August 2022
Registrar:	Weicheng Lin

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Rémi Cèbe

JUDGE MARTHA HALFELD, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal or UNAT) has before it an appeal by Francois Xavier Nsabimana (Mr. Nsabimana), a former staff member who served as Country Program Officer at the International Fund for Agricultural Development (IFAD or Fund) in Bujumbura, Burundi.
2. Mr. Nsabimana filed an appeal with the Joint Appeals Board (JAB or Board) challenging the decision of the Fund to dismiss him from service on account that: (i) he held simultaneous employment at two entities, IFAD being one of them, without disclosing it or obtaining appropriate authorisation from IFAD, and (ii) he failed to disclose activities outside of IFAD to the Office of Ethics.
3. On 20 April 2021, the JAB issued its Judgment in Case 3/2020,¹ dismissing Mr. Nsabimana's appeal and finding that the Fund's decision to dismiss him from service was appropriate.
4. For the reasons set out below, we dismiss the appeal.

Facts and Procedure

5. Mr. Nsabimana was selected for the post of Country Program Officer at the IFAD Country Office in Bujumbura, Burundi, on 7 February 2020. He responded to the offer of appointment on the next day and indicated that he would like to begin working for the Fund on 27 February 2020. However, after an e-mail exchange with Human Resources, it was finally agreed between the parties that the starting date for Mr. Nsabimana would be 3 March 2020.
6. On 3 March 2020, Mr. Nsabimana received the official letter of appointment by e-mail. On the same day, he accepted the offer and signed the letter of appointment. Notwithstanding the mutually agreed start date of 3 March 2020, Mr. Nsabimana did not report for duty at the Burundi office until 10 March 2020. Furthermore, he did not inform the Fund of his intention to start on 10 March 2020 until the day before, that is on 9 March 2020. As a result, he was absent without leave for the first week of his appointment.

¹ *Francois Xavier Nsabimana v. International Fund for Agricultural Development*, Case No. 3/2020 dated 20 April 2021 (Impugned Judgment).

7. It is undisputed that Mr. Nsabimana spent the period from 3 March 2020 until 10 March 2020 at the offices of his then other employer, Burundi Local Development Program for Jobs (PDLE). During that time period, he received full salaries from both IFAD and PDLE. Additionally, it is also undisputed that he did not resign from his employment at PDLE until 10 March 2020, even though he accepted an appointment as an IFAD employee effective 3 March 2020. He also submitted a leave request to his PDLE supervisor for leave for the period of 10 March to 13 March 2020.

8. Mr. Nsabimana claims that for the period of 3 March 2020 until he reported for duty on 10 March 2020, he reviewed IFAD personnel rules and other documents pertinent to IFAD employment in addition to filling out the necessary paperwork regarding his new appointment.

9. On 15 March 2020, Mr. Nsabimana mentioned to his supervisor that he was a member of several nongovernmental organisations (NGOs), namely Collectif 1972; Association of Abavumu of Burundi (IRAB), and Association of Friends of Burundi and Egypt (BEFA). The subject of his association with these organisations arose in a subsequent meeting, during which he was again reminded that there may be a possible conflict of interest.

10. On 1 April 2020, Mr. Nsabimana signed a document entitled “Undertaking”, in which he stated, among other things, that he would disclose any personal business, membership, positions on boards of organisations, firms or NGOs or any financial interests in organisations or firms doing business with IFAD as well as those of his immediate family members that might give rise to a conflict of interest, reflect unfavorably on, or cause embarrassment to IFAD. In the same document, he agreed that he would make such disclosures to the Ethics Office as soon as he became aware of the circumstances which create an obligation to make such a disclosure.

11. Notwithstanding the above affirmation, Mr. Nsabimana never submitted to the Ethics Office the list of organisations with which he was associated.

12. On 3 April 2020, the Country Director for Burundi e-mailed Mr. Nsabimana over possible issues regarding his outside activities. His direct supervisor followed up on 7 April 2020, reminding him of his obligations under the IFAD Code of Conduct.

13. On 15 April 2020, Mr. Nsabimana met with two officers from the Human Resources Division (HRD), who warned him of the need to disclose his affiliations with several NGOs to the Ethics Office.

14. After the meeting, the HRD Officers e-mailed a draft of the minutes of the meeting to Mr. Nsabimana for comment. Regarding the duty to disclose outside affiliations, the minutes stated: “[R] confirmed that he [i.e., Appellant] has to disclose these activities to the Ethics Office. ETH will review the case and if cleared he will receive confirmation that he can continue performing the functions.” Mr. Nsabimana did not request a change to this requirement specified in the meeting minutes.

15. On 20 April 2020, one of the HRD Officers sent another e-mail reminding Mr. Nsabimana of his affirmative obligation to report to the Ethics Office regarding his outside affiliations and inquire whether his continued participation would be permissible. This, Mr. Nsabimana never did, and he also did not present any evidence that he resigned from any of the NGOs with which he was associated.

16. On 23 April 2020, HRD informed the Office of Audit and Oversight (AUO) that Mr. Nsabimana, who was contracted to report to work on 3 March 2020, did not report until 10 March 2020. HRD also reported that Mr. Nsabimana only resigned from his previous employer, PDLE, on 10 March 2020 and that he was actively involved in political activities and other activities outside IFAD.

17. On 24 April 2020, AUO initiated a fact-finding inquiry into the issues involving Mr. Nsabimana. Following such inquiry, which included interviews with Mr. Nsabimana’s direct supervisor, the Country Director for Burundi and the two HRD Officers who previously interacted with him, AUO also contacted PDLE. Having corroborated the information from HRD and in order to safeguard against the increased reputational risks to the Fund, AUO and the Ethics Office recommended, and the President approved, that Mr. Nsabimana be placed on Special Leave With Full Pay (SLWFP) from 7 May 2020, with no access to IFAD systems, until the investigation and the disciplinary process are completed. On 8 May 2020, the Director for HRD sent a Letter of Charges to Mr. Nsabimana. He responded to the charges on 11 May 2020.

18. A second and more thorough investigation ensued. On 3 June 2020, AUO notified Mr. Nsabimana that he was the subject of an investigation relating to the following allegations: (i) he had an undeclared and unauthorised employment with the PDLE at the beginning of his term with IFAD and intentionally misled IFAD about it, and (ii) he failed to disclose to the IFAD Ethics Office his involvement in outside activities.

19. On 4 June 2020, AUO conducted an interview with Mr. Nsabimana regarding the above allegations. Regarding his employment with PDLE, the former staff member claimed that IFAD erred by paying him for those days prior to his reporting for duty on 10 March 2020. He explained that he was willing to repay IFAD for those days, but he actually never followed through with the promise. When asked why he did not report for duty on the date that was agreed, Mr. Nsabimana gave various answers: he was confused; he did not know the system; he was a new employee; he had trouble finding IFAD's offices; orientation was inadequate; he did not think he would have adequate equipment at IFAD, and he did not have the "instinctive reaction" to inform IFAD that he would not report to work on 3 March 2020.

20. As to the second allegation regarding his failure to consult the Ethics Office concerning his outside activities, Mr. Nsabimana again said he was confused; he did not understand the word "disclose"; he thought the Ethics Office would contact him. But even after the 4 June 2020 meeting with AUO, Mr. Nsabimana never made an attempt to contact the Ethics Office.

21. The second investigation was completed on 24 June 2020 and prior to issuing its final report, AUO afforded Mr. Nsabimana the opportunity to comment on the findings of the report, which he did on 19 June 2020.

22. On 17 July 2020, the HRD Director notified Mr. Nsabimana that he was formally charged with misconduct based on the AUO factual findings set out in the 24 June 2020 report and invited him to comment on those charges within the following ten working days. Mr. Nsabimana responded by letter dated 30 July 2020.

23. On 10 September 2020, the HRD Director informed Mr. Nsabimana of the President's decision to dismiss him from service, effective thirty days following receipt of that letter. The letter went on to say that Mr. Nsabimana had committed the misconduct described in the charges. The letter specified that the Sanctions Committee deemed as an aggravating factor

the fact that he engaged in outside activities, despite receiving explicit instructions on multiple occasions to inform the Ethics Office about such activities. Additionally, the Committee also considered, and the President agreed, that Mr. Nsabimana had not demonstrated an understanding of his wrongdoing and the gravity of his misconduct. In conclusion, the President also noted that Mr. Nsabimana committed this misconduct during the probationary period and that he was not a good fit for the position he encumbered.

24. On 17 October 2020, Mr. Nsabimana filed an appeal with the JAB challenging the dismissal decision and sought, among other things, reinstatement to his previous post.

The JAB Decision

25. On 20 April 2021, the JAB issued the Impugned Judgment, dismissing the appeal and finding no illegality in the challenged administrative action. The three-member JAB unanimously decided that the facts that Mr. Nsabimana never consulted the Ethics Office regarding his outside activities and that he did not start at IFAD until 10 March 2020 had been established by clear and convincing evidence. The JAB notably credited the statements made by Mr. Nsabimana during the interview and his own observations to the AUO reports, which left the facts underpinning the two allegations of misconduct undisputed.

26. Second, the JAB found the established facts amounted to misconduct under the applicable law, namely under Article 8.3 of the Human Resources Implementing Procedures (HRIP) and IFAD's Code of Conduct.²

27. Finally, the JAB also concluded that the dismissal decision was fair and reasonable and that the staff member's due process rights were respected. Finding no irregularity in the impugned administrative decision, the Board unanimously dismissed the appeal.

Procedure before the Appeals Tribunal

28. On 20 July 2021, Mr. Nsabimana filed an appeal against the Impugned Judgment. The appeal was registered with the Appeals Tribunal as Case No. 2021-1596. IFAD filed a timely answer on 15 October 2021.

² IFAD's Code of Conduct is derived from Chapter 1 (Duties, obligations, and privileges) of the HRIP.

Submissions

Mr. Nsabimana's Appeal

29. First, Mr. Nsabimana submits that the allegations against him are false, ambiguous and unjustified and that he is appealing to UNAT because of several inadequacies and anomalies during the previous proceedings that led to the JAB Judgment. He claims both AUO and the JAB had pre-determined the outcome of their respective enquiries and were intent on proving him culpable of the misconduct with which he was charged.

30. Second, he claims the decision of the President on 8 May 2020 to place him on SLWFP violated his right to work. He maintains that such action on the part of the Administration was brutal, rushed and did not give him any advance warning.

31. Third, Mr. Nsabimana argues that the requirement by the AUO not to discuss the charges against him with others in order to protect the confidentiality and integrity of the investigation was unreasonable and caused him moral harm.

32. Regarding the allegation that he worked for both IFAD and PDLE at the beginning of March 2020, Mr. Nsabimana explains that there are no foundations to this allegation and in any case, that in of itself could not justify his dismissal. In particular, he argues that his starting date was changed on several occasions and that, at one point, he did communicate to an Administrative Assistant at the Burundi office that he was going to start on 10 March 2020, and not on 3 March 2020. Additionally, Mr. Nsabimana says that he has asked AUO to inform the appropriate department to cut his salary for the first four days missed in March 2020. Mr. Nsabimana says it is only in the Judgment of the JAB that he is learning that he should have contacted the respective department regarding the deduction of his salary for the four days missed of work, even though the Fund had taken away all his work equipment and communication devices. Mr. Nsabimana maintains it was very simple for IFAD just to cut his salary for the four days of missed work and that it was within their power to do so. The fact that the Fund paid him even though it knew he would not start until 10 March 2020 was a trap, argues Mr. Nsabimana.

33. Regarding the allegation that he participated in outside activities without consulting the Ethics Office, Mr. Nsabimana submits that his outside work related to the promotion of human rights and IFAD should not be against these types of activities. Additionally, he

maintains his participation was rare, the NGO was small, and he engaged in these activities outside work hours. Additionally, Mr. Nsabimana explains that he never refused to inform the Ethics Office, as claimed by the JAB. In fact, Mr. Nsabimana maintains that at the time he was about to communicate with the Ethics Office, IFAD rushed to suspend him from service and took away his work equipment and communication tools. He argues even his e-mail and access to the messaging platform was deactivated.

34. Finally, Mr. Nsabimana also claims that he did not receive all the necessary documents related to work procedures before he started at the Fund. He explains that he received some of these documents in April 2020, a month after he had started at the Fund. In addition, as a new employee, he was not even able to go through all the necessary training before IFAD suspended him from service.

35. In conclusion, Mr. Nsabimana asks that he be reinstated to his post of Country Program Officer and that he be offered two years' net base salary in compensatory damages as a result of his unjust dismissal and one year's net base salary for moral harm.

The IFAD President's Answer

36. As a preliminary matter, IFAD submits that the allegations of misconduct have been not only established but also admitted by the staff member himself during the internal investigation. In addition, the dismissal decision was not only reasonable but also proportionate to the alleged offense. Third, there were no procedural flaws during the disciplinary process and the due process rights of the staff member were fully respected.

37. Regarding the allegation of not starting on 3 March 2020 as previously agreed, IFAD argues that the staff member wrote in his letter to the HRD Director on 10 May 2020 that he did in fact start on 10 March 2020 and that during the days prior, he was at the offices of PDLE. The investigators also demonstrated that during the period from 3 March 2020 until 10 March 2020, the staff member received a salary from both employers.

38. IFAD also reiterates that an international civil servant cannot serve two masters at the same time and that it is this cardinal principle that Mr. Nsabimana violated when he maintained employment with both organisations at the beginning of March 2020. As such, IFAD highlights that the JAB was correct in concluding the following:³

[It] is no excuse for not conducting himself prudently, with common sense, with integrity, honestly, and with respect for his fellow employees. Those are commonly accepted requirements for satisfactory conduct in any international organization: to show up for work on the first day of your contract, unless otherwise agreed; to seek permission to be absent from your place of employment from your supervisor or at least give notice of your intent not to be present; to respect the authority and person of your supervisor by seeking that permission; to not double bill for your time by receiving a salary from one organization while also employed by another; to treat your employment with the organization as exclusive, unless otherwise so permitted by the corresponding authority within the organization; and to serve in accordance with the highest standards of integrity.

39. Regarding the allegation of participating in outside activities, IFAD states that the staff member does not deny participation in them but rather attempts to minimise the seriousness of undertaking such activity. Additionally, it was also discovered that he participated in a meeting on 25 April 2020 related to outside political activities, without first seeking authorisation from the IFAD. IFAD explains that participation in outside activities was in clear violation of Staff Rules and Article 1.7.9(v)(c) of the Code of Conduct.

40. IFAD also argues that the dismissal decision was not only properly founded and motivated, it was also a legitimate use of the discretionary power of the President to terminate the contract of a staff member during the probationary period by giving one month notice. IFAD highlights that Section 2.19.1 of the HRIP provides that confirmation of an appointment is conditioned upon satisfactory performance and conduct of the staff member.

41. Regarding the staff member's argument that he did not have enough time to familiarise himself with the applicable rules and procedures at IFAD, the Administration argues that ignorance of the Staff Rules is not an acceptable justification for not being compliant with the applicable law.

³ Impugned Judgment, page 9, para. 4.

42. As a final point, IFAD noted the internal procedures were followed regarding the disciplinary process and the due process rights of the staff member were respected. IFAD also asks this Tribunal to reject the appellant's arguments that the requirement not to discuss the charges against him during the investigation phase, in order to protect the integrity and confidentiality of the process, was unduly burdensome and caused him moral harm. IFAD notes that the requirement to preserve the confidentiality of the process in no way inhibited the staff member from defending himself and to produce evidence and witnesses in support of his defense.

43. In conclusion, the IFAD asks the Appeals Tribunal: (i) to declare itself competent to hear and pass judgment on the instant appeal; (ii) to confirm the Impugned Judgment of 20 April 2021; (iii) to reject the request to reverse the Impugned Judgment; and (iv) to dismiss the appeal in its entirety and the request for damages.

Considerations

Jurisdiction of the Appeals Tribunal

44. The jurisdiction of the Appeals Tribunal in matters such as the present one flows from Article 2(10) of its Statute, which provides that:

The Appeals Tribunal shall be competent to hear and pass judgement on an application filed against a specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations or other international organization or entity established by a treaty and participating in the common system of conditions of service, where a special agreement has been concluded between the agency, organization or entity concerned and the Secretary-General of the United Nations to accept the terms of the jurisdiction of the Appeals Tribunal, consonant with the present statute. Such special agreement shall provide that the agency, organization or entity concerned shall be bound by the judgements of the Appeals Tribunal and be responsible for the payment of any compensation awarded by the Appeals Tribunal in respect of its own staff members and shall include, inter alia, provisions concerning its participation in the administrative arrangements for the functioning of the Appeals Tribunal and concerning its sharing of the expenses of the Appeals Tribunal. Such special agreement shall also contain other provisions required for the Appeals Tribunal to carry out its functions vis-a-vis the agency, organization or entity. Such special agreement may only be concluded if the agency, organization or entity utilizes a neutral first instance process that includes a written record and a written

decision providing reasons, fact and law. In such cases remands, if any, shall be to the first instance process of the agency, organization or entity.

45. As stated in *Spinardi*,⁴ the Appeals Tribunal Statute requires that these special agreements establish a neutral first instance process and body to decide disputes, and that the head of the organisation whose decision is appealed cannot belong to that neutral body. As the Appeals Tribunal is the second level of appeal, it cannot conduct a review without a decision from a neutral first instance process.

46. In the present case, the JAB constitution is correct, and it thus did not provide only advice or a mere recommendation to the IFAD, but rather a genuine decision, as required by Article 2(10) of the Appeals Tribunal Statute. Even though the Appeals Tribunal does not always agree with the language used in the JAB decision, it was reasoned, and all the facts are on the record, hence, the case is ready to be heard at the appeals level.

Oral hearing

47. As a preliminary matter, Mr. Nsabimana filed a request for an oral hearing. Oral hearings are governed by Article 8(3) of the Appeals Tribunal's Statute and Article 18(1) of the Appeals Tribunal's Rules of Procedure (Rules). In the present case, Mr. Nsabimana's justification for an oral hearing is based on the "many questions to hear orally".

48. However, the factual and legal issues arising from this appeal have already been clearly defined by the parties and there is no need for further clarification. 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. Thus, the request for an oral hearing is denied.

Merits of the appeal – the lawfulness of the disciplinary measure

49. The present appeal concerns the disciplinary measure of dismissal imposed on Mr. Nsabimana for breach of the Staff Rules, Code of Conduct and Chapter 8 of the HRIP. The JAB dismissed Mr. Nsabimana's appeal and concluded that the disciplinary measure was appropriate on grounds that there was clear and convincing evidence that he had failed: i) to report to work on 3 March 2020; and ii) to consult the Ethics Officer about NGO affiliations.

⁴ *Spinardi v. Secretary-General of the International Maritime Organization*, Judgment No. 2019-UNAT-957.

50. The 10 September 2020 letter, which communicated the decision to terminate Mr. Nsabimana's appointment referred to two specific reasons for the disciplinary measures imposed on him: i) holding simultaneous employment at two entities, including IFAD, without disclosing this or obtaining appropriate authorisation from IFAD; and ii) failing to disclose his outside activities to the Ethics Office. The letter also referred to breach of the Staff Rules, Code of Conduct and Chapter 8 of the Human Resources Implementing Procedures, as well as to other specific provisions.

51. Article 6, Section 8(3) of the Agreement Establishing the International Fund for Agricultural Development provides at the relevant parts that (emphasis added):

(e) In the employment of the staff and in the determination of the conditions of service, consideration shall be given to the necessity of securing the highest standards of efficiency, competence and integrity as well as to the importance of observing the criterion of equitable geographical distribution.

(f) The President and the staff, in the discharge of their functions, *owe their duty exclusively to the Fund* and shall neither seek nor receive instructions in regard to the discharge thereof from any authority external to the Fund. Each Member of the Fund shall respect the international character of this duty and shall refrain from any attempt to influence them in the discharge of their duties.

52. The IFAD Human Resources Policy establishes the obligations of its staff, among which that “[t]heir responsibilities are exclusively international and, by accepting appointment, they pledge themselves to discharge their functions and regulate their conduct solely with the interest and objectives of the Fund in view.

53. Deriving from Article 1 of the HRIP, the Code of Conduct stipulates in its Section 1.7.9(v)(c), about information required of staff members, that, “[s]taff members shall *disclose any personal business, membership, positions on boards of organizations, firms or non-governmental organizations or any interests*, including financial, in organizations or firms doing business with the Fund, as well as those of their immediate family members, that might give rise to a conflict of interest or reflect unfavourably on or cause embarrassment to the Fund. *If in doubt about disclosing information, staff members should consult the Director, [Ethics Office]*” (emphasis added).

54. In turn, the relevant IFAD Staff Rules state (emphasis added):

Rule 1.1. International character of the functions performed

- (a) Staff members are international civil servants and, as such, their responsibilities are not national but exclusively international. By accepting their appointment, staff members pledge to discharge their functions and regulate their conduct with the *interests of the Fund alone in mind*.
- (b) In the performance of their functions within the Fund, staff members shall not seek or accept any instructions from any government or from any authority external to the Fund. *They may not represent a government, national administration, intergovernmental organization or other organization.*

Rule 1.2. Conduct

- (a) Staff members shall, under all circumstances, conduct themselves in a manner befitting their status as international civil servants and refrain from any action that may *adversely reflect upon their international status or upon the integrity, independence, impartiality and exemplary conduct required by the dignity of their functions*. Staff members shall not engage in any form of discrimination or harassment within the work place or in association with the work performed on behalf of the Fund
- (b) Staff members *shall not engage in any activity, be it political or other, that would be incompatible with the performance of their functions within the Fund, or would incur the moral or material responsibility of the Fund, without the prior authorization of the President*. This does not preclude participation, or volunteer work, in community or civic activities, provided that such participation or volunteer work is not incompatible with the principles stated in the present Rules.
- (c) *Staff members shall not engage in any outside occupation or employment, whether remunerated or not, without the prior authorization of the President, except as provided in rule 1.2 (b).*
- (d) Staff members shall not accept any personal honour, decoration, favour, gift or remuneration from any government or other private or public source, external to the Fund, without the prior authorization of the President.
- (e) Staff members shall not take, or attempt to take, undue advantage of their position as staff members to gain a personal benefit.
- (f) Staff members shall respect the obligations incumbent upon them, as set out in the Staff Rules and Implementing Procedures. ...

Rule 1.4. Duty of loyalty

By taking up his/her position, a staff member undertakes to exercise the functions entrusted to him/her as an international civil servant of the Fund with loyalty, discretion and awareness that the functions entrusted to him/her as an international civil servant of the

Fund, and to discharge these functions, and regulate his/her conduct, *in the interests of the Fund alone.* (...)

Rule 2.5. Probationary period

... (b) During the probationary period, the staff member's appointment may be terminated *at any time by giving one month notice.* Similarly the staff member may, at any time, resign by giving one month's notice.

Rule 8.1. Warnings and Disciplinary measures in cases of misconduct

The President, and the President alone, exercises disciplinary control over staff members. To this end, the President may:

- (a) Impose disciplinary measures on staff members for misconduct;
- (b) Summarily dismiss a staff member for serious misconduct.

Rule 8.2. Unsatisfactory conduct and misconduct

(a) Any act or omission, whether deliberate or resulting from negligence, committed by a staff member in contravention of the: terms of his/her declaration of loyalty, Staff Rules, Implementing Procedures, HR Information Notes, or of the standards of conduct befitting his/her status as an international official, may constitute unsatisfactory conduct or misconduct, and may lead to the institution of disciplinary proceedings and the imposition of disciplinary measures.

(b) Serious misconduct may warrant the staff member's dismissal or summary dismissal in accordance with Rule 8.5 (b). ...

Rule 8.4. Disciplinary measures

Disciplinary measures may take one or more of the following forms: ...

(ix) Dismissal, with or without the forfeiture of part of the relevant period of notice, the termination indemnity and other allowances;

(x) Summary dismissal for serious misconduct with the forfeiture of the termination indemnity and other allowances.

55. Section 8.3 of the HRIP, with regard to unsatisfactory conduct and misconduct, establishes:

(i) In line with Staff Rule 8.2, unsatisfactory conduct or misconduct may lead to the institution of disciplinary proceedings and the imposition of disciplinary measures. Such conduct includes but is not limited to, the following:

(a) public disclosure of confidential information, misrepresentation of facts intended to be relied on, including the falsifying of documents, or *any violation of IFAD's code of conduct* (HRIP Chapter 1: Duties, obligations and privileges);

(b) failure to observe, or to report violations of, applicable norms of prudent professional conduct;

(m) habitual or *substantial neglect of or absence from duty*;

(n) willful disobedience or insubordination;

(o) *false representation made expressly or implicitly by a staff member to the Fund*;

(ii) Some of the conduct described above, including sexual harassment and sexual exploitation and abuse, may constitute grounds for summary dismissal.

56. In his appeal, Mr. Nsabimana claims that there was a violation of his procedural rights during the investigation phase. Having never once been previously disciplined or reprimanded, he was deprived of work from 8 May 2020 until September 2020, when he was summarily dismissed. During this period, apart from being suspended from work, he was also prohibited from sharing his professional situation with people he knew, and he claimed this was equivalent to “torture”.

57. The Appeals Tribunal finds that the alleged procedural rights violations mentioned above are related to the reasons provided by the Fund to administer the disciplinary measure of summary dismissal, i.e. whether the behaviour could be lawfully characterised as misconduct so as to justify the imposition of the disciplinary sanction of summary dismissal. Hence, the Appeals Tribunal will examine both allegations of misconduct in turn.

Failure to report to work on 3-9 March 2020 – simultaneous employment at two entities during this period

58. The JAB found that Mr. Nsabimana failed to report to work on the agreed starting date of 3 March 2020 and only notified the office on 9 March 2020 that he would be in the office the following day, i.e., 10 March 2020. He was therefore absent without leave for the first week of his appointment.⁵ The JAB further found that Mr. Nsabimana substantially neglected his duty to be present on the first day of employment and failed to notify his supervisor that he wished to take that absence. During this period, he worked for another employer, PDLE, and received salary from both PDLE and IFAD. The JAB found that the explanation Mr. Nsabimana gave of having spent this time filling out the papers for IFAD “defies credibility” because he would not have spent so many days “filling out” those papers and, if his excuse was true, he had defrauded PDLE by accepting payment for time he worked for IFAD. If his allegation was untrue, he defrauded IFAD. In either way, his action constitutes misconduct, since he acted without the requisite integrity expected of an IFAD employee and failed to observe applicable norms of prudent professional conduct. The JAB also stated that “to make things even worse”, Mr. Nsabimana had requested leave from PDLE for the period from 10-13 March 2020, demonstrating his willingness to keep both appointments and receive both salaries.

59. For the JAB, the fact that Mr. Nsabimana was new to IFAD and had not yet had his orientation, nor received a copy of the staff rules or other pertinent IFAD regulations on 3 March 2020, was no excuse for his behaviour, since there are commonly accepted requirements for satisfactory conduct in any international organisation and Mr. Nsabimana should have realised that his behaviour constituted misconduct since he was “no novice when it came to working in international organizations”.

60. The JAB then stated that, under strict adherence of Rule 8.7.2(i)(a), dismissal would not have been an appropriate sanction for the misconduct committed in connection with the 3-9 March 2020 absence without leave because Mr. Nsabimana had not received any warning that such behaviour was inappropriate. However, the JAB went further and stated that, even if that were the only offence, it would not have considered summary dismissal unfair and unreasonable given Mr. Nsabimana’s lack of integrity and disingenuous explanations of his misconduct. For the JAB, Mr. Nsabimana was fortunate that the President of IFAD did not summarily dismiss him in

⁵ Impugned Judgment, para. 9.

March on the basis of his absence from work, and the investigations over many months meant that Mr. Nsabimana was therefore placed on SLWFP from 8 May to 10 October.

61. Mr. Nsabimana contends that he had given notice to the Fund's administrative assistant of the date he would start working for the Fund on 10 March 2020 instead of 3 March 2020, and that the Fund could have not paid him the salary for the days he had not worked. He had left his previous work at the PDLE in order to work for the Fund and the summary dismissal prevented him from keeping his position in either institution. In light of this, the dismissal is unjustified.

62. In disciplinary cases, it is established in our jurisprudence that the tribunals will examine: i) whether the facts on which the disciplinary measure is based have been ascertained by a preponderance of evidence (but where termination is a possible sanction, the facts must be established by clear and convincing evidence); ii) whether the 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.

63. In the present case, it is not disputed that Mr. Nsabimana did not present himself for work until 10 March 2020 and that he was paid by the Fund for the period 3-9 March 2020, while he was still in the service of his previous employer. As discussed, the "procedural irregularities" highlighted by Mr. Nsabimana refer essentially to the discussion about whether or not his behaviour could be defined as misconduct, in accordance with the circumstances of the case and the applicable legal framework. Hence, what remains to be answered is whether the JAB erred when it found that the fact of not having presented himself for work until 10 March and having received payment for the period 3-9 March 2020 constituted misconduct and whether the sanction of summary dismissal was proportionate to the offence.

64. In the present case, the letter of appointment contains a clear indication that the fixed-term appointment offered to Mr. Nsabimana was for a period of two years "starting from 3 March 2020 to 2 March 2022." The letter also indicated that the appointment would be governed by IFAD's legal instruments, including the IFAD Policy on Preventing and Responding to Sexual Harassment, Sexual Exploitation and Abuse (attached to the letter), as well as the terms and conditions specified in this letter of appointment and its attachments. Mr. Nsabimana accepted the offer when he put his signature below the terms, "I accept this offer under the terms and conditions set forth in this letter" and which was dated 3 March 2020.

65. Some of the reasons initially invoked by Mr. Nsabimana for not reporting to work on 3 March 2020, the agreed date mentioned in the letter of appointment, were quite disingenuous. The arguments that he had worked for the Fund at the other employer's location, that he did not know where exactly to report to when he finally presented himself for work, that he had not been informed about the rules, and that he had not signed a valid contract, are all without merit. In this sense, Mr. Nsabimana's arguments were somehow conflicting, since they sometimes aimed to argue that the *starting date* was on 10 March 2020 rather than 3 March 2020 (there was not a "valid contract"), while sometimes they relate to a possible justification for the *delay* in presenting himself for IFAD (completion of documents in another location; not sure about where to present himself). Moreover, the letter of appointment is the usual valid instrument evidencing the parties' agreement with regard to the date when the appointment would commence (3 March 2020). The other arguments are either insufficient to justify his absence or not substantiated by evidence.

66. The only reasonable justification which Mr. Nsabimana gave for not reporting to work until 10 March 2020 was that he had previously informed the Fund about his delay. However, this only happened the day before, i.e., 9 March 2020.⁶ Mr. Nsabimana argues that the date indicated in the letter of appointment was not a final one, since other dates of commencement had been previously envisaged and rejected. During the interview with the AUO, Mr. Nsabimana even mentioned a written message which would have been sent to him on 9 March 2020 by his supervisor, according to which he was welcomed to the Fund's family and that she would call him on that day to discuss an orientation meeting. With this communication, Mr. Nsabimana wished to provide evidence that the Fund was aware of the new agreed date (10 March 2020). However, apart from the fact that the existence of this e-mail remained unsubstantiated, since no evidence of it had been brought to the records, the truth of the matter is that its content does not relate to the *starting date* of his appointment, but rather to discussions relating to his *induction* for the new post. The starting date, as indicated in the letter of appointment with Mr. Nsabimana's agreement, was still 3 March 2020.

67. Having said this, the real issue here is not only the failure to report to work on the date the appointment was due to start. This misconduct could have been subject to other corrective measures, such as a simple admonition, for example, followed by the corresponding pay decrease which could have served as a pedagogic measure for the staff member. However, the situation in

⁶ See Mr. Nsabimana's answer in the transcripts of the interview during the investigation, AUO, page 19.

the present case is more complex, since there was overlapping payment during the period when Mr. Nsabimana was absent from work.

68. On the issue of overlapping payments, as Mr. Nsabimana was accused of wrongdoing, it was within his interest to quickly redress the irregularity once it was detected. The evidence on the record reveals that he was first made aware of this irregularity at least at the beginning of May 2020, when he responded to the letter from the HRD (Mr. Nsabimana's letter is dated 10 May 2020). Furthermore, Mr. Nsabimana was put on SLWFP from 8 May to 10 October 2020 and yet he never made any attempt to reimburse the Fund for the six days of overlapping employment in March 2020, during which he received two salaries without having worked for the Fund. Here, there was no room for allegations that he had not suffered any previous admonition in this regard or that he had not received the applicable rules, since they had been attached to the letter of appointment.

69. Having examined all the circumstances of the case, the Appeals Tribunal concludes that Mr. Nsabimana seemed indeed undecided as to which employer he would choose when he started working for the Fund. Apart from his initial disappointment with his new salary⁷, this uncertainty was perhaps the reason why he delayed his starting date at IFAD from 3-10th March 2020, then on 5 March 2020 requested leave with full pay from his previous employer for the period 10-13 March 2020, before finally resigning from his previous post on 10th March 2020, the date on which he ultimately started working for the Fund.

70. In any event, the Appeals Tribunal finds no error in the JAB's decision which affirmed the contested decision of wrongdoing following Mr. Nsabimana's failure to report to work on 3 March 2020 and holding of simultaneous employment at two entities, while at IFAD, without disclosing this or obtaining appropriate authorisation from IFAD.

⁷ Mr. Nsabimana's answer in the transcripts of the interview during the investigation, AUO, page 39.

Failure to consult the Ethics Office about NGO affiliations

71. The JAB found that, in light of article 7.1 of the HRIP, which sets out IFAD's Code of Conduct, and after having been warned both orally and in writing, Mr. Nsabimana failed to consult the Ethics Office about his NGO affiliations. This failure constitutes both disobedience and violation of the Code, which equates to misconduct as defined by Article 8.3 of the HRIP. The JAB further found that this offence took place in April, after Mr. Nsabimana had had time to familiarise himself with the Staff Rules, the HRIP and the Code of Conduct. The JAB also stressed the fact that Mr. Nsabimana had signed an undertaking on 1 April 2020 where he had agreed to comply with the disclosure of the information on his activities with the NGOs. Also, Mr. Nsabimana had been advised by HDR officers in a meeting on 15 April 2020 and again on 21 April to contact the Ethics Officer about his participation in certain organisations, even though Mr. Nsabimana had resisted under the pretext that his participation in those organisations was permissible. For the JAB, where there is doubt, the disclosure and other information requested is mandatory.

72. The JAB also found that, even though Mr. Nsabimana offered to resign from the NGOs if the Ethics Officer would not clear his participation in them and even though he said he had resigned as *president* of one of these NGOs, he did not consult the Ethics Officer, nor state that he had resigned from any of these NGOs. After the interview with the Office of Audit and Oversight **on 4 June 2020**, he still could have consulted the Ethics Officer, but he failed to do so.

73. As previously discussed, Section 1.7.9(c) of the IFAD's Code of Conduct, set out by the HRIP, specifically provides that:

Staff members shall disclose any personal business, membership, positions on boards of organizations, firms or non-governmental organizations or any interests, including financial, in organizations or firms doing business with the Fund, as well as those of their immediate family members, that might give rise to a conflict of interest or reflect unfavourably on or cause embarrassment to the Fund. *If in doubt about disclosing information, staff members should consult the Director, [Ethics Office].* (emphasis added)

74. Section 1.7.1(iv) of IFAD's Code of Conduct provides: "Staff members are responsible for obtaining approval from the President for any activity for which approval may be required under the Code of Conduct and for reporting conflicts of interest or failures to follow the Code to the relevant supervisor or to the Director, ETH. Failure to seek approval where applicable may result in corrective or disciplinary measures."

75. Section 1.7.7 on relations with external parties provides at the relevant part that:

(c) Staff members shall maintain the best possible relations with governments and avoid any action that might damage those relations. They shall not attempt to interfere in the affairs of governments, and only influence country's policies within the scope of IFAD's policies, programmes and projects and of the official duties and responsibilities of staff. Staff members, either individually or collectively, shall not criticize or try to discredit a government. At the same time, it is understood that staff members may speak freely in support of the Fund's policies. Any activity, direct or indirect, to undermine a government constitutes a violation of the Code of Conduct, which may be subject to corrective or disciplinary actions

76. Section 1.7.10 on activities outside IFAD stipulates that:

(i) Staff members' primary responsibility is to devote their energies to the work of the Fund. Accordingly, staff members are restricted in the degree to which they may engage in outside activities, whether remunerated or not, or otherwise provide services to another organization during their employment with the Fund. If a staff member has any doubt as to whether they can perform outside activities, they shall seek guidance from the Director, ETH. The Director, ETH shall make a recommendation, in consultation with the Office of the General Counsel where appropriate, to the relevant Head of Department who shall decide whether to authorize the outside activities.

77. In his appeal, Mr. Nsabimana claims that the JAB decision almost entirely repeated the content of the AUO report. Mr. Nsabimana is a member of a local civil association whose aim is to defend human rights, particularly those of victims of the 1972 genocide in Burundi, his home country, and his participation in the association was outside working hours. Apart from this, he had initiated communication with the association in order to envisage his departure even though he was usually working more than 10 hours a day including at the Fund's office in Bujumbura (Burundi). However, Mr. Nsabimana states that he was surprised by the "brutal and rushed" decision to suspend him from work and prevent him from having access to his professional computer or e-mail, which effectively prevented from informing the Ethics Office about his participation in the association.

78. Mr. Nsabimana further maintains that he did not receive the documents concerning the procedural requirements for the new post until April 2020, a month after having started working for IFAD, which is a procedural irregularity. He did not receive the usual orientation for new recruits when he started the new job, so he did not have the opportunity to familiarise himself with

the Fund's procedures. In any event, he states that he had "nothing to hide" and his dismissal was not appropriate.

79. The Appeals Tribunal finds that, following what has been previously decided, it is an undisputed fact that Mr. Nsabimana did not consult the Ethics Office about his participation in the NGOs. What needs to be determined now is whether the JAB erred when it found that, in so doing, Mr. Nsabimana demonstrated misconduct and that the sanction of summary dismissal was proportionate to the offence.

80. In his interview with the AUO, Mr. Nsabimana admitted having participated not only in the local association mentioned in his appeal, but also in other associations, for example IRAB, Abavumu of Burundi Association, the Burundians and Egyptians Friendship Association (BEFA) and another dealing with extended family, having held the roles of president, coordinator and secretary.⁸ From the same interview, it became clear that as early as 15 March 2020, Mr. Nsabimana had an interview with the HRD in which these collaborations with different associations surfaced and which gave rise to concerns about possibly not being permitted to continue his participation in such entities in light of the Code of Conduct. Further to the meeting, on 21st March 2020, the HRD sent a message (copying in the Ethics Office) seeking Mr. Nsabimana's comments on the matter.

81. Mr. Nsabimana's assertion that he was ready to disclose his participation in these associations when he was dismissed is not corroborated by the evidence on record. On the contrary, even after having been questioned about his association with different organisations in light of the Code of Conduct, he resisted seeking the Ethics Office advice on the matter in order to resolve his situation, which remained ambiguous, particularly due to his different roles often involving managerial and representative responsibilities. Furthermore, the evidence on record reveals that Mr. Nsabimana participated in at least one public event relating to defending victims of genocide, and this worried his supervisor. Also, there is no evidence, apart from his own assertion, that Mr. Nsabimana effectively resigned from his prominent positions in these associations. Nor is there evidence of the real business purposes of these associations or the compatibility of his roles therein, with regard to the requirements of the Code of Conduct. His suspicion about possible bad faith on the part of the HRD copying the Ethics Office in on the correspondence is not corroborated by any evidence of bias or discrimination against him, not to

⁸ Mr. Nsabimana's answer in the transcripts of the interview during the investigation, AUO, page 31.

mention that his evasiveness or inaction in engaging with the Ethics Office does not meet normal professional standards, which include transparency and good communication among internal organs.

82. As affirmed in its preamble, the Code of Conduct cannot provide staff with answers or guidance for every ethical issue that may arise in the course of the Fund's activities and should never be used as a substitute for good judgement. In case of doubt, staff should seek guidance from the Ethics Office. Mr. Nsabimana was put on SLWFP from 8 May 2020 to 10 October 2020 and yet made no attempts to contact the Ethics Office on the issue, as he had been explicitly directed to do, first orally and then in writing via the e-mail of 20 April 2020.

Proportionality of the sanction

83. In light of the above, the Appeals Tribunal does not find any error in the JAB conclusion that Mr. Nsabimana engaged in misconduct when he failed: i) to report to work on 3 March 2020, having received payment from two employers from 3-9 March 2020 and; ii) to consult the Ethics Office about his NGO affiliations. Now, the Appeals Tribunal shall examine whether the sanction is proportionate to the offence.

84. Section 8.7.2 of the HRIP stipulates the disciplinary measures which the President may apply for misconduct. With regard to dismissals, Subsection (ii)(a) of that provision states:

Dismissal may be imposed where it is determined that a staff member has engaged in misconduct or, for serious unsatisfactory conduct, if previous warnings and/or disciplinary measures have failed to adequately improve the conduct of the staff member.

85. In turn, Subsection (ii)(b) provides:

Summary dismissal may be imposed for serious misconduct when the misconduct in question is blatant and the interests of the Fund require the immediate termination of the staff member's appointment. This involves a staff member's immediate expulsion from the workplace with no payment for the normal period of notice, no termination indemnity and other benefits. Salary, allowances and benefits will be paid up to the date of such dismissal ...

86. Having examined all the circumstances of the case, the Appeals Tribunal is not persuaded by the arguments on appeal. Nor has it detected any error in the JAB ruling on the proportionality of the sanction to the misconduct. Indeed, the JAB found that the facts on which the sanction

was based have been established by clear and convincing evidence, that they qualify as misconduct under the applicable law, that Mr. Nsabimana's due process rights were respected, and that the disciplinary measure of summary dismissal was fair, reasonable and proportionate to the circumstances of the case. The Appeals Tribunal hence finds that, although it does not always agree with the language used by the JAB in its decision, there is no error in the JAB conclusion which affirmed the contested disciplinary measure of summary dismissal imposed on Mr. Nsabimana.

87. Therefore, the appeal must fail.

Judgment

88. The appeal is dismissed, and the JAB Decision of Case No. 3/2020 is affirmed.

Original and Authoritative Version: English

Decision dated this 1st day of July 2022.

(Signed)

Judge Halfeld, Presiding
New York, USA

(Signed)

Judge Raikos
New York, USA

(Signed)

Judge Knierim
Hamburg, Germany

Judgment published and entered into the Registry on this 12th day of August 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar