



Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TAKLU-NAGGA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Monika Ona Bileris

Counsel for the Respondent:
Elizabeth Brown, UNHCR
Francis Navarro, UNHCR

Introduction

1. The Applicant was a Senior Protection Officer with the United Nations High Commissioner for Refugees (“UNHCR”). He served at the P-4 level and was temporarily assigned to serve at the UNHCR Office in Lilongwe, Malawi.

2. On 9 August 2022, he filed an application before the Dispute Tribunal sitting in Nairobi to challenge the Respondent’s decision to dismiss him from service of the Organization pursuant to staff rule 10.2(a)(ix). The disciplinary measure was imposed for three separate allegations of fraud and one allegation of corruption.

3. The Respondent filed his reply on 7 September 2022. Included in the Respondent’s reply was a motion to exceed the page limit stipulated in the Tribunal’s Practice Directions.

4. On 9 September 2022, the Applicant moved for leave to file a rejoinder to the reply.

5. The Tribunal issued Order No. 048 (NBI/2023) granting the parties’ motions on 17 February 2023.

6. The Applicant filed his rejoinder to the Respondent’s reply on 8 March 2023.

Facts and Submissions

7. The Applicant joined UNHCR on 13 May 2001 as a Junior Professional Officer (“JPO”) sponsored by the United States of America and was appointed as an Associate Protection Officer in Ethiopia and subsequently served in multiple UNHCR operations in the field. On 1 July 2014, the Applicant was appointed as Senior Protection Officer (P-4) in Khartoum. On 30 May 2019, he was temporarily assigned to Lilongwe, also as Senior Protection Officer at the same level.

8. On 13 September 2021, the Applicant received a memorandum from the Director of the Division of Human Resources (“DHR”) indicating that she had received information that the Applicant “might have engaged in an entitlement fraud scheme” which is tantamount to committing serious misconduct. As the alleged fraud was an offence, which if established, would warrant separation from service or dismissal, she also decided that the Applicant be placed on administrative leave without pay.¹

9. A separate investigation into unrelated allegations of fraud by another staff member, Davies Ndambuki, revealed that the Applicant may have colluded with him and one other staff member to obtain rental subsidy.

10. The Applicant has owned an apartment in Sub-City Woreda, Addis Ababa, Ethiopia since February 2008.

11. The investigators found emails indicating that the Applicant had rented out his flat in Addis Ababa to Mr. Ndambuki and Ms. Murungi. The lease indicated an amount which was used to claim rental subsidy, but the amount actually paid to the Applicant was substantially less.

12. On 15 September 2021, the Applicant received a Notice of Investigation, which informed him that a formal investigation into his conduct had been opened and that the Inspector General’s Office (“IGO”) would be seeking to interview him.²

13. The Applicant was interviewed on 2 November 2021. He also submitted written comments on 15 December 2021.

14. On 14 January 2022, the Applicant was served with a memorandum containing Allegations of Misconduct. The Applicant was invited to respond to the charges therein. Attached to the memorandum was the Investigation Report.³

¹ Applicant’s Annex 3.

² Applicant’s Annex 7.

³ Applicant’s Annex 10.

15. The Applicant responded to the charges on 15 February 2022.

16. On 11 May 2022,⁴ the DHR wrote to the Applicant to inform him that after a careful review of the evidence gathered by the IGO, including their interview with the Applicant and his written response to the interview and the charges, the High Commissioner “determined that the disciplinary measure of dismissal pursuant to staff rule 10.2(a)(ix) was the appropriate sanction.” Specifically, the Applicant was found to have:

- (i) Engaged in fraud by knowingly assisting Mr. Davies Ndambuki in submitting a fraudulent claim for rental subsidy in December 2017, in connection with the lease of [his] apartment in Addis Ababa, as a result of which Mr. Ndambuki received USD 44,219.04 [as corrected, see footnote 34 Respondent’s Reply] in rental subsidy to which he was not entitled;
- (ii) Engaged in fraud by knowingly assisting Mr. Ndambuki in submitting a fraudulent claim for the reimbursement of the real estate agent’s fees in December 2017, in connection with the lease of [his] apartment in Addis Ababa, as a result of which Mr. Ndambuki received USD 1,839.91 in benefits to which he was not entitled;
- (iii) Engaged in corruption by having Mr. Ndambuki pay Ms. Stella Murungi a USD 1,000 kickback for facilitating his fraudulent lease agreement with [him];
- (iv) Engaged in fraud by knowingly assisting Ms. Murungi in submitting a fraudulent claim for rental subsidy in May 2019, as she leased [his] apartment in Addis Ababa, as a result of which Ms. Murungi received USD 20,806.06 to which she was not entitled.

17. The Applicant was separated upon receipt of the letter.

18. The Applicant’s case is as follows.

19. The Applicant’s uncle, Mr. Kshay, was given a power of attorney to manage the property and the leases of it, and to collect any rent that was due from a tenant.

⁴ Applicant’s Annex 2.

20. Ms. Murungi was a tenant of the property from July 2014 to December 2016; and again, from January to May 2020. Rent was USD3,600 a month.

21. Between 27 November 2017 and 31 December 2019, the property was tenanted by Mr. Ndambuki for USD3,500 a month. There was an oral agreement between the tenant and the landlord that USD2,000 would be paid into the Applicant's account in the United States, and the balance to the Applicant's relatives in Ethiopia. Mr. Ndambuki sometimes paid large amounts in advance.

22. The Applicant explains that Ms. Murungi was supposed to move back into the apartment in January 2020 and had paid one month's rent plus security deposit, but Mr. Ndambuki's contract was extended by several months. Unable to evict his current tenant, the Applicant found Ms. Murungi alternative housing until his flat fell vacant.

23. The Respondent maintains that there is clear and consistent evidence to show that Mr. Ndambuki did not pay USD3,500 in monthly rent and that the Applicant had knowingly provided a false lease and a false rent receipt to Mr. Ndambuki so that he could claim and obtain rental subsidy from UNHCR to which he was not entitled. In other words, the Applicant committed fraud when he knowingly assisted Mr. Ndambuki to submit a fraudulent rental subsidy claim in December 2017.

24. The Respondent submits that multiple communications between the Applicant and Mr. Ndambuki corroborate that Mr. Ndambuki only paid the Applicant USD2,000 per month in rent. Throughout the duration of the lease, the Applicant and Mr. Ndambuki exchanged messages about Mr. Ndambuki's payments in which they referred exclusively to that amount and never mentioned other payments. On 1 February 2018 and 19 February 2018, the Applicant asked Mr. Ndambuki to pay him USD12,000 as six months' advanced rent. On 26 March 2018, Mr. Ndambuki informed the Applicant that he had transferred USD8,000 to him and asked for another month to transfer the remaining USD4,000. On 3 May 2018, the Applicant asked Mr. Ndambuki to confirm that he had paid the remaining rental balance of USD4,000. On 10 December 2018, the Applicant asked Mr. Ndambuki to pay him USD12,000 as six

months' advanced rent. On 3 April 2019, they also discussed a "missed rent payment" for the month of February 2019 in the amount of USD2,000.

25. By misrepresenting the amount of rent in his application for rental subsidy, Mr. Ndambuki obtained rental subsidy to which he was not entitled. At the time of his application for the subsidy, his net income was USD6,000.54. Mr. Ndambuki's individual threshold amount was thus USD1,200.11. A monthly rent of USD3,500 meant that the excess amount was USD2,299.89; 80% of which - USD1,839.91- was reimbursed to the Applicant.

26. Had Mr. Ndambuki applied for rental subsidy based on the USD2,000 that he was clearly paying the Applicant, the excess amount would have been USD799.89, and he would have received USD639.91 in rental subsidy. He was not entitled to the USD1,839.91 that he was being paid. The record, the Respondent submits, is replete with evidence that the Applicant engaged in this transaction in the full knowledge that it was fraudulent.

27. There is no evidence, the Respondent submits, that a further USD1,500 was paid to the Applicant or his family in cash, anywhere. The evidence adduced by the Applicant purporting to be a statement by Mr. Kshay dated 29 January 2022 reads as follows:

At the end of December Mr. Davies, departed Ethiopia, after his departure, again Ms. Stella, moved in January to June 2020, with monthly rent \$3600, this time I was receiving between \$1500-1000. Ato Berhane, at different, when he was Yemen, I was visiting Stella, at UNHCR to collect money from Stella, for our families in Tigray region.
(sic)

28. The Respondent submits that the statement is entirely incredible. The document is "largely unintelligible, [...] is a haphazard collation of a power of attorney and factual statements prepared to address the allegations of misconduct. It is not clear who prepared the document. No proof of identity is attached to it, the names' spelling is not the same as in all other documents on record, including three leases and one rent receipt submitted by Ms. Murungi in 2015 and 2016, and the signature is entirely different."

Given the purported date of the document, it is curious, the Respondent contends, that the Applicant did not attach it to the statement he submitted in response to the allegations of misconduct in March 2022.

29. The Applicant maintains that this premise is false, and that the Respondent's narrative is based on a misunderstanding of what actually transpired. The Applicant categorically insists that he never asked Mr. Ndambuki for a share of the subsidy, that the Respondent does not allege that he did and certainly cannot show that he benefitted from any subsidy paid to Mr. Ndambuki.

30. The USD2,000 referred to in the correspondence cited and tendered by the Respondent relates to the amount that parties to the agreement decided would be paid directly into his bank account, the rest being paid in cash to his family. The Applicant's failure to mention that part of the arrangement in correspondence is not proof that it was not part of their deal. It was up to the landlord and tenant to decide how they would conduct business, and there was nothing unlawful about their agreement, even if it was not executed in the form expected by the Respondent.

31. The Respondent also found the Applicant to have knowingly assisted Mr. Ndambuki to submit a fraudulent claim that purported to be fees for a real estate agent in December 2017.

32. Mr. Ndambuki submitted various certificates for one Mr. Tamerat Girma Yirdaw, a real-estate brokerage contract with Mr. Yirdaw, and an invoice dated 25 November 2017 for USD3,500 allegedly issued by Mr. Yirdaw. Based on this submission, Mr. Ndambuki was reimbursed USD1,839.91 for the agent's fees in March 2018. The amount reimbursed, the Respondent submits, was split three ways and shared with the Applicant and Ms. Murungi.

33. As the amount reimbursed did not constitute the full amount claimed, the Applicant wrote to his tenant on 19 March 2018 and asked that the amount be shared between the latter and Ms. Murungi.

34. The Applicant's claim that three real estate agents were involved is inconsistent with Mr. Ndambuki's application for rental subsidy. The latter submitted one invoice to one agent. Mr. Ndambuki's evidence is that he paid USD3,500 to Mr. Yirdaw.

35. The subsidy for the agent's fees is meant to reimburse the costs incurred by the staff member who rents the accommodation, not the landlord's costs. Mr. Ndambuki was not entitled to any subsidy for any fees payable by the Applicant.

36. The Applicant's explanation on this point serves only to prove the misconduct alleged. Indeed, there is no evidence that the Applicant contracted or paid any real estate agents. If there were estate agents involved in this transaction, the record is silent as to who they might have been.

37. The Respondent also found the Applicant to have orchestrated a kickback scheme.

38. The record contains an email dated 1 February 2018 from the Applicant to Mr. Ndambuki. They agreed that Mr. Ndambuki would pay Ms. Murungi money for her facilitation of the lease. On 1 February 2018, the Applicant wrote to Mr. Ndambuki and asked if he could pay him an amount of "\$12.000 + \$1000 = 13.000" the following week.

39. The Applicant's explanation that these monies constitute the settlement on a pre-existing debt is not supported by the evidence. Indeed, email correspondence on the record dated 29 March 2018, from Ms. Murungi to the Applicant, confirms that the amount was for her having secured the house for Mr. Ndambuki.

40. The record shows multiple inconsistencies, all of which can only support the proposition that the Applicant, Mr. Ndambuki and Ms. Murungi were not credible in their explanations:

- (i) The Applicant initially denied that the USD1,000 referred to in his email to Mr. Ndambuki on 19 February 2018 was meant for Ms. Murungi;

- (ii) The Applicant then explained that the USD1,000 was a reimbursement for money that Ms. Murungi had lent his family in 2015 or 2016;
- (iii) The Applicant subsequently stated that the USD1,000 had “something to do with the building” and that the building management had come after him for “the service and the cleaner and all this;”
- (iv) The Applicant then reverted to the version that he had asked Mr. Ndambuki to return USD1,000 that Ms. Murungi had lent his family in 2016. The Applicant also claimed that, because Mr. Ndambuki did not pay, he asked his uncle, Mr. Kshay, to reimburse Ms. Murungi in cash in 2019.
- (v) When asked by the investigator if Ms. Murungi had facilitated or been involved in his rental contract with Mr. Ndambuki, the Applicant responded: “No, no, no. Not at all. No, not at all. Not at all.”

41. Contrary to the Applicant's assertions and explanations, the evidence supports the inference that the payment to Ms. Murungi was a kickback.

42. The Applicant tells the Tribunal that even if the Applicant requested Mr. Ndambuki to pay Ms. Murungi a finder's fee, he was within his rights to do so. This in itself does not violate any United Nations Staff Regulation of Rule, and there is no proof that this amount is linked to the request for a broker's fee subsidy, which, if that were the case, would have been for the USD3,500 requested, and not USD1,000.

43. The Applicant was also found to have assisted Ms. Murungi to file a fraudulent rental subsidy claim in May 2019. Ms. Murungi submitted a claim for rental subsidy against a lease amount of USD3,600 per month. Ms. Murungi was paid USD1,600 by way of subsidy against this claim between July 2019 to July 2020.

44. Like Mr. Ndambuki, the record shows that Ms. Murungi too was not in fact paying the Applicant the amount indicated in the lease.

45. On 17 June 2019, the Applicant sent Ms. Murungi the receipt for rent and deposit dated 29 May 2019 (which Ms. Murungi submitted with her application for rental subsidy) and wrote: “[A]s agreed Stella, you will deposit into my account every month \$1,750..with immediate action.. tomorrow I will send you my citi bank account.” (*sic*)

46. On 16 January 2020, the Applicant wrote to Ms. Murungi that, “Stella, Your monthly rent will be \$1750, as agreed.. Thank you” (*sic*)

47. If Ms. Murungi submitted the lease agreement between herself and the Applicant to the Organization as proof of payment of rent for the alternative housing, the Applicant had nothing to do with it and should not be blamed. He cannot be held responsible for what Ms. Murungi submitted nor for the subsidy she received.

48. The Applicant further submits as follows:

There was clearly a language barrier and the communications relied upon were filled with errors and did not always express what they were meant to. The witness interviews were conducted in English, and none of the witnesses are English-speaking natives. A reading of the IGO Report shows that it was difficult for the witnesses to communicate their thoughts, and questions were often left unanswered, or the answers were simply confusing, but that does not necessarily result in a finding of fraud by default, and certainly falls short of a finding of clear and convincing evidence.

49. The Applicant vehemently denies having asked for or received any benefit from the subsidy claims submitted by Mr. Ndambuki and Ms. Murungi as his tenants. The Applicant argues that even if Mr. Ndambuki was only paying USD2,000/month rent, his subsidy was USD1,840.92/month, less than the amount stated on the lease agreement, therefore the Organization was not defrauded. The broker subsidy was a legitimate claim for services rendered by three brokers. The alleged kickback to Ms. Murungi had nothing to do with the apartment rental but was payment for money owed to her for another personal matter. And the Applicant had no hand in submitting for Ms. Murungi’s rental subsidy.

50. The Applicant also submits that the sanction meted out to him was wholly disproportionate, based as they were on “mistakes of fact” which “did not amount to misconduct.”

Considerations

51. In reviewing a disciplinary measure, the Dispute Tribunal should determine: (a) whether the alleged facts have been established; (b) whether the established facts constitute misconduct; (c) whether the disciplinary measure is proportionate to the offence; and (d) whether due process was respected (see *Molari* 2011-UNAT-164 and *Masri* 2010-UNAT-098).

(a) whether the alleged facts have been established

52. Rental subsidy is an entitlement payable to eligible staff members pursuant to staff rule 3.7(c). UNHCR/AI/2014/6 (Administrative Instruction on Administration of Rental Subsidies) governed rental subsidy in UNHCR during the relevant period. In accordance with the Administrative Instruction (“AI”), staff members are expected to bear rental costs, without subsidy, up to a predetermined amount called the “individual threshold”. The individual threshold amount is calculated by applying percentage rates, established by the International Civil Service Commission (“ICSC”), to the staff member’s net income. When the amount of rent paid by the staff member exceeds the individual threshold amount, the staff member is entitled to reimbursement of 80% of the amount that exceeds the individual threshold. Accordingly, the more rent a staff member pays above the individual threshold, the greater the rental subsidy (up to the maximum amounts provided in the AI).

53. In addition, eligible staff members may receive a subsidy for fees paid to a real estate agent/broker for services rendered in obtaining accommodation at the duty station.

54. It is not contested between the parties that Mr. Ndambuki was assigned to a

field-services position in Addis Ababa between June 2017 and December 2019. On 21 December 2017, he applied for rental subsidy, specifying that monthly rent was USD3,500 and that he had paid USD3,500 in agent's fees. He received approximately USD1,840 per month in rental subsidy from UNHCR between March 2018 and January 2020.

55. However, it results from the records that Mr. Ndambuki did not pay USD3,500 in monthly rent and that the Applicant had knowingly provided a false lease and a false rent receipt to Mr. Ndambuki so that he could claim and obtain a higher rental subsidy from UNHCR to which he was not entitled.

56. Indeed, it results from the record that on 26 March 2018, Mr. Ndambuki wrote to the Applicant:

Dear [Applicant], I have transferred 8k. Allow me to put the balance next month since if I do the full amount, I will be left without food. I used the bank routing number below; Routing number: 021000089. I believe it is the correct bank routing number as seen online for Citibank. Regards. [Mr. Ndambuki's signature].

57. And the Applicant replied:

Thanks my friend. Dude what you paid me it's the amount what you got from rental subsidize as reimbursement... your portion about 160 USD, with your security payment your portion is 2000 USD.. don't tell me I will be left without food.. I will see you on Friday if you're in Addis, I will give you a call. Again thank you so much. Berhane (*sic*)

58. On 4 December 2017, in the same email where the Applicant shared the lease with Mr. Ndambuki for his signature, the Applicant wrote:

Please don't forget when you fill the rental subsidize application to mention that, you paid the real estate porker one month rent for the amount of \$3500.. this amount will be cover by the office.... The porker name.. ask your sister she will give you the name of the porker.. (*sic*)

59. During his interview with the IGO, the Applicant confirmed that, by "sister", he referred to Ms. Murungi and that, by "porker", he meant the real estate broker.

60. Two days later, on 6 December 2017, the Applicant sent an email to Mr. Ndambuki with the rental subsidy application form. In his email, the Applicant wrote:

Davies, Attached please find the rental Subsidize application. I fill the part that ask you if you did you pay a fee to a licensed agent or broker to obtain the accommodation,, you will say yes amount \$3500.00 USD.. divided by three $3500/3 + \$1160$.. each.. Thanks

61. The emails exchanged between the Applicant and Mr. Ndambuki above mentioned are clear and speak for themselves: the Applicant wrote that he had set an amount of rent of USD3,500, that Mr. Ndambuki would obtain almost half of the rent in rental subsidy from UNHCR, and that, considering that Mr. Ndambuki would pay a monthly rent of USD2,000, only few hundreds of dollars would come from Mr. Ndambuki's pocket.

62. Also, the other communications between the Applicant and Mr. Ndambuki corroborate that Mr. Ndambuki only paid the Applicant USD2,000 per month in rent. The messages referred exclusively to that amount and never mentioned other payments arising directly from the contract.

63. The said emails (all discovered by the IGO throughout the forensic analysis of the Applicant's official UNHCR email archives) have the strong evidentiary value of an out-of-court confession to a third party, which makes evidence against the author of the declaration.

64. To contrast what results from these exchanges, no evidence was provided by the Applicant on having received the rent in the amount of USD3,500 written in the rental agreement.

65. The Applicant alleged that part of the rent was paid monthly in cash to his family members living in a different country, but apart from the difficulty to imagine payment in cash of a relevant amount of money to be entrusted to a third person to be delivered to the beneficiary (see para. 19 of the Investigation Findings – INV/2021/049-A, where Mr. Ndambuki incredibly stated that “every month he

withdrew USD1,500 per month in Kenya and flew back into Ethiopia with the money to pay his landlord's cousin or brother, whose name he did not know"), the Tribunal notes that the Applicant did not offer any evidence on these additional payments.

66. While for the receipt dated 4 February 2018, not signed by the apparent author, the Applicant and Mr. Ndambuki provided wholly inconsistent and contradictory accounts (highlighted in detail in paras. 40-41 and 44 of the reply), also for the purported "True Statement by Leul Berhe Kshay" dated 29 January 2022, whose equivocal content and form raised many doubts (well highlighted by the Respondent: see para. 46 of the reply), has no probative value and it cannot overcome the evidentiary value arising from the sentences of the above transcribed emails.

67. The Applicant is not blamed by the Administration for having received any rental subsidy himself or for having received illegal payments from the UNHCR, nor for having submitted fraudulent documents to UNHCR. However, on one side, by misrepresenting the amount of rent in his application for rental subsidy, based on the lease provided by the Applicant, Mr. Ndambuki obtained rental subsidy to which he was not entitled. On the other side, the Applicant, by indicating in the contract a higher amount of the rent than that one effectively borne by the tenant, obtained a rent which wouldn't be accepted by the tenant without the mentioned escamotage.

68. When Mr. Ndambuki applied for rental subsidy, his net income was USD6,000.54; the percentage rate established by the ICSC for Ethiopia was 20%; Mr. Ndambuki's individual threshold amount was thus USD1,200. A monthly rent of USD3,500 meant that the excess amount was USD2,299.89, of which Mr. Ndambuki was reimbursed 80%, i.e., USD1,839.91. Had Mr. Ndambuki applied for rental subsidy based on his real monthly rent (USD2,000), the excess amount would have been USD799.89, and he would have received USD639.91 in rental subsidy.

69. The agreement between the Applicant and Mr. Ndambuki (on indicating a rent almost double than the effective) was a fraud on the UNHCR, who received a clear financial loss in the monthly amount above mentioned. Without that agreement, the

Applicant would have had almost half of the rent (USD2,000 instead of USD3,500) and the tenant would have paid more from his pocket (about USD1,381.09 instead of USD160).

70. In other terms, the parties to the rental agreement unlawfully profited by misconceiving the real amount of the rent, from the mechanism of partial reimbursement in force at UNHCR, where the more rent a staff member pays above the individual threshold, the greater the rental subsidy (up to the maximum amounts provided in the AI) he/she receives.

71. The communications between the Applicant and Mr. Ndambuki on 26 March 2018 show that the Applicant was fully cognizant of the fraud and of the fact that they shared the advantages of the fraudulent scheme.

72. In addition, the email exchanges on record shows that the three staff members colluded to fraudulently obtain a subsidy for the agent's fees, which they agreed to split among themselves.

73. On 19 March 2018, after Mr. Ndambuki had shared with the Applicant an email from DHR explaining the calculation of the reimbursement for the agent's fee, which amounted to USD1,839.91, the Applicant wrote to Mr. Ndambuki and Ms. Murungi:

According the rule you should be full agent fee subsidy, receiving the amount of 1839.91 USD. I don't think it's right. with this in mind. please divided between the two of you. each will get USD 920. just deposit the rent amount into my account. (*sic*)

74. The emails from the Applicant to Mr. Ndambuki and Ms. Murungi are manifest and highly persuasive evidence that the Applicant first instigated Mr. Ndambuki to submit a fraudulent claim for the subsidy of agent's costs from UNHCR and then instructed him to divide the subsidy, USD1,839.91, with Ms. Murungi.

75. The Applicant's explanation is unsupported. There is no evidence in the file that the Applicant contracted or paid any real estate agents.

76. It results from the file that Ms. Murungi helped Mr. Ndambuki in renting the Applicant's flat and that the Applicant instructed Mr. Ndambuki to pay USD1,000 to Ms. Murungi.

77. On this issue, the Tribunal shares the Applicant's view that there was nothing illicit in Ms. Murungi's involvement in facilitating the rental contract and in being compensated for her services, rendered within a purely private negotiation relationship.

78. The Applicant has been also accused of engaging in fraud by knowingly assisting Ms. Murungi in submitting a fraudulent claim for rental subsidy in May 2019.

79. Ms. Murungi was assigned to Addis Ababa between 16 October 2018 and 30 June 2020. On 31 May 2019, she applied for rental subsidy in connection with her lease of the Applicant's flat. In her application, Ms. Murungi identified the Applicant as the landlord and stated that monthly rent was USD3,600.

80. On 16 January 2020, the Applicant wrote to Ms. Murungi that, "Stella, Your monthly rent will be \$1750, as agreed. Thank you".

81. This email shows the same modus operandi between the Applicant and Ms. Murungi as in Mr. Ndambuki's fraud. The Applicant knowingly provided Ms. Murungi a false lease with an inflated rent and a false rent receipt, which Ms. Murungi used to claim and obtain a total of USD20,806.06 in rental subsidy to which she was not entitled. As in Mr. Ndambuki's case, there is no evidence of the existence of any agreement so that Ms. Murungi paid part of the rent in cash, and similarly the alleged payment in cash of part of the rent (also in this case withdrawing money in Kenya and delivering it in Ethiopia to unidentified persons, even violating custom rules on transportation of money through borders) is not credible at all.

82. In the matter, the applicable standard of proof is clear and convincing evidence. The Appeals Tribunal has held that "Disciplinary cases are not criminal. Liberty is not at stake [...] Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt— it means that the truth of the

facts asserted is highly probable.” (*Molari* 2011-UNAT-164, para. 30). The Appeals Tribunal has also specified that “clear” means that, “evidence of misconduct must be manifest as opposed to suppositional” and that “convincing” requires, “that this clear evidence be persuasive to a high standard.” By the same token, “[e]vidence, which is required to be clear and convincing, can be direct evidence of events, or may be of evidential inferences that can be properly drawn from other direct evidence.” (*Negussie* 2020-UNAT-1033, para. 45).

83. In this case, the Tribunal is of the view that the documents on record demonstrate, by clear and convincing evidence, that the Applicant had rented out his flat in Addis Ababa to Mr. Ndambuki and Ms. Murungi, based on a lease with an inflated rent (and without paying agent’s fees), and that the latter two used that lease to claim rental subsidy from UNHCR in an amount undue.

(b) Whether the established facts constitute misconduct.

84. By knowingly providing leases and rent receipts that contained false information to Mr. Ndambuki and Ms. Murungi, which they submitted in December 2017 and May 2019, respectively, and because of which they received a total of USD65,025.10 in rental subsidy from UNHCR to which they were not entitled, the Applicant breached his obligation to uphold the highest standards of integrity and engaged in fraud.

85. IOM No. 044/2013 – FOM 044/2013 (Strategic Framework for the Prevention of Fraud and Corruption) (the “Strategic Framework”) defines fraud as:

Any act or omission, including misrepresentation or concealment of a material fact, that knowingly or intentionally misleads, or attempts to mislead, a party to obtain a benefit, whether directly or indirectly, whether for oneself or for a third party. Fraud could involve misappropriation of cash (such as fraudulent claims/disbursements) or other assets (such as fraudulent shipments, falsifying inventory records), or fraudulent statements (purposefully misreporting or omitting information) [...] Fraudulent acts constitute serious acts of misconduct, and include the following examples:

Forging of documents, preparing false entries in UNHCR systems or making false statements to obtain a financial or other benefit to which a person is not entitled.

86. Therefore, the established facts constitute misconduct.

c) whether the disciplinary measure is proportionate to the offence.

87. Considering previous practice and the jurisprudence of the Tribunals, each of the allegations for which the Applicant was sanctioned would thus individually warrant dismissal.

88. UNHCR applies a zero-tolerance approach to fraud and corruption pursuant to the Strategic Framework. This means that there is no place for fraud or corruption in UNHCR and that, where established, such misconduct attracts severe disciplinary sanctions.

89. The Appeals Tribunal has held in *Payenda* 2021-UNAT-1156, at para. 38 that

As a general rule, any form of dishonest conduct compromises the necessary relationship of trust between employer and employee and will generally warrant dismissal.

(d) whether due process was respected

90. It is not disputed that the investigation and disciplinary process fully complied with the requirements set out in UNHCR/AI/2019/15 Administrative Instruction on Conducting Investigations in UNHCR) and UNHCR/AI/2018/18. Indeed, the Applicant's due process was fully respected.

Conclusion

91. In light of the foregoing, the application is dismissed.

Case No.: UNDT/NBI/2022/068

Judgment No.: UNDT/2023/035

(Signed)

Judge Francesco Buffa

Dated this 26th day of May 2023

Entered in the Register on this 26th day of May 2023

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi