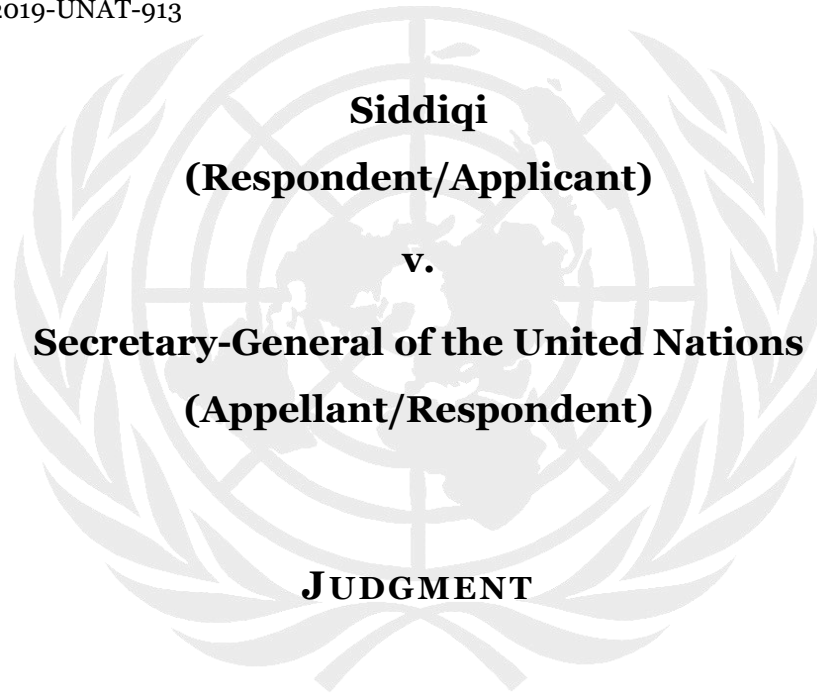




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-913



**Siddiqi
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge Dimitrios Raikos Judge John Raymond Murphy
Case No.:	2018-1207
Date:	29 March 2019
Registrar:	Weicheng Lin

Counsel for Respondent/Applicant:	Mohamed Abdou, OSLA
Counsel for Appellant/Respondent:	John Stompor

JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/086, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 3 September 2018, in the case of *Siddiqi v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 2 November 2018, and Mr. Mohammad Siddiqi filed his answer on 7 January 2019.

Facts and Procedure

2. On 18 April 2010, Mr. Siddiqi joined the United Nations International Children's Emergency Fund (UNICEF) on a fixed-term appointment as a Project Officer (NO-2) in Kunduz Province, Afghanistan. In January 2013, Mr. Siddiqi separated from the Organization following the abolition of his post. On 14 April 2013, he was re-appointed on a fixed-term appointment as an Education Officer (NO-1) in the UNICEF Bagdhis Office, still in Afghanistan.

3. On 23 April 2017, a mandated Harmonized Approach to Cash Transfers (HACT) spot check took place and certain irregularities concerning the potential misuse of UNICEF funds were raised against several staff members in Bagdhis province.

4. On the morning of 16 May 2017, Mr. EM, Programme Assistant, Mr. MR, Child Survival and Development Officer, and Ms. LM, Senior Finance/Accounts Associate, met for a conversation on the matter. Mr. Siddiqi entered the room and joined the conversation.

5. On 17 May 2017, Mr. AE, Mr. Siddiqi's first reporting officer (FRO), reported to Ms. AK, Representative, UNICEF, Afghanistan Country Office, and Mr. DH, former Chief of Operations, that "on Tuesday 16 May 2017 while [he] was on the way to Qalai-Naw [Mr. Siddiqi] told in front of Ms. LM who was coming for a mission for spot check and other Bagdhis colleagues that 'if his contract be terminated he will bring a pistol and kill Mr. [MY], [Mr. AE] and some others'".¹ Mr. AE added that he considered this as a potential threat to his life. After a risk assessment, the United Nations Security Office in Afghanistan warranted special measures for Mr. AE and Mr. MY.

¹ Impugned Judgment, para. 9.

6. On 11 July 2017, Mr. Siddiqi was placed on administrative leave with full pay pending the investigation by the Office of Internal Audit and Investigations (OIAI) concerning allegations of threats to kill “for an initial period of [three] months or upon OIAI’s completion of its investigation and any subsequent disciplinary process, whichever comes first.”²

7. Between June and August 2017, the OIAI investigators interviewed Mr. Siddiqi as well as several staff members. The staff members interviewed were Mr. AE— the complainant and Mr. Siddiqi’s FRO—Mr. MY, Head of UNICEF Herat Zone Office, Ms. EK, Chief Field Office, Herat, and the three staff members who were present during the conversation in which the alleged threats were made (Mr. EM, Mr. MR, and Ms. LM).

8. In August 2017, the OIAI issued its investigation report entitled “Allegation of threats to kill”, finding that Mr. Siddiqi made a “genuine threat” to “bring a gun to the office to kill staff if his contract was ended with the [O]rgani[z]ation”.³

9. On 5 September 2017, Mr. Siddiqi was notified of the charges against him, namely “issuing [a] threat to kill other staff members in the Afghanistan Country Office in violation of [S]taff [R]egulation 1.2 (b) and [S]taff [R]ules 1.2 (g) and 10.1 (a) and constituting misconduct under CF/EXD/2012-005 [Disciplinary process and measures], [Sections] 1.4 (a), (c) a[n]d (m).”⁴

10. On 23 October 2017, Mr. Siddiqi filed his response to the charges denying all allegations of misconduct. He also pointed to numerous inconsistencies in the evidence gathered by the investigators and raised mitigating factors.

11. On 6 November 2017, the Deputy Executive Director, Management, UNICEF, issued the contested disciplinary measure, finding that:⁵

- a. There is clear and convincing evidence that [Mr. Siddiqi] threatened to kill other staff members in the Afghanistan Country Office in violation of [S]taff [R]egulation 1.2(b) and [S]taff [R]ules 1.2(g) and 10.1(a);

² *Ibid.*, para. 10.

³ *Ibid.*, para. 12.

⁴ *Ibid.*, para. 13.

⁵ *Ibid.*, para. 15.

- b. This constitutes misconduct under CF/EXD/2012-005, s[ecs]. 1.4(a), (c) and (m); and
- c. [T]he appropriate sanction is dismissal.

12. In its Judgment, the UNDT rescinded the contested decision to dismiss Mr. Siddiqi and replaced the disciplinary measure with suspension without pay for a three-month period. The UNDT set an in-lieu compensation amount as one-year net base salary based on Mr. Siddiqi's salary on 6 November 2017. Finding there was an absence of evidence of additional harm, the UNDT rejected his claim for compensation under Article 10(5)(b) of the UNDT Statute.

13. Given that the evidence was essentially based on witness testimonies, the UNDT held a hearing to review the methodology employed by the investigators to collect the evidence and to hear the direct witnesses of the alleged facts on their account of the events. The UNDT found that the witness statements of the three direct witnesses of the incident, which formed the basis of the contested decision, were not sufficiently reliable and credible to establish the alleged facts in accordance with the required standard. In this regard, the UNDT noted that the legal framework (CF/EXD/2012-005) was vague and did not contain an exhaustive set of norms concerning the investigation's procedure and the investigation report did not detail the conduct of the investigation and only referred to the production of witness statements collected following interviews conducted by Skype. The UNDT ordered audio recordings of witness interviews which revealed that witnesses had been asked questions in writing in advance. The witnesses' written answers had not been disclosed to the decision-maker or otherwise mentioned in the investigation report. The audio recordings had not been provided either to the decision-maker. The entire investigation file was not disclosed to the Deputy Executive Director, Management, UNICEF. For these reasons, the UNDT found that the procedure used to collect the statements of the three key witnesses of the incident did not present sufficient guarantees to ensure their reliability and credibility.

14. The UNDT further held that the witness evidence was not reliable because the written questions were leading and suggestive, and the lack of verbatim testimony (they were summarized instead) affected their reliability especially since the crux of the matter dealt with the exact words that were allegedly pronounced by Mr. Siddiqi. At the UNDT hearing, the investigator admitted that she included the word "gun" in Ms. LM's written statement, when it had not been said in the actual interview. This casts doubt on the investigators'

impartiality and/or competence. In addition, the witness statements were not taken under oath. Further, the UNDT hearing revealed that Mr. Siddiqi was speaking Farsi when he made the alleged statement (not English) which was not mentioned in any witness statement summaries or in the investigation report. The UNDT noted this was critical since it could not be excluded that the statement was not accurately translated by the witnesses. There were inconsistencies in the witness statements, and their previous answers were not brought to the attention of the decision-maker.

15. The UNDT found that the facts upon which the disciplinary measure was based were not established through clear and convincing evidence rendering Mr. Siddiqi's statement unable to be interpreted as a real and serious threat to kill. The UNDT found that the three direct witnesses were sufficiently coherent, however, to conclude that Mr. Siddiqi had threatened to kill some staff members, although not consistent to conclude that he had threatened to kill any specific staff member or a number of people. Although he used the word "kill" his statement was not coherent and specific enough to denote intent to execute a threat to kill and the witnesses confirmed they did not take the threat seriously. Rather, the statement was intimidating and aggressive in tone directed to the individuals who were conducting and discussing an HACT spot check and referred to possible consequences if he was terminated as a result of the spot check exercise. Thus, the UNDT found that Mr. Siddiqi's statement denoted intent to interfere with the spot check exercise and that this violated Staff Rule 1.2(g) and Section 1.4(a) of CF/EXD/2012-005.

16. The UNDT then reviewed information circulars that reported imposed sanctions in disciplinary cases where staff members used threatening language for which they were demoted and where staff members performed an act that was intimidating in nature for which they were censured and demoted. Taking this into consideration, the UNDT found it appropriate to replace the sanction of dismissal, which was the most severe sanction, with a suspension without pay for a period of three months pursuant to Section 4.3(d) CF/EXD/2012-005.

Submissions

The Secretary-General's Appeal

17. The Secretary-General requests the Appeals Tribunal to vacate the Judgment and uphold the Administration's decision to dismiss Mr. Siddiqi for threatening to kill staff members. In the alternative, if the Appeals Tribunal agrees with the UNDT's finding, the Secretary-General

requests that the UNDT's award of compensation in lieu of rescission be reduced. In support, the Secretary-General argues that the UNDT erred in fact and law in finding that there was not clear and convincing evidence that Mr. Siddiqi had threatened to kill other staff members. The UNDT based its conclusion on the finding that the witness statements were unreliable, Mr. Siddiqi did not identify specific staff members in his threat, and his threat was not sufficiently serious. In finding the witness statements were not reliable, the UNDT noted they were not taken under oath as required in *Nyambuza*.⁶ However, the facts of this case are distinguished from *Nyambuza* in that the witness statements were consistent (Mr. KR stated that Mr. Siddiqi threatened to kill Mr. AE and Mr. MY; Ms. LM stated that Mr. Siddiqi threatened to kill Mr. AE and Mr. MY; and Mr. EM testified that Mr. Siddiqi threatened to kill Mr. AE and Mr. MY). This consistency is ample indicia of reliability in line with *Nyambuza* wherein the Appeals Tribunal stated that "when a statement is not made under oath or affirmation, however, there must be some other indicia of reliability or truthfulness for the statement to have probative value".⁷ Further in *Mbaigolmem*, the Appeals Tribunal held that where the "UNDT believed additional evidence was required it was obliged to direct the parties to adduce that evidence in the oral hearing and explain to them the implications of not doing so".⁸ Unlike in *Mbaigolmem*, the witnesses in the instant matter provided evidence in oral hearings before the UNDT.

18. In addition, the UNDT erred in finding that Ms. LM's witness testimony was unreliable because the investigator added the word "gun" to her statement although she did not say it in her interview. The investigator did not invent the word. It was introduced by Mr. AE's initial report of the threat. Mr. KR and Mr. EM also stated that Mr. Siddiqi threatened to bring a "gun" or "pistol" to kill staff members. The investigator went through a three-fold process (e-mailed inquiry, recorded skype interview, and opportunity to review and amend the statement) with the witnesses culminating in a signed statement. Ms. LM confirmed the wording and signed it. Further, the Secretary-General argues that the investigators did not include leading or biased comments/questions in e-mails to witnesses, and that the UNDT should not have concern that two of the direct witnesses shared an office since the investigators' message indicated it was strictly confidential and requested they not discuss their answers with anyone else. The witnesses as staff members are under an obligation to cooperate and act with integrity. There is no evidence to support the UNDT's assumption that the two witnesses had colluded.

⁶ *Nyambuza v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-364.

⁷ *Ibid.*, para. 35.

⁸ *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-819, para. 30.

19. Lastly, the UNDT indicated that the investigation report failed to mention that Mr. Siddiqi was speaking Farsi; however, this is not material as the witnesses were also Farsi speaking national staff and nothing was lost in translation. Based on the foregoing, the UNDT erred in finding the witness statements were not sufficiently reliable to establish the alleged facts. The UNDT also erred in fact and law in finding the witness statements were not consistent enough to be considered clear and convincing evidence. All three individuals present during the incident gave evidence that Mr. Siddiqi had threatened to kill Mr. AE and Mr. MY.

20. In addition, the UNDT erred in fact in its conclusion that the threats had not been serious. The UNDT based this on its conclusion that the three witnesses present during the alleged incident confirmed that they did not take the threat seriously and did not report it. However, Ms. LM testified before the UNDT that she had mentioned it to Mr. AE, as head of UNICEF's office where the threats were made and to Mr. Siddiqi's first reporting officer, who was a relevant authority within UNICEF to receive such a report. In addition, the UNDT erred in concluding that the witness evidence was not consistent since Mr. EM and Mr. KR testified that Mr. Siddiqi had wanted to scare those who were conducting the spot check exercise and Ms. LM was in charge of the spot check exercise, while Mr. AE and Mr. MY were not involved. This is incorrect as Mr. AE and Mr. MY were connected with the spot checks, which were initiated as a result of a report prepared by Mr. AE.

21. The Secretary-General also submits that the UNDT erred in finding that the personal security risk assessments conducted for Mr. AE and Mr. MY were unreliable and irrelevant evidence. These assessments were relevant to the seriousness of the threats. The threats were of sufficient gravity for the United Nations Security Office to recommend placing Mr. Siddiqi on administrative leave. The Field Security Coordination Officer recommended that Mr. MY should stop his visits to Badghis. While the UNDT noted that the assessments were not signed or dated, the Field Security Coordination Officer testified before the UNDT that he completed the assessments. Based on the foregoing, the facts were established by clear and convincing evidence that Mr. Siddiqi made this threat against specific individuals and these facts legally amounted to misconduct. The Secretary-General further argues that the sanction of dismissal was proportionate to the misconduct as threatening to kill colleagues is serious and unacceptable.

22. Based on the foregoing, the Secretary-General requests the Judgment be vacated. In the alternative, the Secretary-General argues that the amount of compensation awarded in lieu of rescission should be reduced. The purpose of compensation is to place a staff member in the

same position he or she would have been in had the unlawful decision not occurred. In the instant matter, Mr. Siddiqi had under two months left on his appointment at the time of his dismissal and an award of one year's net base salary unjustly enriched him. In addition, the UNDT ordered suspension without pay for three months. Thus, during his remaining contract term he would not have received salary. Further, the Secretary-General submits that Mr. Siddiqi testified that he worked as a contractor earning USD 2,700 per month since February 2018, which was not taken into consideration by the UNDT when setting the award.

Mr. Siddiqi's Answer

23. Mr. Siddiqi requests the Appeals Tribunal to reject the appeal and uphold the Judgment. Mr. Siddiqi argues that the Secretary-General did not deny the major irregularities identified by the UNDT, namely that the decision-maker did not have the total body of evidence gathered by the investigators, the investigators failed to take proper measures to ensure two witnesses who shared an office did not coordinate their account, the absence of a verbatim statement affected their reliability, the investigator interfered with evidence by editing statements to reflect her own interpretation of the evidence and by adding information derived from other sources, the investigation report referred improperly to unrelated allegations against him without ample opportunity to defend himself, and lastly, the investigators did not confront the witnesses about their inconsistencies. For these reasons the UNDT correctly held that the witnesses' testimonies were unreliable. Furthermore, Mr. Siddiqi notes that the UNDT held a three-day hearing and determined the witness testimonies were not credible.

24. The Secretary-General fails to identify errors in the UNDT's Judgment, let alone one that would render its decision manifestly unreasonable. In the absence of a compelling argument that the UNDT erred in law or in fact resulting in a manifestly unreasonable decision, the Appeals Tribunal has repeatedly ruled that it will not interfere with the findings of the UNDT.

25. Mr. Siddiqi further argues that the UNDT did not err in finding the witness statements had not been taken under oath which impacted their reliability. The UNDT correctly pointed out there were important inconsistencies between the witness statements collected by the investigator and the witnesses' previous written answers to her questions. The UNDT also pointed out there were discrepancies between the same statements of the same witnesses at the investigation stage and at trial. Moreover, the UNDT correctly detailed that the audio recording of the interview with Ms. LM revealed that the witness never mentioned the word "gun" and that

this addition was of significant import for the investigation. Also, the UNDT correctly noted the failure of the investigation report to indicate Mr. Siddiqi was speaking Farsi, which was essential in quoting exactly verbatim what Mr. Siddiqi was alleged to have said. The UNDT correctly found that the evidence was not consistent for it to conclude that Mr. Siddiqi had threatened to kill any specific staff members. The witnesses were, however, consistent on stating that Mr. Siddiqi was speaking fast and that none of them took the threat to be serious. The UNDT was also correct to find the risk assessments unreliable as they were prepared based on suspicions and unverified information.

26. The UNDT correctly determined the amount of compensation in lieu of rescission. The Appeals Tribunal has ruled that “[in-lieu] compensation is not compensatory damages based on economic loss. Thus, there is no reason to reduce this award by the amount of the termination indemnity.”⁹

27. Mr. Siddiqi also submits that the Secretary-General’s argument that he was unjustly enriched due to only two months left in his contract is unconvincing as his post was in the cycle plan until 2019 and his vacant post has yet to be filled. Mr. Siddiqi requests the Secretary-General to explain to the Appeals Tribunal why he is not being reinstated as his previous post in UNICEF is still vacant and there is no practical impediment precluding the Organization from returning him to his post. The amount of compensation awarded is appropriate and reasonable in light of the serious harm to his reputation, the damage to his career prospects as a result of his separation, and the disruption of his life caused by the immediate and abrupt nature of summary dismissal.

Considerations

Standard of review in disciplinary cases

28. In disciplinary cases under Article 2(1)(b) of the UNDT Statute, the UNDT will examine the following: i) whether the facts on which the disciplinary measure is based have been established (by a preponderance of evidence, but where termination is a possible sanction, the facts must be established by clear and convincing evidence); ii) whether the established facts

⁹ *Zachariah v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-764, para. 36, quoting *Eissa v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-469, para. 27.

amount to misconduct; iii) whether the sanction is proportionate to the offence; and iv) whether the staff member's due process rights were respected.

The UNDT's finding that there was no clear and convincing evidence that Mr. Siddiqi had threatened to kill identified staff members

29. We find that the UNDT erred in law and fact leading to a manifestly unreasonable decision when it held that Mr. Siddiqi had not threatened to kill identified staff members but only had made an unspecified threat to kill "some" staff members.

30. The statements of the three witnesses, who were present during the meeting on 16 May 2017 (Ms. LM, Mr. KR and Mr. EM), render clear and convincing evidence that Mr. Siddiqi did not only utter an unspecified threat but that he had threatened to kill identified staff members. From the beginning, during the disciplinary investigation, and before the UNDT, the witnesses have continuously and consistently stated that Mr. Siddiqi identified specific staff members and mentioned names when uttering his threat to kill. All three witnesses agreed that at least two names were mentioned, Mr. AE, Mr. Siddiqi's First Reporting Officer, and Mr. MY, the Head of UNICEF, Herat Zone Office. Their testimonies differed as to whether Ms. LM and a fourth staff member named "Somaye" were also targeted. The UNDT's conclusion that, due to this contradiction, the evidence was insufficient, is unreasonable. There is no reason to believe, and the UNDT did not find, that the witnesses colluded and knowingly gave a false statement. As all three of them heard the exact same two names, an error can also be excluded. On the contrary, the remaining discrepancies between their testimonies can be easily explained given the fact that, all three witnesses indicated that Mr. Siddiqi was very upset, emotional, angry, and spoke very fast. Also, all three witnesses testified that Mr. Siddiqi directly addressed Ms. LM and spoke only to her while Mr. KR and Mr. EM were sitting at their desks. Therefore, Mr. Siddiqi would not have uttered the name "Ms. LM" but said "you" instead.

31. It is also unreasonable that the UNDT questioned the credibility of the witness statements because "Mr. E.M. and Mr. K.R. testified that [Mr. Siddiqi] wanted to scare those who were conducting the spot check exercise and Ms. L.M. was in charge of the spot checks whilst Mr. AE and Mr. MY were not involved in conducting this exercise".¹⁰ In his appeal, the Secretary-General correctly points out that the UNDT's assumption is not correct and that both Mr. AE and Mr. MY were connected with the spot check. Not only did Mr. AE testify to this

¹⁰ Impugned Judgment, para. 60.

regard in his witness statement, dated 2 August 2017, Mr. Siddiqi himself (in his response to the charge letter and in his 24 July 2017 comments to the transcript of his interview) has also confirmed that Mr. AE and Mr. MY were involved in the spot check.

32. Further, the UNDT ignored Ms. LM's witness statement, who in her testimony before the UNDT quoted Mr. Siddiqi's words as follows: "If, right now, I am blamed for some of the abuse of this money or something, maybe if right now – they wanted to terminate me, if the case of terminat[ion] is th[e] issue, before I go from UNICEF I will kill about six to 10 people before [I] go out of the office. It can be either (indistinct), [Mr.] AE or Mr. MY or you or Somaye or anybody around this office who are blaming me." At the center of Mr. Siddiqi's anger and frustration clearly stood the possibility of him being terminated, a decision in which Mr. AE, his FRO, and Mr. MY, the Head of UNICEF Herat Zone Office, would have played an important role.

33. The UNDT's holding that "it appears from the testimony of all the direct witnesses that [Mr. Siddiqi] did not make any specific and serious threat to kill but rather a spontaneous and confused statement where he referred to the killing of 'some' staff members while mentioning the names of various staff members in the course of the discussions about the spot check exercise" is also without any foundation.¹¹ It is in direct contradiction to the statement of Ms. LM, cited above, who testified that Mr. Siddiqi said that he would kill six to 10 people, and that it could be Mr. AE, Mr. MY, her or "Somaye". Mr. KR testified that Mr. Siddiqi said: "If I get terminated due to this case I will kill these people" and that Mr. Siddiqi named Mr. AE and Mr. MY; he did not remember any other names. There is nothing in the witness statements to support the UNDT's assumption that there were two different and distinct parts of the conversation, on the one hand, a threat to kill "some" unidentified staff members, and on the other hand, a discussion about the spot checks where names of certain staff members were mentioned. None of the witnesses have testified to this respect.

The UNDT's finding that the threat was not serious

34. The UNDT also erred in law and fact leading to a manifestly unreasonable decision when it concluded that Mr. Siddiqi's threat was not serious but "rather appears to be an outburst triggered by the Applicant's fear that his employment may have been at jeopardy".¹²

¹¹ *Ibid.*, para. 61.

¹² *Ibid.*

35. The UNDT mainly drew a conclusion from its assumption that Mr. Siddiqi only uttered a general and unspecified threat but did not threaten to kill identified staff members. However, this is a factual and legal error, because, as stated above, there is clear and convincing evidence that Mr. Siddiqi did threaten to kill at least two identified staff members.

36. Under the circumstances, it was a lawful and reasonable presumption of the Secretary-General to consider Mr. Siddiqi's threat was serious. Three witnesses have testified that he had uttered a threat to kill identified staff members, namely Mr. AE and Mr. MY. Mr. Siddiqi had a poor relationship with his FRO, Mr. AE, for a long time.

37. The UNDT's reasoning that the "witnesses confirmed that they did not take the threat seriously and did not report it to the relevant authorities" has no merit.¹³ The UNDT itself found that Ms. LM had informed Mr. Siddiqi's FRO, Mr. AE, about the incident who then himself filed a complaint against Mr. Siddiqi. Furthermore, the UNDT misrepresented Ms. LM's witness statement which clearly confirmed that she took the threat seriously. Before the UNDT, she stated:

I was very worried why he has this reaction against me [and] I was thinking that maybe suddenly he will beat me or something. [...] Up to now, I'm sometimes thinking it can be – happen in future, what Mr. Siddiqi – to me, but sometimes saying no, maybe this is the nature of the men. They're shouting and there will not be – nothing, but I'm not sure up to now.

38. Further, all three witnesses confirmed that Mr. Siddiqi calmed down after they had assured him that nobody was going to blame him and that he would not be terminated. The Secretary-General, in his assessment of the seriousness of the threat, may take into account what would and could happen if any unfavourable decisions were to be taken against Mr. Siddiqi by Mr. AE and Mr. MY, if Mr. AE, for example, gave Mr. Siddiqi an unfavourable performance evaluation.

39. Finally, in assessing the seriousness of Mr. Siddiqi's threat to kill Mr. AE and Mr. MY, the UNDT erred in only relying on the perception of the people who directly witnessed this threat. It should also have taken into account the "broader picture" as stated above, namely the perception expressed by Mr. AE and the personal security risk assessments. We find that in a situation like the present, where a staff member in Afghanistan threatens to kill other identified staff members,

¹³ *Ibid.*

the Tribunals should grant the Secretary-General a broad discretion as to the question whether the threat is to be considered serious or not.

Degree of Misconduct and Proportionality

40. The Secretary-General had the discretion to determine whether Mr. Siddiqi's threat to kill identified staff members amounted to misconduct or serious misconduct. For the reasons noted above, the UNDT erred in finding that the facts did not establish that Mr. Siddiqi had made a threat against specified staff members. In turn, the UNDT erred, for the reasons noted above, in finding that the threat was not serious. As we have stated, it is our view that the established facts do indicate that Mr. Siddiqi made a threat to kill specific staff members and that this threat was serious. In turn, the UNDT erred in considering the misconduct as anything less than serious misconduct. The Appeals Tribunal, therefore, finds that a determination that the said conduct was serious misconduct was a reasonable exercise of the Secretary-General's discretion.

41. The Appeals Tribunal's jurisprudence on the principle of proportionality is best described in *Sanwidi* where we held:¹⁴

... In the present case, we are concerned with the application of the principle of proportionality by the Dispute Tribunal. In the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective. This entails examining the balance struck by the decision-maker between competing considerations and priorities in deciding what action to take. However, courts also recognize that decision-makers have some latitude or margin of discretion to make legitimate choices between competing considerations and priorities in exercising their judgment about what action to take.

... When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also

¹⁴ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-082, paras. 39, 40, 42, and 47.

examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

[...]

... In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decisionmaker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

[...]

... Keeping in mind the matters outlined above, we hold that the UNDT, in exercising judicial review, may interfere with the exercise of the Secretary-General's discretion in disciplinary proceedings against a staff member on the ground that the disciplinary measure is not proportionate to the misconduct. The UNDT is not bound by the jurisprudence of the former Administrative Tribunal, although in appropriate cases its judgments concerning disciplinary proceedings may have non-binding persuasive value. However, while exercising judicial review, due deference must be shown to the Secretary-General's administrative decisions because Article 101(3) of the 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.

42. It follows, and we have consistently held, that the degree of the sanction is usually reserved for the Administration, which has discretion to impose a measure that it considers adequate to the circumstances of the case and in light of the actions and behaviour of the staff member involved. As we have stated in *Portillo Moya*:¹⁵

... 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

¹⁵ *Portillo Moya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-523, paras. 20 and 21.

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.

... 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.[] If that is not the case, judicial review should not interfere with administrative discretion.

43. The Secretary-General also has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose. We note that, in the 7 November 2017 letter, the Administration considered Mr. Siddiqi's health status as well as his family situation and prior performance.

44. Given the seriousness and degree of Mr. Siddiqi's misconduct, the sanction of dismissal, though harsh, was not unreasonable, absurd, or disproportionate. The Appeals Tribunal finds that it was a reasonable exercise of the Secretary-General's discretion to determine that a threat to kill identified staff members rendered Mr. Siddiqi unfit for further service with the Organization and is satisfied that dismissal was neither unfair nor disproportionate to the seriousness of the offence. As such, the Appeals Tribunal finds that it was a reasonable exercise of the Administration's broad discretion in disciplinary matters; a discretion with which it will not lightly interfere. The UNDT thus erred in finding the sanction disproportionate and in substituting its opinion for that of the Administration.

Due process

45. The Appeals Tribunal is satisfied that the key elements of Mr. Siddiqi's due process rights were respected.

46. We find that the UNDT erred in criticizing the investigation procedure used to collect the statements of the three key witnesses of the incident, namely Ms. LM, Mr. KR and Mr. EM and stating that it did not present sufficient guarantees to ensure their reliability and credibility. We note that all three witnesses testified that Mr. Siddiqi had threatened to kill at least two identified staff members and had signed written statements to this effect. However, this Tribunal will not go further into this issue because, even if any violations of Mr. Siddiqi's

due process rights had occurred, they were cured during the proceedings before the UNDT, which heard the three witnesses and others under oath and gave Mr. Siddiqi the opportunity to confront and cross-examine them. The statements of the three key witnesses before the UNDT render clear and convincing evidence that Mr. Siddiqi threatened to kill at least two identified staff members.

47. The Appeals Tribunal is satisfied that the key elements of Mr. Siddiqi's rights of due process were met and that the interests of justice were served in this case. Mr. Siddiqi was fully informed of the charges against him, the identity of his accuser, the witnesses and their testimony; as such, he was able to mount a defense and to call into question the veracity of their statements.¹⁶

¹⁶ *Leal v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-337, para. 24. See also *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, paras. 33-40.

Judgment

48. The Secretary-General's appeal is granted and Judgment No. UNDT/2018/086 is hereby vacated.

Original and Authoritative Version: English

Dated this 29th day of March 2019 in New York, United States.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Murphy

Entered in the Register on this 29th day of May 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar