



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

Judgment No. 2015-UNAT-523

**Portillo Moya
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Luis María Simón, Presiding
Judge Richard Lussick
Judge Sophia Adinyira

Case No: 2014-600

Date: 26 February 2015

Registrar: Weicheng Lin

Counsel for Ms. Portillo Moya: Marisa MacLennan

Counsel for Secretary-General: Rupa Mitra

JUDGE LUIS MARÍA SIMÓN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2014/021, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 24 February 2014 in the case of *Portillo Moya v. Secretary-General of the United Nations*. The Secretary-General appealed on 25 April 2014 and Ms. Isnia Dayanara Portillo Moya answered on 23 June 2014.

Facts and Procedure

2. Ms. Portillo Moya was a GS-5 Logistics Assistant responsible for the supervision of the warehouses of the World Food Programme (WFP) in Honduras, at the time of the incidents resulting in the disciplinary measure.

3. Ms. Portillo Moya was investigated by the Office of Inspections and Investigations (OSDI) after receipt of written complaints regarding alleged misconducts. Ms. Portillo Moya was placed on special leave with pay pending completion of the investigation.

4. On 29 December 2009, the Director, Human Resources Division (HRD), WFP informed Ms. Portillo Moya that the OSDI investigation had found that she had “breached various WFP Staff Rules and Regulations and related issuance and ha[d] displayed a standard of conduct which is below that required in international civil service”. These breaches included: (i) the use of offensive language contrary to WFP’s Harassment, Sexual Harassment and Abuse of Authority Policy (HSHAP); (ii) assisting transport companies in completing their invoices contrary to the procedures established in the WFP Consolidated Financial Manual; and (iii) knowingly distributing damaged beans and expired vegetable oil after deleting the expiration dates from their container bottles.

5. On 26 March 2010, Ms. Portillo Moya provided WFP with written comments stating, inter alia, that the use of “informal official conversation” was the cultural norm at her workplace, that she provided support to the transport companies in order to avoid delay, and that she did not receive any money from them.

6. On 24 June 2010, following a review of Ms. Portillo Moya's comments, the Director, HRD, informed Ms. Portillo Moya that there was an irretrievable breach of trust as a result of the findings of "a pattern of serious misconduct and a series of grave incidents protracted over a significant period of time, from 2007 to 2009", and that her actions had the potential to negatively impact the WFP's reputation and cause very serious risk to the health and/or lives of WFP beneficiaries. Ms. Portillo Moya was informed that the disciplinary measure of "Separation from Service" would be imposed with no termination indemnities in accordance with the United Nations Staff Rule 10.2(viii).

7. On 27 September 2010, Ms. Portillo Moya filed an application with the Dispute Tribunal contesting the decision to separate her from service.

8. In Judgment No. UNDT/2014/021, the Dispute Tribunal noted that Ms. Portillo Moya was not contesting the disciplinary proceedings or its findings of fact, but only the proportionality of the sanction. Upon review of the facts, the Dispute Tribunal determined that Ms. Portillo Moya contravened her legal obligations as a supervisor and an international civil servant by her regular use of offensive language to her colleagues and subordinates. The Dispute Tribunal also determined that Ms. Portillo Moya had breached the WFP's financial provisions and rules regarding the shipment and delivery of goods. The Dispute Tribunal noted that Ms. Portillo Moya's conduct affected WFP's reputation and potentially endangered the lives of the recipients of WFP assistance. As a result, the Dispute Tribunal determined that the Secretary-General lawfully exercised his right to charge and then sanction Ms. Portillo Moya with serious misconduct.

9. The Dispute Tribunal considered that a staff member must be provided with the legal reason and the explanation for a disciplinary decision of termination. This requires an analysis of any exonerating, aggravating and mitigating circumstances in order to ensure the staff member's right to a proportionate sanction. Having noted no exonerating circumstances, the Dispute Tribunal considered that the following aggravating circumstances existed: Ms. Portillo Moya's illegal actions endangered both the health of the recipients of goods and the image of WFP; as a supervisor, she had an obligation to lead by example; notwithstanding the fact that she had been informed by her supervisor that staff members were complaining of her behavior, she continued to behave the same; and she directly instructed two warehouse managers to distribute damaged and expired food and

ordered the redistribution of expired oil without conducting laboratory tests, which could have created serious medical problems for the beneficiaries of those goods.

10. The Dispute Tribunal also considered that the following were mitigating circumstances:

- (i) this was Ms. Portillo Moya's first offense since joining the WFP in 2000;
- (ii) she cooperated with the investigators and did not contest the facts established by the investigation;
- (iii) there was no evidence of financial gain from her activities;
- (iv) while all staff members and the Organization have obligations in contributing to a harmonious workplace, the majority of staff members in the Logistics Unit appeared to have ignored their individual responsibilities to prevent harassment in the workplace due to their lack of understanding of WFP's prevention policy on harassment and the United Nations' core values;
- (v) the supervised staff members, as well as Ms. Portillo Moya's supervisor, should have taken a greater role in discouraging Ms. Portillo Moya's behavior;
- (vi) one of the complainants also used offensive language creating the impression that such usage was acceptable; and
- (vii) lack of clear evidence that Ms. Portillo Moya was offered assistance during the disciplinary proceedings in the form of reasonable support to deal with the impact of any harassment or abuse of authority or that she was accompanied by a willing work colleague during key stages of the procedure.

11. The Dispute Tribunal found that the memorandum informing Ms. Portillo Moya of the contested decision did not identify and analyse the aggravating and mitigating circumstances and the decision-maker exercised his discretion to impose the sanction without looking at all these aspects, resulting in a disproportionate sanction. The Dispute Tribunal substituted the disciplinary sanction of separation from service *without* termination indemnity with the lesser sanction of separation from service *with* termination indemnity.

Submissions

The Secretary-General's Appeal

12. The Dispute Tribunal erred in law in concluding that the imposed disciplinary sanction was disproportionate to Ms. Portillo Moya's serious misconduct and thereby substituting it with a lesser sanction of separation from service with compensation in lieu of notice *with* termination indemnity. The Administration has broad discretion in disciplinary matters and, absent obvious absurdity, proven abuse or arbitrariness, its discretion should not be disturbed. Noting that the Dispute Tribunal agreed that the evidence against Ms. Portillo Moya established serious misconduct and that the sanction of separation was justified, the Dispute Tribunal should not substitute its own judgment among the various options available to the Secretary-General such as separation with or without notice and with or without termination indemnity. The Administration's decision to separate with compensation in lieu of notice and without termination indemnity was not the most serious sanction available and was reasonable in light of Ms. Portillo Moya's wrongful actions over the years. It was also comparable to other disciplinary decisions affirmed by the Appeals Tribunal.

13. The Dispute Tribunal also erred in law in finding that there were mitigating factors which had been disregarded by the Administration. The Secretary-General considers that

- (i) the serious misconducts in question should not be viewed as Ms. Portillo Moya's first since her appointment in 2000, but rather should be viewed in terms of the number of times these offenses and misconducts were committed during a period of two years;
- (ii) cooperation with an investigation should not be viewed as a mitigating factor given that it is a staff member's duty;
- (iii) the lack of evidence as to personal financial gain is not a mitigating factor given that Ms. Portillo Moya committed fraud in misrepresenting the condition of the commodities to food monitors and beneficiaries;
- (iv) the fact that the majority of staff members in the Logistics Unit failed to discourage Ms. Portillo Moya from using offensive language should not be a

mitigating factor since their position as subordinates naturally makes it more difficult to report or speak up against a supervisor and their failure to do so should not be used to mitigate Ms. Portillo Moya's illegal actions;

(v) the fact that one of the complainants also used similarly inappropriate language cannot excuse Ms. Portillo Moya's behaviour as Ms. Portillo Moya was required to follow standards of conduct set forth in the HSHAP;

(vi) there is no right to be offered reasonable support to deal with the impact of any harassment or abuse of authority that a staff member creates herself. Further, Ms. Portillo Moya's appeal only related to the proportionality of the sanction and not to any procedural defects in the disciplinary proceedings. Consequently, the issue raised by the Dispute Tribunal of whether Ms. Portillo Moya had been accompanied by a companion during the disciplinary proceedings is outside the scope of its review and cannot be considered as a mitigating factor;

(vii) as the Dispute Tribunal did not find any mitigating factors with respect to the distribution of damaged and expired foods, the Secretary-General contends that such serious misconduct alone would have been sufficient to support the disciplinary measure of separation without termination indemnity.

Ms. Portillo Moya's Answer

14. The Dispute Tribunal did not err in examining the totality of the circumstances, including any mitigating factors as part of its consideration of proportionality. The Dispute Tribunal as part of its judicial review function can evaluate whether all relevant facts were properly considered by the Secretary-General.

15. Ms. Portillo Moya requests that the Secretary-General's appeal be dismissed.

Considerations

16. The Appeals Tribunal holds that the Dispute Tribunal erred in law in concluding that the imposed disciplinary sanction was disproportionate and consequently substituting it with a lesser one.

17. As stated by our jurisprudence, when handling disciplinary cases the role of the judicial review is to ascertain whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence.¹

18. The first two parts of that review were not necessary in the present case because the staff member did not challenge the existence of the misconduct or the constitutive facts. Only the proportionality of the sanction of separation without termination indemnity was impugned.

19. It follows from the reasoning of the quoted jurisprudence that the matter of the degree of the sanction is usually reserved for the Administration, who has discretion to impose the measure that it considers adequate to the circumstances of the case and to the actions and behaviour of the staff member involved.

20. This appears as a natural consequence of the scope of administrative hierarchy and the power vested in the competent authority. It is the Administration which carries out the administrative activity and procedure and deals with the staff members. Therefore, the Administration is best suited to select an adequate sanction able to fulfil the general requirements of these kinds of measures: a sanction within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance, etc.

21. That is why only if the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity, that the judicial review would conclude in its unlawfulness and change the consequence (i.e., by imposing a different one). This rationale is followed in the jurisprudence of this Tribunal.² If that is not the case, judicial review should not interfere with administrative discretion.

¹ See *Kamara v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-398, para. 29 quoting *Haniya v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-024, para. 31.

² See *Aqel v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-040, para 35 and *Konaté v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-334, para 21.

22. In the present case, serious misconduct was established and the disciplinary measure of separation from service without termination indemnity was proportionate to it. The misconduct put public health at risk as food was distributed with altered expiration dates to hide the fact of its expiration. This kind of behaviour, coming from a manager working precisely in an entity whose goals are to secure food for the people of the world, cannot be tolerated and certainly calls for a termination, since it causes a total loss of trust in the staff member who is involved in those kinds of manoeuvres, and who also committed other misconduct. All staff members entrusted with the responsibility for international humanitarian aid should behave with the highest level of integrity and thoroughness in relation to their functions. Any staff member whose duties include control of these kinds of goods and who acts in such a deviated manner as Ms. Portillo Moya did should not be spared disciplinary measures.

23. It must be taken into account that the adopted sanction was not the most severe available and that the Dispute Tribunal erred in considering certain circumstances as mitigating factors when they actually do not constitute such.

24. Even if the misconduct had taken place for the first time, it was too serious to justify a lighter sanction especially considering the fact that it also had been committed over a period of time. As cooperating with the investigation constitutes a duty for the staff member (not affecting the principle of innocence), it cannot be considered a relevant mitigating factor either. Similar conclusions can be reached with regard to the analysis and evaluation conducted by the Dispute Tribunal regarding the other alleged mitigating factors, which resulted in the Dispute Tribunal stepping irregularly into the area of administrative discretion.

25. Hence, this Tribunal holds that the imposed sanction was neither absurd nor disproportionate and should not have been disturbed by judicial review.

Judgment

26. The appeal is allowed; the Dispute Tribunal's Judgment is vacated and the impugned administrative decision is affirmed.

Original and Authoritative Version: English

Dated this 26th day of February 2015 in New York, United States.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Adinyira

Entered in the Register on this 17th day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar