UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1260

Yatte Jules Beda

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge John Raymond Murphy Judge Dimitrios Raikos
Case No.:	2021-1583
Date of Decision:	1 July 2022
Date of Publication:	16 August 2022
Registrar:	Weicheng Lin

Counsel for Appellant:	Sètondji Roland Adjovi
Counsel for Respondent:	Amanda Stoltz

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. Mr. Yatte Jules Beda, the Appellant and a former staff member of the Office of the United Nations High Commissioner for Refugees (UNHCR) challenges the decision to dismiss him from service following a disciplinary proceeding in which he was accused of corruption. The Appellant does not contest having received monies from a UNHCR project but says the monies were a performance guarantee to ensure the project would be completed.

2. In Judgment No. UNDT/2021/057 (Judgment), the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) disagreed and dismissed his application in its entirety. He now appeals to the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) and requests the Judgment be vacated and his challenge allowed.

3. For the reasons set out below, we dismiss the appeal.

Facts and Procedure

4. Mr. Beda joined UNHCR in July 1990 as a Secretary (G-4) in Côte D'Ivoire. In February 1991, he was granted a fixed-term appointment at the G-5 level. On 1 January 2000, he was promoted to G-6 and granted an indefinite appointment. One year later, he was promoted to G-7. In April 2002, Mr. Beda was converted into the professional category as Associate Field Officer (P-2). After that, he served in programme, finance and administrative functions in many duty stations including in Cameroon, Senegal, Rwanda, Chad, Sudan, Liberia, Lebanon, and Burundi. In June 2007, he was promoted to P-3.

5. On 6 June 2014, Mr. Beda was assigned to Bangui, Central African Republic (CAR) as Senior Programme Officer. His personal grade was P-3 but he was serving in a position at the P-4 level. On 1 January 2015, he was promoted to P-4 and on 1 July 2017 he was appointed as Operations Coordinator in Peshawar, Pakistan. The facts that led to the contested decision occurred while Mr. Beda served in Bangui where he was the second reporting officer of a Senior Programme Assistant serving at the G-5 level.

6. In March 2017, UNHCR entrusted a local Non-Governmental Organization (NGO) with the renovation of shelters for refugees in the Yaloke district, approximately 220 kms away from Bangui. The NGO was tasked to build roofs for 26 houses and, where necessary, repair the walls of those 26 houses. The total value of the project was XAF8,139,300 (approximately

USD14,386). The project was executed under the modality of direct implementation based on a field operational advance. This entails that a UNHCR staff member is personally responsible for the funds used in the project. The Senior Reintegration Officer (SRO) (P-4), was the staff member responsible for the field operational advance. He made the request for the advance on 20 March 2017 and received a UNHCR cheque for the total project value on 21 March 2017. Later that day, the SRO gave the NGO Coordinator a first instalment of XAF5,500,000 (approximately USD 9,722) in cash, which was deemed sufficient to cover material and transportation costs. A receipt was issued to document this advance payment.

7. Later that day, the Senior Programme Assistant called the NGO Coordinator to request him to provide XAF2,000,000 of the money he had received for the project. They met about two kilometres away from the UNHCR premises and the NGO Coordinator handed the requested amount in an envelope. The Senior Programme Assistant took the money without providing a receipt to the NGO Coordinator. The Senior Programme Assistant then brought the envelope to Mr. Beda who, without counting the money kept it in a drawer in his office.

8. In late March 2017, the NGO Coordinator requested additional funds. In support of his request, he submitted a report on the progress of the construction site indicating that he had renovated 20 houses. On 28 March 2017, the SRO disbursed another XAF1,000,000 to the NGO.

9. On 25 April 2017, the Senior Programme Assistant and a Field Associate (Shelter Cluster), UNHCR, visited the project site and discovered that contrary to the NGO's report, only 10 houses had been renovated. On that same day, the NGO Coordinator sent an e-mail to the Senior Programme Assistant informing him that UNCHR had visited the project and noted that without the money that the Senior Programme Assistant requested to be returned, the works were not going well. The NGO Coordinator requested the Senior Programme Assistant to tell his "boss" to return him the money unconditionally, otherwise he would denounce the matter as he could no longer keep the secret. The NGO Coordinator forwarded this e-mail to the Field Associate (Shelter Cluster).

10. On 26 April 2017, the Senior Programme Assistant forwarded the NGO Coordinator's e-mail to Mr. Beda who then instructed the Senior Programme Assistant to return the money to the NGO Coordinator. On that same day, the NGO Coordinator received XAF2,000,000

from the Senior Programme Assistant on UNHCR premises and issued a receipt to document the payment.

11. On 19 May 2017, the Inspector General's Office (IGO), UNHCR received an allegation that the Senior Programme Assistant who worked in the UNHCR Office in Bangui had obtained a bribe from the NGO Coordinator. Concretely, it was alleged that around 23 March 2017, the Senior Programme Assistant had requested and received a bribe of XAF2,000,000 (around USD3,400) from the NGO Coordinator (the monies). It was further alleged that Mr. Beda, who was the Senior Programme Assistant's supervisor at the time of the alleged facts, might also be involved in the fraud scheme.

12. The IGO opened an investigation and interviewed five witnesses, including Mr. Beda who was interviewed on 14 July 2017. On 19 July 2017, the IGO shared the interview transcript with Mr. Beda and gave him the opportunity to review it. Mr. Beda sent his comments and additional information on 25 July 2017. On 28 August 2017, the IGO shared the draft investigation findings with Mr. Beda and invited him to comment, which he did on 5 September 2017. Mr. Beda asserted that the amount taken from the NGO Coordinator was a performance guarantee retained in case he did not fulfil his contractual obligations.

13. On 5 September 2017, the IGO sent the final version of the investigation report to the Division of Human Resources and Management (DHRM), UNHCR.

14. By letter dated 14 November 2017, the Director, DHRM, UNHCR, transmitted the final version of the investigation report to Mr. Beda and informed him of the decision to initiate a disciplinary process against him. Mr. Beda was invited to provide his comments on the allegations of misconduct within two weeks.

15. On 22 January 2018, Mr. Beda provided his comments on the allegations of misconduct against him. He asserted that he had retained the amount of XAF2,000,000 from the NGO Coordinator as a performance guarantee. In support of his contention, he submitted a copy of the operational advance form including a handwritten note addressed to the Senior Programme Assistant suggesting payment of XAF6,000,000 to the NGO, the rest to be paid following a report by the colleagues in the Shelter Cluster (handwritten note).

16. By letter dated 2 May 2018, the Director, DHRM, UNHCR, informed Mr. Beda of the High Commissioner's decision to dismiss him from service on the basis of clear and convincing evidence that he had instructed the Senior Programme Assistant to request a bribe of XAF2,000,000 from the NGO Coordinator, that the Senior Programme Assistant had received the money from the NGO Coordinator in a sealed envelope, and that the Senior Programme Assistant had handed the money to him.

The Dispute Tribunal Judgment

17. In the Judgment, the Dispute Tribunal held that the facts on which the disciplinary measure was based had been established through clear and convincing evidence. The UNDT found the testimonies of the SRO and the IGO Investigator were "very clear, consistent and reliable",[1] while the Appellant's and Senior Programme Assistant's versions of events were "unreliable, implausible and inconsistent".[2] The Dispute Tribunal confirmed that the Appellant did not contest having received the amount of XAF2,000,000 from the NGO Coordinator through the Senior Programme Assistant but argued he had the authority to request a performance guarantee for the project to ensure the Yaloke project would be completed. The UNDT held that the Appellant had no authority to demand a performance guarantee from the NGO Coordinator and that, based on the testimony of the NGO Coordinator, the monies were intended by the Appellant to be a bribe. The UNDT was not convinced of the probative value of the handwritten note as it was not logical to have the note as neither the Appellant nor the Senior Programme Assistant were involved in the implementation of the project and the note was not referred to during the investigation. As for the eventual return of the monies, the tribunal found it was done to avoid the NGO Coordinator from "denounc[ing]" the matter to the Administration.

18. The Dispute Tribunal "noted" that the NGO Coordinator wrote a letter dated 20 August 2018 to the UNHCR Representative in Bangui "in which he appears to depart from his initial testimony"[3] in the investigation (NGO letter). However, the NGO Coordinator did not testify before the Dispute Tribunal as he was under medical treatment in a hospital in Bangui, and the Dispute Tribunal decided, by Order No. 6 (GVA/2021), that his testimony was no longer required as the case record already contained relevant evidence in relation to the

[1] Impugned Judgment, para. 37.
[2] *Ibid.*
[3] *Ibid.*, para. 71.

facts in which he had been involved. In the Judgment, the Dispute Tribunal held this letter was not reliable as it was "unclear", contradicted other evidence on the record, and appeared to be "driven by ulterior motives".[4]

19. Consequently, the Dispute Tribunal found that the established facts amounted to misconduct, that the disciplinary measure applied was proportionate to the conduct, and that Mr. Beda's due process rights had been respected during the investigation and the disciplinary process. Accordingly, the Dispute Tribunal dismissed the application in its entirety.

Submissions

Mr. Beda's Appeal

20. Mr. Beda says that the Dispute Tribunal erred in fact in failing to properly assess the evidence of the witnesses, particularly the evidence of the NGO Coordinator, the investigator, and the SRO/UNHCR.

21. Mr. Beda submits the Dispute Tribunal erred in law by failing to follow the standard set by the Appeals Tribunal which requires misconduct to be established by clear and convincing evidence.

22. Further, Mr. Beda argues that the Dispute Tribunal failed to provide a "motivation" for evidence in numerous instances, the most critical concerning the documentary evidence. Mr. Beda produced a contemporaneous document to support the instruction that he gave to the Senior Programme Assistant i.e. the handwritten note. The Secretary-General challenged the authenticity of the document, and the Dispute Tribunal sustained such a challenge. However, the document was not in his custody, and he had no way to access the document in the financial archives. The Dispute Tribunal denied the testimony of the staff member custodian of the document and speculated with the Secretary-General on the authenticity. Furthermore, the investigator displayed bias which the Dispute Tribunal failed to see and sanction. As a result, the UNDT Judge became biased against Mr. Beda, violating his right to a fair trial right.

23. The Appellant also argues that the Dispute Tribunal and investigator committed procedural errors.

[4] *Ibid*., para. 75.

24. He says the Dispute Tribunal wrongfully failed to hear the Appellant's witnesses although he duly provided a reason for each witness he proposed to call. Also, during the UNDT hearing on 19 January 2021, counsel for the Secretary-General asked the SRO two questions to which objections were raised by counsel for Mr. Beda on grounds that speculation by any witness should not have been solicited nor admitted into the proceedings as confirmed by the Judge upon multiple objections by counsel for Mr. Beda.

25. Then during the testimony of the investigator at the hearing on 20 January 2021, Mr. Beda submits that the Judge made comments which showed her familiarity with the witness. In addition, she outlined the questioning procedure to be followed for the investigator to be directly examined first by counsel for the Secretary-General (as he was the Secretary-General's witness) and then to be cross-examined by counsel for Mr. Beda. However, following the direct examination where counsel for the Secretary-General continually asked leading and speculative questions, instead of passing the witness to Mr. Beda's counsel for cross-examination as stipulated during the swearing in of the witness, the Judge instead started praising the witness for his reports and testimonies in previous cases, and then asked the witness leading and speculative questions, which the Judge herself had ruled out of order just the day before.

26. Notwithstanding the inappropriate line of questioning by the Judge, Mr. Beda contends the response by the investigator effectively accused Mr. Beda of bribing the NGO coordinator to get him to recant his previous testimony. His statements clearly displayed that he had a predisposed outcome to his investigation that Mr. Beda was guilty, and also displayed "racist attitudes that all people in Africa are corrupt" and are able to be bribed by the Organization's staff who get paid "a ridiculous amount of money" that enables them "to get whatever they want". He also stated that he did not travel to Bangui because "it was a straightforward case", he did not interview witnesses identified by Mr. Beda because he "did not contest the facts" and that because it involved a limited number of people, it could be done remotely. He also did not get the original documentation and stated that he considered a critical annotated document that came to his attention more than two months after the investigation report had been completed was dubious, had no credibility and was fabricated without any evidence of this. This violated his responsibility as an investigator to establish facts and was in violation of Staff Regulation 1.2 (b).

27. He argues that the unfounded statements by the witness were exacerbated by the bias of the Judge in refusing the line of questioning by counsel for Mr. Beda when seeking to impugn the previous statements by the investigator and to establish his bias against Mr. Beda. The conduct of the judge continually addressing counsel for the Secretary-General by her first name, her level of familiarity "fawning" over the witness based on previous experiences and the refusal to allow counsel for Mr. Beda to impugn the witness statements made during direct examination was unacceptable bias in favour of the Secretary-General. Moreover, the statement by the Judge about the investigator was not even accurate. In the *Negussie* case, the Tribunals criticized the investigation, and the investigator did sign the highly criticized investigation report in that case.

28. Finally, the Appellant submits that a conflict of interest arose from the fact that the counsel for the Secretary-General was also the legal adviser in the disciplinary proceedings. For instance, the investigator mentioned he thought of reopening the investigations after the recantation letter, but the legal adviser who is also the counsel for the Secretary-General advised against. It is not fair to the staff member that the legal representative of the Administration before the Tribunal is the legal adviser in the disciplinary proceedings.

The Secretary-General's Answer

29. The Secretary-General, or Respondent, submits that the Dispute Tribunal did not err and requests the appeal be dismissed.

30. The Secretary-General contends that the Appellant has failed to establish that the UNDT erred in fact in its assessment of the evidence and witnesses before it. It is settled case law that an appellant must identify the alleged defects in the judgment and state the grounds relied upon in asserting that the judgment is defective. In the present case, the Appellant has not substantiated his allegations or shown how they are relevant to the UNDT's disposition of the case, let alone how they might make the UNDT's Judgment a manifestly unreasonable one, thus bringing the issue within the remit of the UNAT. In addition, Mr. Beda is simply repeating on appeal arguments already presented before, and considered by, the UNDT.

31. Based on the evidence and testimony before it, the UNDT correctly concluded that the project was carried out under the modality of direct implementation on the basis of a field operational advance and that the NGO Coordinator was not an "implementing partner". The

UNDT, therefore, concluded that Mr. Beda was not involved in the implementation of the project, and he had no authority to demand a performance guarantee from the NGO Coordinator.

32. The Secretary-General says that the UNDT had an appreciation of all the issues for determination and the evidence before it and did not err in its factual findings. The Judgment shows that the UNDT followed the standard set by the UNAT in *Negussie*. The UNDT analyzed each individual piece of disputed evidence and the totality of the evidence in support of the allegations of misconduct and concluded that the allegations had been established by clear and convincing evidence. It considered the credibility and reliability of the relevant evidence and testimonies presented before it.

33. The Secretary-General argues that the UNDT applied the correct legal test when reviewing the facts on which the contested decision was based. Specifically, the UNDT, in considering whether the facts on which the disciplinary measure was based had been established, concluded that the facts had been established through "clear and convincing evidence" in accordance with the threshold established by the jurisprudence of the UNAT.

34. As to Mr. Beda's contention that the UNDT erred in law in failing to follow the standard set by the UNAT regarding a determination of corruption, Mr. Beda cites the UNAT Judgment in *Asghar* as authority that "probability or mere preponderance should not suffice for a determination of corruption". Neither the Administration nor the UNDT reached their decision based on "probability" or "mere preponderance" of evidence. The threshold as identified by the UNDT and against which the facts were assessed was that of "clear and convincing evidence," in accordance with the precedent established by the UNAT.

35. Mr. Beda's allegation that the UNDT erred in law in failing to provide "a motivation" regarding its findings concerning the authenticity of a document produced by Mr. Beda is misplaced. The UNDT addressed in detail the credibility of the document before concluding that it was not convinced of the probative value of the alleged handwritten note. In so doing, the UNDT correctly exercised its discretion to assess the evidence before it and to determine both its admissibility and its weight and provided its reasons for doing so. Mr. Beda also refers to the UNDT's decision to deny the testimony of the "staff member custodian of the document" as an error in the reasoning of the UNDT although he failed to specify further how either of these decisions constitute an error of law.

36. The Appeals Tribunal has consistently held that the UNDT has broad discretion to determine the admissibility of any evidence under Article 18(1) of the UNDT Rules of Procedure (UNDT Rules) as well as the weight to be attached to such evidence.

37. The Secretary-General says that the Appellant has failed to establish that the UNDT committed an error of procedure in failing to hear all "relevant" witnesses "without ground". The burden of satisfying the UNAT that the Judgment of the UNDT is defective rests with the Appellant. The Appellant however failed to even specify which witnesses he considered were relevant and that the UNDT failed to hear, how the UNDT's decision not to hear testimony from these unidentified "relevant" witnesses impeded the UNDT's assessment of the facts, and how the testimony, if heard, would have changed the outcome of the case. Moreover, Mr. Beda's allegation that the UNDT denied his request "without ground" is incorrect. The UNDT provided reasons for not hearing all the witnesses proposed by the parties.

38. The UNDT correctly exercised its discretion to hear witnesses during the hearing and, in its Order No. 3 (GVA/2021), provided reasons for not hearing all witnesses proposed by the parties. While Article 17(1) of the UNDT Rules permits parties to call witnesses and experts to testify, Article 17(6) gives the Judge the discretion to decide whether the presence of witnesses is required. Under Article 18(5) of the UNDT Rules, the Judge may limit oral evidence as he or she deems fit. The UNAT has consistently held that case management issues, including the question of whether to call a certain person to testify or to order the production of documents, remain within the discretion of the UNDT and do not merit a reversal except in clear cases of denial of due process of law affecting the right to produce evidence by a party.

39. There is no merit in Mr. Beda's contention that the UNDT Judge was biased against him, violating therefore his right to a fair trial. A party who claims ulterior motive must be able to substantiate their claim to be successful, and the test for determining whether a judge is biased is whether a fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that the judge is biased. The fact that the Judge addressed counsel for the Respondent by the first name and indicated familiarity with the investigator's previous work does not establish evidence of a relationship giving rise to bias or a conflict of interest. Nor does the Judge's conduct during the questioning and cross-examination of the investigator constitute bias. Moreover, Mr. Beda made no application for recusal of the Judge assigned to the case in accordance with the provisions of the UNDT Statute or Rules. Mr. Beda does not identify any findings in the Judgment that indicate or

result from this alleged bias, and the issue of the Judge's conduct during the hearing should not be permitted to be raised for the first time on appeal.

Considerations

Preliminary issue: Rejoinder

40. On 8 June 2022, Mr. Beda filed a motion seeking leave to file a rejoinder pursuant to Article 31 of the Appeals Tribunal Rules of Procedure (Rules). There is no provision for a rejoinder in the Rules, but Article 31 provides that all matters not "expressly provided for" shall be dealt with by the decision of the Appeals Tribunal in the particular case.

41. In the application, the Appellant largely reiterates his arguments made in his appeal submission. He argues that the NGO Coordinator made several contradictory statements and the Dispute Tribunal erred in not allowing the Appellant's witnesses to testify, failed to see contradictions in the evidence, erred in not relying on the NGO Coordinator's retraction letter, erred in relying on the investigator not travelling to Bangui, and in failing to address the conflict of interest in the investigation with the counsel for the Respondent.

42. There is nothing new in the Secretary-General's submissions that requires the Appellant to have an opportunity to provide a rebuttal or rejoinder. Further, the Appellant seeks to repeat arguments and submissions made in his appeal submission. There is no probative value to the rejoinder the Appellant seeks to file. Therefore, the Appellant's motion is denied.

Merits

43. In disciplinary cases, the Dispute Tribunal must establish: i) whether the facts on which the sanction is based have been established, ii) whether the established facts qualify as misconduct under the Staff Regulations and Rules, and iii) whether the sanction is proportionate to the offence.[5]

[5] *Samandarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-859, para. 21.

44. In the present case, we find the Appellant merely repeats arguments raised before the Dispute Tribunal regarding the evidence. The appeals procedure is not an opportunity for a party to reargue their case,[6] which is essentially what the Appellant has done. Nevertheless, we find the Dispute Tribunal did not err in fact or in law in the Judgment.

Whether there is clear and convincing evidence to establish the facts in the allegations

45. The "Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred".[7] "[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence", which "means that the truth of the facts asserted is highly probable".[8] Clear and convincing evidence of misconduct, including serious misconduct, imports two high evidential standards: clear requires that the evidence of misconduct must be unequivocal and manifest and convincing requires that this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance.[9]

46. Despite the Appellant's argument, the Dispute Tribunal applied this standard in its Judgment.[10] The Appellant says the Dispute Tribunal erred in law using the probability or mere preponderance for a determination of corruption and the Dispute Tribunal failed to establish "any positive corrupted practice" and concluded "by deduction and by default". There is no basis for the Appellant's argument. The Dispute Tribunal clearly applied the appropriate legal standard of proof in its Judgment and properly assessed the evidence and credibility of witness testimony, making the required findings of fact to support the allegations of misconduct.

47. The Appeals Tribunal has consistently held that the Dispute Tribunal "ordinarily should hear the evidence of the complainant and the other material witnesses, assess the credibility and reliability of the testimony under oath before it, determine the probable facts and then render a decision as to whether the onus to establish the misconduct by clear and

[6] *Crichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035, para. 30.
[7] *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para. 15, quoting *inter alia Mizyed v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-550, para. 18.
[8] *Ibid.*
[9] *Sisay Negussie v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1033, para. 45.
[10] See impugned Judgment, paras. 34 and 76.

convincing evidence has been discharged on the evidence adduced."[11] That is what the Dispute Tribunal did in the present case.

48. The Dispute Tribunal relied on relevant facts that were largely undisputed. It then reviewed the Appellant's evidence and arguments regarding his involvement in the project, the alleged performance guarantee, and the retraction of the NGO Coordinator's initial testimony. The UNDT methodically assessed the evidence for each of these subjects in light of the Appellant's arguments, making appropriate findings on the reliability and weight of contradictory evidence, and providing reasons for its findings.

49. Regarding the evidence of the NGO Coordinator, the Appellant argues that no reasonable person could have found him reliable bearing in mind he cannot be trusted based on the totality of the evidence from him. The NGO Coordinator was not able to attend the hearing. However, the Dispute Tribunal found that the NGO Coordinator maintained the same version of events on at least three different occasions: in his statement before the Field Associate (Shelter Custer) following the UNHCR inspection visit to the project, in his e-mail to the Senior Programme Assistant asking him to tell his "boss" to return the money, and in his letter to the SRO officially informing him that he had been a victim of fraud since he was requested to pay XAF2,000,000 for the "big boss". The Dispute Tribunal noted the NGO Coordinator's version of events was consistent and that there was no reason for the NGO Coordinator to fabricate the facts to incriminate himself in a fraud or bribery scheme. The UNDT found the Appellant had not provided any evidence to justify any allegation of improper motive on the part of the NGO Coordinator. In addition, the NGO Coordinator's testimony during the investigation was consistent with that of the Field Associate (Shelter Cluster). The Dispute Tribunal found the NGO Coordinator's evidence credible because it was consistent with his other statements and with other evidence, and there was a lack of any evidence of improper motive to fabricate testimony. The trial judge is best placed to assess the nature and probative value of the evidence placed before them by the parties to justify their factual findings.[12]

[11] *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-819, para. 29.
[12] *George M'mbetsa Nyawa v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1024, para. 63; *Ladu*, *op cit*., para. 26; *Goodwin v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-467, para. 36, citing *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.

50. The UNDT also assessed the NGO Coordinator's letter dated 20 August 2018 to the UNHCR Representative in Bangui in which he "appear(ed) to depart from his initial testimony".[13] The Dispute Tribunal found it "dubious"[14] that it was produced after the NGO Coordinator's interview and after the filing of the Respondent's reply to the UNDT dated 10 August 2018. In addition, the Dispute Tribunal questioned why this letter was written and found the context in which it was produced "obscure".[15] Given the NGO Coordinator could not have been questioned over the content of the letter, the Dispute Tribunal found it could not give it much weight as well as being unreliable.

51. In our view, the NGO Coordinator's letter cannot be considered as a retraction of his testimony. The letter states that he wished to "clarify" his statements. He indicated that he was "under the impression that by sharing the blame with the staff of the Programme Section, [he] would be able to continue with the project." He was "astonished" that he was asked to submit invoices "without explanation" and he was "surprised" he was not given the agreed funds and the project was handed over to another NGO. He then "conveyed" his "regrets" to the Programme Section and the Appellant. This cannot be interpreted as a retraction of his evidence or testimony. In stating that he shared the "blame" with the Programme Section so he could continue with the project, he does not absolve the Programme Section or the Appellant from "blame" nor does he retract the relevant evidence that he provided the monies to the Appellant on his request.

52. As for the investigation, the Appellant argues the investigator's evidence is not reliable because he contradicted himself when there was a typographical error in his investigation report. For instance, the investigator wrote an amount in his report that was not accurate, and he failed to provide any explanation for such a "serious" mistake. Also, the Appellant says the SRO/UNHCR lied about the NGO when he stated that it ran other projects after its failure to deliver in 2017 when there was no evidence of any such project. It was for the Administration to prove the statement by its witness failing which the Dispute Tribunal should have drawn a negative inference and concluded that the witness could not be trusted. Finally, the Appellant says the Dispute Tribunal misconstrued the role of the Appellant in the implementation of the projects.

[13] Impugned Judgment, para. 71.
[14] *Ibid.*, para. 72.
[15] *Ibid.*, para. 73.

53. These submissions are unfounded and inaccurate. The Dispute Tribunal found the testimonies of the investigator and the SRO/UNHCR to be "very clear, consistent and reliable".[16] In contrast, it found the version of the facts presented by Mr. Beda and the Senior Programme Assistant/UNHCR to be "unreliable, implausible, and inconsistent".[17] In providing reasons for this finding, the UNDT relied on the failure of the Appellant to provide a plausible explanation for ignoring standard procedure in the UNHCR Financial Management Manual in accepting and retaining the monies, and the failure of the Appellant and the Senior Programme Assistant to inform the SRO nor anyone else about the alleged performance guarantee. The UNDT held this was unreasonable. As for the handwritten note the Appellant adduced to support his submission that the intent of the monies was as a performance guarantee, the Dispute Tribunal was not convinced as neither the Appellant nor the Senior Programme Assistant referred to it during the investigation. The Dispute Tribunal, as the trier of fact, properly considered and assessed the credibility and reliability of all the evidence and made appropriate findings providing reasons for those findings.

54. We find the Dispute Tribunal did not err in finding that the facts on which the disciplinary measure was based had been established by "clear and convincing evidence". In order to be "clear", the evidence of misconduct must be unequivocal and manifest.[18] In the present case, the evidence is clear that that the Appellant and the Senior Programme Assistance colluded to solicit and obtain monies from the NGO Coordinator in relation to the Yaloke project to which they were not entitled. The evidence is clear that the monies the Appellant received were not a performance guarantee as he and the Senior Programme Assistant were not involved in the implementation of the project and the SRO was personally responsible for the funds, not the Appellant. The Appellant had no authority to demand a performance guarantee from the NGO Coordinator. The evidence is also "convincing" namely that this evidence is persuasive to a high standard appropriate to the gravity of the allegation of corruption against the Appellant and in light of the severity of the consequence of its acceptance.

[16] *Ibid*., para. 37.
[17] *Ibid*.
[18] *Sisay Negussie v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1033, para. 45.

Whether these facts amount to misconduct under the Staff Regulations and Rules

55. The acceptance of the unlawful monies constitutes misconduct pursuant to the Staff Regulations and Rules. The monies were not a performance guarantee and therefore, the transaction was unwarranted and unlawful. As a result, the Appellant breached and violated his obligations as a staff member as set out in Staff Regulation 1.2 and Staff Rule 1.2 to:

a. uphold the highest standards of integrity (Staff Regulation 1.2(b));

b. discharge his functions and regulate his conduct with the interests of the Organization only in view (Staff Regulation 1.2(e));

c. conduct himself at all times in a manner befitting his status as an international civil servant and not to engage in any activity incompatible with the proper discharge of his duties with the United Nations (Staff Regulation 1.2(f));

d. Not use his office or knowledge gained from his official functions for private gain (Staff Regulation 1.2(g));

e. Not seek nor accept any favour, gift, remuneration or any other personal benefit from a third party in exchange for performing, failing to perform, or delaying the performance of any official act (Staff Rule 1.2(k)); and,

f. Not accept any gift, remuneration or favour from any source having or seeking to have any type of contractual relationship with the Organization (Staff Rule 1.2(p)).

56. In addition, the Appellant's acceptance of the monies amounts to corruption pursuant to sec. 3.8 of IOM No. 44/2013-FOM 044/2013 "Strategic Framework for the Prevention of Fraud and Corruption" as an "offering, giving, receiving or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party. Corruption may take the form of an undisclosed conflict of interest, unauthorized acceptance of honours, gifts or remuneration, bribery (including kickbacks), illegal gratuities or economic extortion." The Appellant requested and received the monies unlawfully and without disclosing the transaction to the appropriate personnel.

Whether the disciplinary sanction of dismissal was disproportionate

57. It is well established that the Secretary-General has wide discretion in applying disciplinary sanctions for misconduct, but the disciplinary measure must be proportionate to the misconduct as proven by appropriate evidentiary methods. "However, due deference must be shown to the Secretary-General's decision on sanction because Article 101(3) of the United Nations Charter requires the Secretary-General to hold staff members to the highest standards of integrity and he is accountable to the Member States of the United Nations in this regard."[19]

58. Therefore, "(t)he ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline."[20]

59. In *Rajan*, the Appeals Tribunal held that "(t)he most important factors to be taken into account in assessing the proportionality of a sanction include the seriousness of the office, the length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency".[21]

60. In the Judgment, the Dispute Tribunal appropriately assessed the proportionality of the disciplinary sanction of dismissal, in particular, the factors the High Commissioner considered in imposing the sanction. The mitigating factor was the Appellant's long service with UNHCR working in hardship duty stations, but also aggravating factors such as his prior record of misconduct and the detrimental effect on an important project in the CAR. The Dispute Tribunal considered but rejected the Appellant's argument that his prior record of misconduct was not relevant and also considered the gravity of corruption in the Organization which cannot be tolerated. The UNDT did not err in deciding the High Commissioner's exercise of discretion in imposing the sanction was reasonable and judicious.

[19] *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-890, para. 16.
[20] *Samandarov*, *op. cit.*, para. 25.
[21] *Rajan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-781, para. 48.

61. As stated by established jurisprudence, the Administration has a broad discretion in disciplinary matters which will not be lightly interfered with on judicial review so long as the discretion is exercised lawfully and judiciously.[22] It is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it or to substitute its own decision for that of the Administration.[23]

Whether due process was respected during the disciplinary proceedings

62. In reviewing due process in disciplinary proceedings, the Appeals Tribunal has consistently held that only substantial procedural irregularities can render a disciplinary sanction unlawful.[24]

63. The Appellant submits that both the investigator and Dispute Tribunal Judge were biased and violated his due process rights and that the Dispute Tribunal procedurally erred by refusing to hear all "relevant" witnesses "without ground".

64. There is no evidence to support these allegations.

64. It is well established that the Dispute Tribunal has a "broad discretion to determine the admissibility of any evidence under Article 18(1) of the UNDT Rules and the weight to be attached to such evidence. This Tribunal is also mindful that the Judge hearing the case has an appreciation of all of the issues for determination and the evidence before the UNDT."[25]

65. Article 17(6) of the UNDT Rules provides that the "Tribunal shall decide whether the personal appearance of a witness or expert is required at oral proceedings and determine the appropriate means for satisfying the requirement for personal appearance".

66. Therefore, the Dispute Tribunal has discretion in the admission of evidence, the assessment of that evidence, and the attachment of weight to admitted evidence. The Appellant has failed to convince us of any error in the procedure adopted with respect to this exercise of the Dispute Tribunal's discretion.

[22] *Ladu, op.cit.*, para. 40.
[23] *Sanwidi v. Secretary-General of the United Nations,* Judgment No. 2010-UNAT-084, para. 40.
[24] *Thiombiano v. Secretary-General of the United Nations,* Judgment No. 2020-UNAT-978, para. 34.
[25] *Messinger v. Secretary-General of the United Nations*, Judgment No.

67. The Dispute Tribunal considered the Appellant's request to hear other witnesses to testify about the poor quality of the NGO Coordinator's work in a previous project and his limited capacity to complete the present project correctly. The UNDT correctly considered this evidence irrelevant to the present case and provided reasons why. This was a judicious exercise of the UNDT's discretion.

68. As for the bias allegations, there is no evidence that the investigator was "biased" or had an improper motive. The onus to show improper motive is on the party asserting it, which the Appellant has not discharged.[26] The facts that the investigator did not travel to Bangui, did not interview the Appellant's witnesses on the NGO Coordinator's quality of work, interviewed the NGO Coordinator for 30 minutes, and did not have him sign the transcript of the interview are not evidence of bias or improper motive. The Dispute Tribunal correctly reviewed these allegations and held they were unsupportable and provided reasons for its findings. There is no indication that it erred in this analysis. The Dispute Tribunal addressed the Appellant's arguments regarding the fairness of the investigation. On appeal, the Appellant repeats arguments already considered by the Dispute Tribunal and fails to show how the Dispute Tribunal erred in its analysis.

69. As for the allegation of bias against the Dispute Tribunal Judge, the Appellant has again failed to discharge the onus of proving the objective test of bias, namely that a reasonable person, fully informed of all relevant circumstances, would apprehend that there was conscious or unconscious bias on the part of the judge because of which the judge could not decide the case fairly.

70. The Appellant references the judge "fawning over" the investigator, addressing counsel for the Respondent by first name, pursuing an "inappropriate" line of questioning, and not allowing counsel for the Appellant to impugn the investigator's statement during examination.

71. It is preferable for any judge or decision maker not to address parties or counsel by their first names, particularly informally addressing only one party or counsel. It is also preferable for the judge or decision maker not to make personal comments to a witness (here, the investigator) about the quality of their work presently or previously. However, these circumstances of themselves do not indicate that the Dispute Tribunal Judge was biased or that there was a reasonable apprehension of bias. We find the line of questioning and the

[26] *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, para. 38.

sustained objections were reasonable and relevant to the inquiry in the application. A reasonable and fully informed person would not consider this alone to be evidence of bias or a reasonable apprehension of bias such that they could not consider the matter fairly. The Judge was detailed in reviewing the evidence, both by witnesses and documentary, and provided her findings with an analysis and rationale. The findings of the Judge are supportable and not based on conscious or unconscious bias on her part.

72. Further, if the Appellant is raising bias on the part of the Judge, the Appellant should have made an application for recusal in accordance with the UNDT Statute and Rules, not after the Judgment was issued and for the first time, on appeal. He did not do so.

73. In conclusion, we find that the Dispute Tribunal did not err in its Judgment which is affirmed.

Judgment

74. The appeal is dismissed.

Original and Authoritative Version: English

Decision dated this 1st day of July 2022 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Sandhu, Presiding	Judge Murphy	Judge Raikos

Judgment published and entered into the Register on this 16th day of August 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar