



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

BEDA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Sètondji Roland Adjovi

Counsel for Respondent:

Marisa Maclennan, UNHCR

Francisco Navarro, UNHCR

Introduction

1. By application filed on 10 July 2018, the Applicant, a former staff member of the Office of the United Nations High Commissioner for Refugees (“UNHCR”) contests the decision to dismiss him from service following a disciplinary proceeding in which he was accused of corruption.
2. The Respondent filed his reply on 10 August 2018 and the Applicant filed a rejoinder to the reply on 25 November 2020.
3. A case management discussion (“CMD”) took place also on 25 November 2020. A hearing on the merits took place from 18 to 20 January 2021.
4. The parties filed their respective closing submission on 3 February 2021.
5. By Order No. 60 (GVA/2021) dated 1 March 2021, the Tribunal informed the parties that the Tribunal will issue its judgment in English and a French translation of it will be made available to the parties at a later stage. The parties were also informed that the time limit for appeal will start to run from the issuance of the English version of the judgment.

Facts

6. The Applicant 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, the Applicant 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.

7. On 6 June 2014, the Applicant 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.

8. The facts that led to the contested decision occurred while the Applicant served in Bangui where he was the second reporting officer of a Senior Programme Assistant serving at the G-5 level.

9. 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. Said NGO had 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).

10. The project was executed under the modality of direct implementation on the basis of a field operational advance. This entails that a UNHCR staff member is personally responsible for the funds used in the project.

11. The Senior Reintegration Officer (P-4), UNHCR, 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.

12. On that date, the Senior Reintegration Officer 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.

13. Later that day, the Senior Programme Assistant referred to in para. 8 above called the NGO Coordinator to request him to return XAF2,00,000 of the money he had received for the project. They met about two kilometres away from 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.

14. The Senior Programme Assistant then brought the envelope to the Applicant who, without counting the money kept it in a drawer in his office.

15. 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 Senior Reintegration Officer disbursed another XAF1,000,000 to the NGO.

16. On 25 April 2017, the Senior Reintegration Officer 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.

17. On that same day, the NGO Coordinator sent an email to the Senior Programme Assistant informing him that UNCHR had visited the project and noting 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 email to the Field Associate (Shelter Cluster).

18. On 26 April 2017, the Senior Programme Assistant forwarded the NGO Coordinator's email to the Applicant 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.

19. 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. It was further alleged that the Applicant, who was the Senior Programme Assistant's supervisor at the time of the alleged facts, might also be involved in the fraud scheme.

20. The IGO opened an investigation and interviewed five witnesses, including the Applicant who was interviewed on 14 July 2017.

21. On 19 July 2017, the IGO shared the interview transcript with the Applicant and gave him the opportunity to review it. The Applicant sent his comments and additional information on 25 July 2017.

22. On 28 August 2017, the IGO shared the draft investigation findings with the Applicant and invited him to comment, which he did on 5 September 2017. The Applicant asserted that the amount taken from the NGO Coordinator was a performance guarantee retained in case he did not fulfil his contractual obligations.

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

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

25. On 22 January 2018, the Applicant 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. The authenticity of the handwritten note is disputed by the Respondent.

26. By letter dated 2 May 2018, the Director, DHRM, UNHCR, informed the Applicant of the High Commissioner's decision to dismiss him from service. The letter reads, in its relevant part, as follows:

In particular, the High Commissioner concluded that it has been established on the basis of clear and convincing evidence that you instructed [the] Senior Programme Assistant, to request a bribe of CFA 2,000,000 from [the NGO Coordinator], a UNHCR contractor/implementing partner in Bangui, Central African Republic. [the Senior Programme Assistant] received the money from [the NGO Coordinator] in a sealed envelope and handed it to you.

Parties' submissions

27. The Applicant's principal contentions are:

- a. The Applicant retained the amount of XOF2,000,000 as a performance guarantee. There is reliable documentary evidence (handwritten note) that he gave instructions to the Senior Programme Assistant in this regard;
- b. It was within the Applicant's authority to make such withholding and since he was not aware of the fact that the Senior Reintegration Officer had already retained a performance guarantee, he instructed the Senior Programme Assistant to do so;
- c. The Applicant kept the money in a sealed envelope in a drawer in his office and once he became aware on 26 April 2017 of the fact that the Senior Reintegration Officer had not paid the NGO in full, he instructed the Senior Programme Assistant to return the money to the NGO Coordinator;
- d. The NGO Coordinator's testimony cannot be relied upon. In 2016, he had failed to complete an assignment despite being paid for it (Don Bosco's project) and he had lied in the reports of the project indicating that he had done more work than he had actually completed. Furthermore, he had recanted the allegations made against the Applicant;

e. The NGO Coordinator failed to complete the project despite a further payment made by the Senior Reintegration Officer and tried to find a “scapegoat” to justify his own failure;

f. There were significant flaws in the investigation procedure mainly because the Investigator did not travel to Bangui to conduct the investigation, and he failed to interview the witnesses proposed by the Applicant; and

g. There is no connection between the 2009 disciplinary sanction and the alleged misconduct in 2017.

28. The Respondent’s principal contentions are:

a. The facts of the case were established through “clear and convincing” evidence in accordance with the threshold established by the Appeals Tribunal’s jurisprudence;

b. An analysis of the uncontroverted facts of the case, the NGO Coordinator’s credible inculpatory testimony and his subsequent retraction, the Applicant’s and the Senior Programme Assistant’s actions in light of the responsibilities and interaction of the staff members involved in the project, the Applicant’s and the Senior Programme Assistant’s handling of the money and their failure to record their actions, their return of the money without any verification and their explanations, lead to the conclusion that there is clear and convincing evidence that the Applicant and the Senior Programme Assistant solicited and obtained a bribe;

c. The High Commissioner correctly determined that the Applicant’s conduct constituted corruption as he requested a kickback from a UN contractor, and this conduct was inconsistent with his basic obligations under the Staff Regulations and Rules;

- d. The disciplinary measure was proportionate to the offence. In determining the proportionality of the disciplinary sanction, the High Commissioner considered aggravating and mitigating circumstances as well as the parity principle; and
- e. The Applicant's due process right was respected.

Consideration

Preliminary issue

29. The Tribunal recalls that the NGO Coordinator was one of the witnesses initially called to provide testimony at the hearing as per Order No. 3 (GVA/2021). However, since the NGO Coordinator informed the Tribunal that he was under medical treatment in a hospital in Bangui, the 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 facts in which he had been involved.

30. The NGO Coordinator was informed of the Tribunal's decision by email of 19 January 2021. However, on 20 January 2021, the last day of the hearing, the NGO Coordinator sent a letter to the Tribunal, which he qualified as his testimony.

31. Given that the Tribunal had already decided that the NGO Coordinator's testimony was no longer required, his letter dated 20 January 2021 was not admitted into evidence and therefore was not considered by the Tribunal.

The scope of judicial review in disciplinary cases

32. The Appeals Tribunal has held that judicial review is focused on how the decision-maker reached the impugned decision, and not on the merits of the decision (see *Sanwidi* 2010-UNAT-084 and *Santos* 2014-UNAT-415).

33. The Appeals Tribunal has also determined what the role of this Tribunal is when reviewing disciplinary cases (see *Mahdi* 2010-UNAT-018 and *Haniya* 2010-UNAT-024). In the case at hand, this Tribunal considers that the issues to be examined are:

- a. Whether the facts on which the disciplinary measure was based have been established according to the applicable standard;
- b. Whether the established facts legally amount to misconduct under the Staff Regulations and Rules;
- c. Whether the disciplinary measure applied is proportionate to the offence, and
- d. Whether the Applicant's due process rights were respected during the investigation and the disciplinary process.

Have the facts on which the disciplinary measure was based been established?

34. According to the jurisprudence of the Appeals Tribunal, when the disciplinary sanction results in separation from service, the alleged misconduct must be established by clear and convincing evidence. This standard of proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. In other words, it means that the truth of the facts asserted is highly probable (see *Molari* 2011-UNAT-164).

35. The Tribunal will now assess whether the evidence collected by the Administration to establish the facts meets the applicable standard of proof.

36. Between 18 and 20 January 2021, the Tribunal held a hearing on the merits in the Applicant's case, during which it examined and cross-examined- not only the Applicant, but other relevant witnesses, namely the Senior Programme Assistant, the Senior Reintegration Officer, and the IGO Investigator. It was not possible, however, to have the NGO Coordinator's testimony in Court due to his medical condition.

37. The Tribunal found both the Senior Reintegration Officer's and the IGO Investigator's testimonies very clear, consistent and reliable. On the contrary, the Tribunal found the Applicant's and the Senior Programme Assistant's version of the facts unreliable, implausible, and inconsistent.

38. The Applicant was dismissed for requesting and receiving, via a subordinate (the Senior Programme Assistant), a bribe of XAF2,000,000 from the NGO Coordinator in the context of the implementation of a UNHCR project in Yaloke.

39. It is the role of the first instance Judge to critically assess the evidence, review how it was collected and under which circumstances and whether it rationally supports the allegations made against the Applicant. For this purpose, the Tribunal refers below to the sequence of the most relevant facts, which are undisputed:

a. The Yaloke project was carried out under the modality of direct implementation on the basis of 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, UNHCR, was the staff member responsible for the field operational advance in this project;

b. On 21 March 2017, the Senior Reintegration Officer gave the NGO Coordinator a first instalment of XAF5,500,000 in cash for the project. The former retained part of the project cost as a performance guarantee which he deposited in the Mission's safe;

c. Later that day, the Senior Programme Assistant met with the NGO Coordinator approximately 2 kms away from UNHCR premises and received XAF2,000,000 from him in an envelope. The Senior Programme Assistant did not provide the NGO Coordinator with a receipt;

d. The Senior Programme Assistant then brought the envelope to the Applicant who did not inform anyone about the amount of money received from the NGO Coordinator;

e. On 25 April 2017, the NGO Coordinator sent an email to the Senior Programme Assistant informing him that UNCHR had visited the project and that, without the money requested by the Senior Programme Assistant, 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 email to a Field Associate (Shelter Cluster), UNHCR; and

f. On 26 April 2017, the Senior Programme Assistant forwarded the NGO Coordinator's email to the Applicant 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.

40. The Applicant does not contest having received the amount of XAF2,000,000 from the NGO Coordinator through the Senior Programme Assistant but alleges that:

- a. He had the authority to request a performance guarantee for the project;
- b. The amount of XAF2,000,000 was retained as a performance guarantee to ensure that the Yaloke project would be completed;
- c. There is documentary evidence of his instructions, namely his handwritten note in the operational advance form suggesting to the Senior Programme Assistant the payment of XAF6,000,000 to the NGO, the rest to be paid following a report by colleagues in the Shelter Cluster;
- d. He instructed the Senior Programme Assistant to return the performance guarantee right after he became aware on 26 April 2017 of the fact that the Senior Reintegration Officer had not paid the NGO in full; and
- e. The NGO Coordinator retracted his initial testimony of the facts.

41. The Tribunal will assess the evidence on record in light of the Applicant's arguments challenging the facts on which the disciplinary measure was based.

The Applicant's involvement in the project

42. The Applicant claims that the Programme Section had authority to oversee UNHCR implementing partners. However, the evidence on record shows that the Yaloke project was carried out under the modality of direct implementation on the basis of a field operational advance. The NGO Coordinator was not an implementing partner but merely a supplier of construction services.

43. The Senior Reintegration Officer testified at the hearing that the role of the Programme Section in the project was only to approve the budget and clear the operational advance.

44. Therefore, even if the Applicant approved the operational advance and signed the cheque for the project, he and the Senior Programme Assistant were not involved in the implementation of the project. The evidence shows that the Senior Reintegration Officer had overall responsibility for the project as he had requested the operational advance and was personally responsible for the funds.

45. Consequently, the Applicant had no authority to demand a performance guarantee from the NGO Coordinator.

The alleged performance guarantee

46. The Applicant claims that the amount of XAF2,000,000 was retained as a performance guarantee to ensure that the Yaloke project would be completed.

47. The evidence shows that a performance guarantee had already been retained by the Senior Reintegration Officer prior to the disbursement of the initial instalment to the NGO Coordinator. There were, therefore, no grounds to request another performance guarantee.

48. According to the NGO Coordinator's testimony during the investigation, on 21 March 2017, after receiving the first instalment for the project, he received a call from the Senior Programme Assistant requesting him to meet. They met in the city and the Senior Programme Assistant asked him to pay XAF2,000,000 for "the boss", without naming the Applicant. The Senior Programme Assistant told him

that if he did not pay such amount, his NGO would not be able to work for UNHCR in the future. The NGO Coordinator then decided to give the Senior Programme Assistant the requested amount in cash. The NGO Coordinator further testified that he had been a victim of fraud and that it was clear to him that he would not recover the amount of money given to the Senior Programme Assistant.

49. After a careful analysis of the evidence, the Tribunal notes that the NGO Coordinator kept the same version of the events in at least three different occasions: 1) in his statement before the Field Associate (Shelter Cluster) following the UNHCR inspection visit to the project, 2) in his 25 April 2017 email to the Senior Programme Assistant asking him to tell his “boss” to return the money unconditionally, otherwise he would report the matter as he could no longer keep the secret, and 3) in his 30 May 2017 letter to the Senior Reintegration Officer officially informing him *inter alia* that he had been a victim of fraud since he was requested to pay XAF2,000,000 for the “big boss”.

50. The Applicant argues that the NGO Coordinator’s testimony is not reliable. However, the Tribunal does not see any reason for the NGO Coordinator to fabricate the alleged facts, particularly considering that by his testimony, he incriminated himself in a fraud scheme.

51. Furthermore, the Applicant has not provided any evidence to justify the alleged hostility of the NGO Coordinator towards him or the Senior Programme Assistant. The Tribunal recalls that the onus is on the Applicant to substantiate his allegations of improper motives.

52. The Tribunal notes that the NGO Coordinator’s testimony during the investigation is consistent with that of the Field Associate (Shelter Cluster). It also notes with concern that neither the Applicant nor the Senior Programme Assistant made any attempt to document their actions or to at least provide the NGO Coordinator with a receipt for the alleged performance guarantee.

53. The Applicant was an experienced staff member in his field of work. He had worked for UNHCR since 1990. However, it appears that he deliberately ignored the applicable procedure as per the UNHCR Financial Management Manual.

54. At the hearing, the Applicant did not provide any plausible explanation for his behaviour, while the Senior Reintegration Officer clearly explained that the standard procedure was to keep money in the Mission's safe. It is therefore reasonable to infer that the Applicant should have at least followed the same procedure instead of keeping the money in an envelope in a drawer in his office.

55. The Tribunal further notes that neither the Applicant nor the Senior Programme Assistant informed the Senior Reintegration Officer, who was the staff member responsible for the project's funds, or anyone else about the alleged performance guarantee. Any reasonable person acting in good faith would have, at least, informed the Senior Reintegration Officer.

56. Consequently, taking into consideration the evidence on record, the Tribunal finds that the Applicant's intention was not to keep a performance guarantee but rather to obtain a bribe from the NGO Coordinator.

The alleged documentary evidence

57. The Applicant claims that his handwritten note in the operational advance form dated 20 March 2017, which he approved, is evidence of his intention to request a performance guarantee. This handwritten note reads as follows:

Dear [First name of the Senior Programme Assistant], given the nature of the works, I suggest payment of XAF6,000,000 the rest to be paid after the report by the colleagues in Shelter.

58. The authenticity of the handwritten note is disputed by the Respondent who suggests, based on the Applicant and the Senior Programme Assistant's failure to mention this crucial element in a timely fashion, that it was written *ex post facto* for the sole purpose of responding to the allegations of misconduct.

59. Given that neither the Applicant nor the Senior Programme Assistant were involved in the implementation of the project, the Tribunal finds no logic in the handwritten note. If the Applicant's intention was to request a performance guarantee, his instruction would have been addressed to the Senior Reintegration Officer instead of to the Senior Programme Assistant.

60. Even assuming that the handwritten note was authentic, the Tribunal finds unreasonable that neither the Applicant nor the Senior Programme Assistant referred to its existence during the investigation. The Tribunal notes that the investigation report specifically states that the Applicant recognized that there was no written document indicating that an amount of XAF2,000,000 would be retained as a performance guarantee by the Programme Section.

61. Furthermore, the Tribunal notes that the facts are not in line with the alleged instruction in the handwritten note because according to that instruction, the Senior Programme Assistant should have retained an amount of XAF2,139,300, that is, the difference between the total amount of the project (XAF8,139,300) and the suggested payment (XAF6,000,000). However, the Senior Programme Assistant obtained an amount of XAF2,000,000 from the NGO Coordinator without documenting such action.

62. The Tribunal is therefore not convinced of the probative value of the alleged handwritten note.

The return of the alleged performance guarantee

63. The Applicant argues that he kept the money in a sealed envelope in a drawer in his office, and that once he became aware on 26 April 2017 of the fact that the Senior Reintegration Officer had not paid the NGO in full, he instructed the Senior Programme Assistant to return the money to the NGO Coordinator.

64. The Tribunal recalls that the Applicant instructed the Senior Programme Assistant to return the alleged performance guarantee only after the NGO Coordinator sent an email to the Senior Programme Assistant on 25 April 2017 informing him of the UNHCR inspection visit and requesting him to tell his "boss"

to return the money or else “he would denounce the matter as he could no longer keep the secret”. The Tribunal notes that neither the Applicant nor the Senior Programme Assistant replied to the NGO Coordinator’s strong accusations.

65. Furthermore, while the aim of a performance guarantee is precisely to ensure that a contractor fulfils contractual obligations, neither the Applicant nor the Senior Programme Assistant informed or consulted the Senior Reintegration Officer or the Field Associate (Shelter Cluster) about the progress of the work before returning the alleged guarantee.

66. Under such circumstances, the Tribunal is of the view that by returning the alleged performance guarantee, the real intention of the Applicant and the Senior Programme Assistant was to avoid that the NGO Coordinator denounce the matter to the Administration. Indeed, the evidence shows that on 26 April 2017, when the Senior Programme Assistant returned the money to the NGO Coordinator, the Applicant and the Senior Programme Assistant ignored that the NGO Coordinator had already forwarded his accusatory email to the Field Associate (Shelter Cluster).

The retraction of the NGO Coordinator’s initial testimony

67. The Tribunal recalls that the NGO Coordinator was interviewed during the investigation. The NGO Coordinator testified, under oath, on 7 July 2017. His testimony reads in its relevant part as follows:

I was victim of fraud ... when it was noticed that the works hardly progressed, I had to disclose what had occurred to [the Field Associate (Shelter Cluster)]. I told him that [the Senior Programme Assistant] had taken the money. I then requested [the Senior Programme Assistant] to reimburse me. It was at that moment that he reimbursed me.

68. According to the testimony of the IGO Investigator at the hearing, the NGO Coordinator’s account of the events was always clear and objective. The IGO Investigator testified that he explained to the NGO Coordinator why he was being interviewed and informed him that his testimony was being recorded.

69. Therefore, it is irrelevant, from the Tribunal's point of view, whether the transcript of the NGO Coordinator's interview was signed or not. What is essential is that the NGO Coordinator knew that he was being interviewed in the context of a formal investigation, that he testified under oath and was aware that his testimony was being recorded.

70. The NGO Coordinator's testimony is corroborated by at least three separate facts as mentioned in para. 49 above, and there is no evidence that his testimony was manipulated or influenced by bias or ulterior motives against the Applicant or the Senior Programme Assistant.

71. However, the Tribunal notes 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. In this letter, the NGO Coordinator indicates that after further reflections and "following consultations", he wished to clarify his statement to the IGO Investigator in relation to the project. He states that "following the site visit and the delay incurred ... he understood that by sharing the blame with the staff of the Programme Section, he could continue with the project".

72. The Tribunal considers dubious that the retraction letter was produced 13 months after the NGO Coordinator's interview and only after the filing of the Respondent's reply on 10 August 2018.

73. The Tribunal also notes that the reasons why this letter was written and the context in which it was produced remain obscure.

74. The Tribunal also recalls that it was not possible to examine nor cross-examine- the NGO Coordinator during the hearing to question him over the content of the letter or the reasons for his apparent retraction and, consequently, there is not much weight the Tribunal can give to a piece of evidence that was not subject to a critical assessment by the parties nor by the Tribunal.

75. It suffices to note that the 20 August 2018 letter is unclear, it contradicts the evidence on record and appears to be driven by ulterior motives. Consequently, the Tribunal finds that it is not reliable evidence and cannot be used to override the NGO Coordinator's initial testimony and the contemporary evidence collected during the investigation.

76. In light of the above, the Tribunal finds that the facts on which the disciplinary measure was based have been established through "clear and convincing evidence" and will now turn to the analysis of other elements subject to judicial review.

Do the established facts amount to misconduct?

77. It has been established that the Applicant and the Senior Programme Assistant colluded to solicit and obtain a bribe of XAF2,000,000 from the NGO Coordinator in relation to the Yaloke project. The Applicant instructed the Senior Programme Assistant to receive the bribe. The Senior Programme Assistant complied with the Applicant's instructions, received the money in an envelope and handed it to the Applicant.

78. The Applicant's behaviour amounts to corruption as per sec. 3.8 of IOM No. 044/2013-FOM 044/2013 "Strategic Framework for the Prevention of Fraud and Corruption" which defines it as follows:

The 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.

79. By engaging in corruption, the Applicant also breached his obligations as a staff member set forth in staff regulation 1.2; in particular he failed:

- a. To uphold the highest standards of integrity (staff regulation 1.2(b)),
- b. To discharge his functions and regulate his conduct with the interests of the Organization only in view (staff regulation 1.2(e));

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

d. To not use his office or knowledge gained from his official functions for private gain (staff regulation 1.2 (g)).

80. The Applicant further violated his obligations under staff rule 1.2 as he failed:

a. To 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

b. To 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)).

81. Consequently, the Tribunal finds that the Applicant's behaviour as per the established facts amounts to misconduct and demonstrates, in general, his lack of integrity to serve as an international civil servant.

Was the disciplinary measure applied proportionate to the offence?

82. It is well-established jurisprudence that the Secretary-General has wide discretion in applying sanctions for misconduct and that at all relevant times he must adhere to the principle of proportionality (*Applicant* 2013- UNAT- 280). Once misconduct has been established, the level of sanction can only be reviewed in cases of obvious absurdity or flagrant arbitrariness (*Aqel* 2010-UNAT-040).

83. In *Rajan* 2017-UNAT-781, the Appeals Tribunal held that

The most important factors to be taken into account in assessing the proportionality of a sanction include the seriousness of the offence, 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.

84. In his letter dated 2 May 2018, imposing the contested disciplinary measure on the Applicant, the High Commissioner indicated that in his assessment of the proportionality of the disciplinary measure, he considered mitigating and aggravating circumstances of the case as well as his and the Secretary-General's prior practice in disciplinary matters.

85. As a mitigating circumstance, the High Commissioner considered that the Applicant had a long service with UNHCR working in several hardship duty stations.

86. As aggravating circumstances, the High Commissioner considered:

a. The fact that the Applicant had a prior record of misconduct, as he had been sanctioned for sexual harassment and assault against two women in 2009, and

b. That his actions had a detrimental effect on an important project for persons of concern in the Central African Republic. The High Commissioner noted that the contractor's inability to complete the project was in large part attributable to the fact that he had to pay as a bribe a substantial part of the sum received from UNHCR.

87. The Applicant claims that there is no connection between the 2009 disciplinary sanction and the alleged misconduct in 2017. He further submitted that the reference to his past misconduct was unjustified and it reinforced the unfair assessment that led to the disciplinary sanction.

88. The Tribunal is not persuaded by the Applicant's argument. The record shows that the High Commissioner properly considered the Applicant's previous disciplinary record in his assessment of the proportionality of the disciplinary measure. The fact that there is no link between the disciplinary sanction imposed on the Applicant in 2009 and his misconduct in 2017 is irrelevant and shows a misunderstanding of the High Commissioner's assessment.

89. The Tribunal agrees with the Respondent in that the Organization cannot tolerate corruption since it goes against its core values, jeopardizes its mission, and affects its image as well as the trust donors have placed on it.

90. The Tribunal also notes that in similar cases of fraud or corruption, the practice of the Secretary-General and the High Commissioner has been to impose disciplinary measures of dismissal or separation from service with compensation in lieu of notice.

91. In light of the above, the Tribunal finds that in his assessment of the proportionality of the disciplinary sanction, the High Commissioner properly considered mitigating and aggravating circumstances of the case as well as his and the Secretary-General's practice in similar cases.

92. Given the gravity of the Applicant's misconduct, the Tribunal considers that the decision to dismiss him from service is not arbitrary but a reasonable exercise of the High Commissioner's discretion in applying sanctions for misconduct. Consequently, the Tribunal confirms the disciplinary sanction imposed on the Applicant.

Were the Applicant's due process rights respected during the investigation and the disciplinary process?

93. According to the Appeals Tribunal's jurisprudence, due process entitlements only come into play in their entirety once a disciplinary proceeding is initiated (*Akello* 2013-UNAT-336), whereas at the preliminary investigation stage only limited due process rights apply (*Powell* 2013-UNAT-295).

94. After having carefully reviewed the case record, including the investigation stage and the disciplinary process, the Tribunal is satisfied that the Applicant's due process rights were fully respected throughout both phases.

95. During the preliminary investigation, the Tribunal notes that the IGO Investigator informed the Applicant about the allegations against him prior to his interview. The interview was recorded, and its verbatim transcript was shared with the Applicant for his comments and signature. The draft investigation report was

also shared with the Applicant for his comments, which were taken into account in the final version of the report.

96. During the disciplinary process, the Tribunal notes that the Applicant was informed of the charges against him and of his right to be assisted by Counsel. He was also given the opportunity to provide his comments on the allegations of misconduct, which were considered in the decision letter of 2 May 2018.

97. The Applicant claims that the investigation was tainted by procedural flaws that compromised his due process rights and are indicative of bias against him namely that:

- a. The IGO Investigator:
 - i. Did not travel to Bangui to conduct the investigation;
 - ii. Failed to interview other potential witnesses;
 - iii. Only interviewed the NGO Coordinator for 30 minutes and the NGO Coordinator did not sign the transcript of his interview;
 - iv. Is “biased against Africans”; and
- b. “[O]ther agents of the Respondent took investigative measures outside of the investigation office”.

98. The Tribunal recalls that an investigator has a certain margin of discretion, based on a critical assessment of the evidence produced, to decide what is relevant or not for the purpose of the investigation (*Pappachan* UNDT-2019-118).

99. The IGO Investigator explained during the hearing that he decided not to travel to Bangui as he considered that it was not necessary to do so considering the alleged facts and the relatively small number of people involved. In his view, it was possible to conduct the investigation remotely.

100. The IGO Investigator also explained that he decided not to interview the two witnesses proposed by the Applicant because he considered that their testimony was not relevant for the investigation. The Applicant had proposed these witnesses indicating that they would be able 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. However, the NGO Coordinator's capacity or quality of work was not contested as indicated in para. 44 of the investigation report.

101. The Tribunal considers that the length of the NGO Coordinator's testimony is irrelevant. Furthermore, the fact that he did not sign the transcript of his interview does not amount to a procedural irregularity for the reasons explained in para. 69 above. In this respect, the IGO Investigator clarified at the hearing that it is normal practice not to require witnesses other than staff members to sign the transcript of their audio recorded interviews because, in most cases, they have limited access to internet, a computer and a scan to be able to do so. In such circumstances, the transcript of the interview is normally signed by the investigator.

102. The Tribunal notes that while the Senior Reintegration Officer and the Field Associate (Shelter Cluster) may have taken steps to verify facts prior to making a report to the IGO, this is not a procedural irregularity as the investigation was properly conducted by the IGO. In fact, it is reasonable that one would try to minimally verify facts before bringing them to the attention of the IGO, there is nothing illegal in such actions.

103. The Tribunal also finds that there are no grounds to consider that the Investigator was biased against people from Africa, as alleged by the Applicant. The Tribunal recalls that, during the hearing, the IGO Investigator indicated that in his professional experience, one can easily bribe people in Africa with a small amount of money due to the low incomes in that region. This was in response to a specific question of the Tribunal but does not serve to prove bias against the Applicant in the investigation.

104. For the above-mentioned reasons, the Tribunal finds that the Applicant's allegations on procedural irregularities are unsubstantiated and that his due process rights were respected during the investigation and the disciplinary process.

Conclusion

105. In view of the foregoing, the Tribunal DECIDES:

The application is rejected in its entirety.

(Signed)

Judge Teresa Bravo

Dated this 21st day of May 2021

Entered in the Register on this 21st day of May 2021

(Signed)

René M. Vargas M., Registrar, Geneva