



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2024-UNAT-1471

Fouzia Rizqy
(Appellant)

v.

Secretary General of the United Nations
(Respondent)

JUDGMENT

Before:	Judge Abdelmohsen Sheha, Presiding Judge Nassib G. Ziadé Judge Graeme Colgan
Case No.:	2023-1838
Date of Decision:	28 June 2024
Date of Publication:	13 August 2024
Registrar:	Juliet E. Johnson

Counsel for Appellant: Self-represented

Counsel for Respondent: Sylvia Schaefer

JUDGE ABDELMOHSEN SHEHA, PRESIDING.

1. Ms. Fouzia Rizqy, former staff member of the United Nations Mission for the Referendum in Western Sahara (MINURSO), contested a disciplinary decision to separate her from service, with compensation in lieu of notice and with termination indemnity, for having submitted false information with respect to her claims for reimbursement for medical expenses (contested decision).
2. By Judgment No. UNDT/2023/056, the United Nations Dispute Tribunal (UNDT) dismissed the application on the merits (impugned Judgment).¹
3. Ms. Rizqy lodged an appeal of the impugned Judgment with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT).
4. For the reasons set out below, the Appeals Tribunal dismisses the appeal and affirms the impugned Judgment.

Facts and Procedure²

5. Ms. Rizqy joined the Organization on 21 August 2006 as a Team Assistant at MINURSO Guard Force Unit in Laayoune, Western Sahara, at the G-3 level, a position she held until her separation from service.³
6. On 6 June 2018, she submitted to Cigna International Health Service (Cigna), the Organization's global health insurance provider, a claim for reimbursement of medical expenses under the Organization's Medical Insurance Plan (MIP).⁴ Attached to the claim were three type-written invoices indicated to have been issued by Al Hidaya Pharmacy (AHP) in Laayoune, totalling 5,377.20 Moroccan dirham (MAD), equivalent to approximately USD 578.13.
7. Accordingly, Cigna processed a payment of USD 462.51 to Ms. Rizqy in settlement of her medical expenses.⁵

¹ *Rizqy v. Secretary-General of the United Nations*, Judgment dated 14 June 2023.

² Summarized from the impugned Judgment as relevant to the appeal.

³ Impugned Judgment, para 4.

⁴ *Ibid.*, para. 5.

⁵ *Ibid.*, para. 6.

8. In May 2019, Cigna's Fraud Investigation Unit (FIU) conducted a data mining exercise instigated due to what Cigna viewed as a significant increase in customer spending over the previous three-year period as well as the unreasonable and uncustomary claims for the region, and also because of irregularities that FIU had discovered in connection with another case related to the submission of false AHP invoices.⁶ As a product of the data mining exercise, FIU discovered data suggesting irregularities in the case of Ms. Rizqy.

9. Consequently, FIU inquired with AHP about the authenticity of the three invoices Ms. Rizqy had submitted on 6 June 2018.⁷ By e-mail of 21 May 2019, AHP informed FIU that none of the invoices were authentic and that they had not been issued by AHP. AHP indicated that any genuine AHP invoices were handwritten, not printed or copied. AHP also stated that the false invoices were inflated, and the prescribed medication was not consistent with the diagnosis on the invoices. AHP further noted that the name of Ms. Rizqy on the invoices was unknown to AHP as the name was not recorded in its system. FIU thus concluded that the three invoices she had submitted were not authentic and requested her to return the payments made in relation to her claims of 6 June 2018. FIU referred the case to the Organization.⁸

10. On 9 July 2019, the Investigations Division of the Office of Internal Oversight Services (OIOS) received from the Finance Division of the Department of Management Strategy, Policy and Compliance (DMSPC) at the United Nations Headquarters (UNHQ) in New York, a report of possible misconduct, implicating Ms. Rizqy and several other staff members at MINURSO.⁹

11. In conducting the investigation, OIOS interviewed Ms. Rizqy on 24 September 2019.¹⁰ On 30 April 2020, OIOS issued the Investigation Report and referred the matter to the Office of Human Resources (OHR).¹¹

12. By memorandum dated 18 March 2021, the Director of the Administrative Law Division, OHR, informed Ms. Rizqy of the allegations of misconduct against her.¹² On 11 June 2021, following an extension of the initial time limit, she submitted her comments on the allegations.

⁶ Annex to the Sanction Letter, para. 14.

⁷ Impugned Judgment, paras. 7 and 31.

⁸ Annex to the Sanction Letter, para. 14.

⁹ Impugned Judgment, para. 8.

¹⁰ *Ibid.*, paras. 9-10.

¹¹ Annex to the Sanction Letter, para. 14.

¹² Impugned Judgment, paras. 11-12.

13. By the Sanction Letter dated 3 December 2021, the Assistant Secretary-General for Human Resources (ASG/HR), on behalf of the Under-Secretary-General for DMSPC (USG/DMSPC), informed Ms. Rizqy of the contested decision.¹³ The USG/DMSPC concluded that the allegations against her were established by clear and convincing evidence and her conduct violated Staff Regulations 1.2(b) and 1.2(q) and Section 10.1 of Administrative Instruction ST/AI/2015/3 (Medical insurance plan for locally recruited staff at designated duty stations away from Headquarters).¹⁴ With regard to the proportionality of the sanction, the Sanction Letter stated:

In determining the appropriate sanction, the USG/DMSPC considered the nature of your actions, the past practice of the Organization in matters of comparable misconduct, as well as whether any mitigating or aggravating factors apply to your case.

The USG/DMSPC considered that there are no aggravating factors applicable to your case. The USG/DMSPC considered your approximately 14 years of service as a General Service staff member in a hardship duty station, as a mitigating factor.

14. The disciplinary sanction of separation from service became effective upon receipt of the Sanction Letter by Ms. Rizqy on 6 December 2021.¹⁵

15. On 2 March 2022, she filed an application with the UNDT.¹⁶

The impugned Judgment

16. By Judgment No. UNDT/2023/056 dated 14 June 2023, the UNDT found the application receivable, held that the contested decision was lawful, and dismissed the application.

17. The UNDT found that the written statement of AHP, provided to OIOS on 4 October 2019, was consistent with its previous statement, provided to FIU on 21 May 2019.¹⁷ AHP confirmed on 4 October 2019 that the invoices submitted by Ms. Rizqy to Cigna on 6 June 2018 had not been issued by AHP. AHP clarified that neither the stamp nor the signature on the submitted invoices were used by AHP. AHP also stated that Ms. Rizqy was not recorded as a client in AHP's system and that AHP only issued handwritten invoices.

¹³ *Ibid.*, paras. 13-14.

¹⁴ Sanction Letter, pp. 1-2.

¹⁵ Impugned Judgment, paras. 13-14.

¹⁶ *Ibid.*, para. 15.

¹⁷ *Ibid.*, para. 32.

18. The UNDT held that there was no need for an expert opinion on the authenticity of the stamp used on the invoices, as requested by Ms. Rizqy, because AHP did not recognize the stamp and, in any event, the expert opinion would not have changed the fact that the invoices were not handwritten as was AHP's practice.¹⁸

19. The UNDT noted that during her interview with OIOS, Ms. Rizqy had stated that she had received the three disputed invoices from AHP.¹⁹ However, she was not able to explain why these invoices were printed. She stated that, on two occasions, she had bought the medication herself at AHP and that on a third occasion, her sister bought the medication for her. However, in her communication with the Office of Staff Legal Assistance (OSLA) that took place between 10 December 2021 and 3 February 2022, she stated that she had received the invoices from Mr. KB, who was an intermediary between herself and AHP. As OSLA pointed out at the time, this material change in her narrative undermines her credibility, particularly given that she provided testimony to OIOS under oath during the investigation.

20. The UNDT also observed that in her memorandum dated 25 April 2022, Ms. Rizqy recanted her previous statement to OIOS that she had obtained two invoices herself and one invoice via her sister.²⁰ In her 25 April 2022 submission, she acknowledged that her statement to OIOS was not truthful. She alleged that she was misled by Mr. KB, who was also a MINURSO staff member, and that she did not disclose his identity to OIOS because she was under threat and could not afford to take any risk at that time. However, she did not provide any evidence regarding her allegations.

21. Stating that Ms. Rizqy's change in the narrative of the facts seriously undermined her credibility before it, the UNDT concluded that, in any event, regardless of the change in narrative, on 6 June 2018 she had submitted three false invoices for reimbursement to Cigna.²¹ In light of the above, the facts on which the disciplinary measure was based have been established through clear and convincing evidence.

22. The UNDT found that Ms. Rizqy's behaviour amounted to misconduct, as correctly indicated in the Sanction Letter.²²

¹⁸ *Ibid.*, para. 33.

¹⁹ *Ibid.*, paras. 34-35.

²⁰ *Ibid.*, para. 36.

²¹ *Ibid.*, paras. 37-38.

²² *Ibid.*, paras. 39-42.

23. Referring to the Compendium of Disciplinary Measures, “Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour from 1 July 2009 to 31 December 2021”, including disciplinary case No. 588, the UNDT noted that in cases of fraud, misrepresentation, and false certification of information, the Administration usually imposed disciplinary measures at the stricter end of the spectrum, e.g., separation or dismissal.²³ The Compendium shows that in most of the cases involving comparable misconduct, the sanction imposed was separation from service. The amount involved in a case of fraud is irrelevant as any staff member of the Organization is expected to uphold the highest standards of integrity. Moreover, the UNDT observed that in similar cases involving the submission of false medical insurance claims, staff members had often been separated from service without termination indemnity whereas Ms. Rizqy had received termination indemnity as her past long service had properly been considered as a mitigating factor. In light of the above, the UNDT found that the disciplinary measure was proportionate to the offence committed.

24. The UNDT was satisfied that Ms. Rizqy’s due process rights had been respected during the investigation and the disciplinary process.²⁴

Procedure before the Appeals Tribunal

25. On 6 August 2023, Ms. Rizqy filed an appeal of the impugned Judgment with the Appeals Tribunal, to which the Secretary-General filed an answer on 17 October 2023.

Submissions

Ms. Rizqy’s Appeal

26. Ms. Rizqy requests the Appeals Tribunal to reverse the impugned Judgment, rescind the contested decision, reduce the sanction and order her appointment to a suitable position, commensurate with her skill set,²⁵ compensation in lieu of rescission in the amount of two years of salary and pension payments, and compensation for harm from damage to her career and self-respect.

²³ *Ibid.*, paras. 43-53.

²⁴ *Ibid.*, paras. 54-65.

²⁵ As a proportionate sanction, Ms. Rizqy refers to the disciplinary matter No. 588 in the Compendium of Disciplinary Measures: demotion by one grade, with deferment for three years of eligibility for promotion.

27. Ms. Rizqy argues that the UNDT failed to exercise jurisdiction vested in it, erred on a question of law and on a question of fact, resulting in a manifestly unreasonable decision. The UNDT committed two errors.

28. Ms. Rizqy submits that, firstly, the UNDT relied on privileged communication with OSLA to her detriment. That communication and the legal opinion of OSLA should be of limited value to the merits of this case. She produced it only for the purposes of demonstrating the receivability of the application. The UNDT violated her right to a fair trial by using that evidence in its determination of the merits.

29. Ms. Rizqy asserts that, secondly, the UNDT erred in assessing the proportionality of the sanction. The UNDT failed to consider that the sanction departed from the Secretary-General's practice of considering the small amount involved as a mitigating factor, highlighted in disciplinary case No. 588 in the Compendium of Disciplinary Measures. The departure, in her case, from such a practice constitutes discrimination. In disciplinary case No. 588, the mitigating factor of the small amounts involved resulted in the sanction of demotion by one grade and deferment, for three years, of eligibility for promotion for all of the seven staff members. In that matter, the amounts of loss were higher than in her case, yet none of the staff members were separated from service. Her sanction should be comparable.²⁶ The UNDT was wrong to find that the amount involved in a case of fraud was irrelevant.

The Secretary-General's Answer

30. The Secretary-General requests the Appeals Tribunal to uphold the impugned Judgment and dismiss the appeal.

31. The Secretary-General argues that the UNDT correctly determined that the contested decision was lawful. Ms. Rizqy has not established any errors warranting the reversal of the impugned Judgment.

32. The Secretary-General submits that Ms. Rizqy cannot claim a breach of confidentiality or privilege in her communication with OSLA since she herself voluntarily submitted it to the UNDT as evidence. In any event, if the UNDT was in error in relying on this piece of evidence

²⁶ Ms. Rizqy cites *Balint Szvetko v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1311, paras. 18-20 and 44.

or had decided not to consider the communication, the outcome would not have been different. The UNDT considered several additional factors in concluding that she was not credible.

33. The Secretary-General contends that Ms. Rizqy has merely repeated previous arguments in respect of the proportionality of the sanction and they should be dismissed on this ground alone. In any event, her arguments have no merit. Instead of admitting to her misconduct, she provided a series of misleading arguments regarding the authenticity of the invoices. The UNDT considered her reference to disciplinary case No. 588 in the Compendium of Disciplinary Measures. Neither the legal framework nor the Organization's past practice provide that a staff member's fraudulent actions must be tolerated to a certain level of harm. Moreover, the Compendium shows that staff members have been separated from service for even smaller amounts than in the present case.²⁷

Considerations

34. Ms. Rizqy contends that the UNDT failed to exercise jurisdiction vested in it, and erred in fact and in law when it (i) relied on privileged communication between Ms. Rizqy and her attorney at OSLA to conclude that the facts were established by clear and convincing evidence and when it (ii) found that the sanction of separation from service was proportionate to the misconduct and the circumstances of the case. Ms. Rizqy does not contest the other questions decided by the UNDT and, therefore, those questions do not fall within the scope of the present appeal.

35. Before addressing the merits of her case, we note, at the outset, that Ms. Rizqy's reliance on the ground of the UNDT's failure to exercise jurisdiction is misplaced. The legal issues before us are not related to the exercise of jurisdiction, or failure to do so. As we have held in *AAS*, "[e]xceeding the UNDT's jurisdiction is not simply the commission of an error, but more fundamentally, determining an issue or purporting to exercise powers that it is not entitled to or is prohibited from deciding".²⁸ In submitting that the UNDT should not have relied on the privileged communication, Ms. Rizqy is in essence contending that the UNDT erred in procedure, such as to affect the decision on the case, in law, and in fact, resulting in an unreasonable decision. In the same vein, Ms. Rizqy's second argument shall be viewed as a contention that the UNDT erred in law and in fact in affirming the proportionality of the

²⁷ The Secretary-General refers to disciplinary case No. 582 in the Compendium.

²⁸ *AAS v. Secretary-General of the United Nations*, Judgment No. 2024-UNAT-1427, para. 46.

disciplinary measure of separation from service. Considering the latitude our Tribunal normally gives to unrepresented appellants, we shall address the substance of Ms. Rizqy's arguments on the proper grounds of appeal despite that incorrect characterization.

Reliance on the privileged communication between Ms. Rizqy and her attorney

36. Ms. Rizqy contends that the UNDT erred in procedure, such as to affect the decision, in law, and in fact when it relied on privileged communication between her and OSLA to conclude that the misconduct was proven by clear and convincing evidence. Ms. Rizqy concedes that she submitted the document to the UNDT. However, she argues that the only purpose for that submission was to demonstrate her good faith for the timely filing of her case.²⁹

37. As a matter of principle, confidential records, including privileged communication between lawyer and client, enjoy legal protection. However, when the party in whose interests the privilege exists makes a clear waiver or clearly consents to the disclosure of privileged communication, such records form part of the evidence on which Tribunals may rely.³⁰

38. We have examined the case record and found no error in the UNDT's approach. The case record shows that it was Ms. Rizqy, represented by a private attorney in the proceedings before the UNDT, who voluntarily submitted the privileged communication between her and OSLA as an attachment to her application. In doing so, Ms. Rizqy did not impose any limitations or reservations on the UNDT's use of the said document. She did not, for example, assert her privilege by redacting a part of the document which was unnecessary to establish the fact she wished to prove thereby. To the contrary, she referred to the document on multiple occasions in the course of the judicial proceedings.³¹ The document formed part of the case record that was normally disclosed to the opposing party, and was, therefore, an element of the record before the UNDT.³² Hence, we agree with the UNDT that Ms. Rizqy had in fact waived her right to confidentiality and had consented to the disclosure of the document that, consequently, formed an integral part of the case file. Therefore, if the UNDT relied on the aforementioned document to make the appropriate inferences from the information contained

²⁹ Appeal brief, para. 4.

³⁰ *Elmira Ela Banaj v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1202, para. 60.

³¹ Application brief before the UNDT (p. 2, paras. 5 and 6, and p. 3, para. 4); Ms. Rizqy's Submissions Pursuant to Order No. 038 (NY/2023), para. 7.

³² See *Banaj* Judgment, *op. cit.*, para. 60.

therein, this should be viewed as a normal exercise of judicial duties and powers conferred to that Tribunal. Consequently, this part of the appeal cannot succeed.

Proportionality of the disciplinary measure imposed

39. In the impugned Judgment, the UNDT found that the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity imposed on Ms. Rizqy was proportionate to the established misconduct. The Dispute Tribunal rejected Ms. Rizqy's argument that she had been treated differently from other staff members who had been sanctioned for similar misconduct, with a less severe disciplinary measure of demotion by one grade with deferment for three years of eligibility for promotion. To reject that argument, the UNDT noted that "each case is determined on its own merits", taking into account the aggravating and mitigating factors. The Dispute Tribunal further held that the Compendium of Disciplinary Measures shows that separation from service was imposed in most cases of misconduct related to fraud, misrepresentation, and false certification.³³ Moreover, the UNDT found that the amount involved in fraud was irrelevant in view of the notion that staff members are expected to uphold the highest standards of integrity.³⁴

40. Ms. Rizqy takes issue with those findings. She contends that the UNDT erred in law when it did not recognize the Administration's failure to consider the amount of the false invoices as a mitigating factor. In addition, Ms. Rizqy submits that the UNDT failed to consider the discrimination against her by the Administration, manifested in a difference in treatment between her and other staff members. To support her contention, Ms. Rizqy relies on a similar case No. 588 cited in the Compendium of Disciplinary Measures, falling into the same category involving fraud, misrepresentation, and false certification. She argues that, unlike in her case, the Administration imposed on the staff members in that case the less severe disciplinary measure of demotion by one grade with deferment for three years of eligibility for promotion.

41. We recall that, in reviewing proportionality, the UNDT and the UNAT do not substitute their views for that of the Administration. The Secretary-General has a wide discretion to choose the most appropriate disciplinary measure amongst the various measures open to him and we do not interfere with that choice.³⁵ However, as reiterated in many instances, the

³³ Impugned Judgment, para. 51.

³⁴ *Ibid.*, para. 52.

³⁵ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

exercise of that discretion is not unfettered, and the Tribunals have the authority to intervene when the sanction imposed is disproportionate or excessive.

42. As we noted in *Bamba*, “an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline”.³⁶ We also found that, rather than focusing solely on the misconduct, the test of proportionality is circumstantial.³⁷ Thus, the Tribunal must be satisfied that the Administration properly considered all relevant factors when imposing the challenged disciplinary measure, including “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”.³⁸

43. However, in applying the test of proportionality, this Tribunal relies on its previous Judgments in which we affirmed that mitigating factors may, in some cases, have less weight, and shall not necessarily disturb the proportionality of the disciplinary sanction. In this respect, we have noted that, “[a]s a general rule, any form of dishonest conduct compromises the necessary relationship of trust between employer and employee and will generally warrant dismissal”.³⁹ We also found in *Saleh*:⁴⁰

(...) While the decision to terminate employment necessarily involves the considerations and weighing of a number of factors, both mitigating and aggravating, in instances of dishonesty the severity of the misconduct tends to outweigh other mitigating considerations such as length of service, a clean disciplinary record, difficult personal circumstances, expressions of remorse and the like. The reason for that is dishonesty by a staff member invariably seriously damages or destroys the relationship of mutual trust and confidence in a way that renders the continuation of a quasi-fiduciary employment relationship untenable or even intolerable.

³⁶ *Maguy Bamba v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1259, para. 52 (internal citation omitted).

³⁷ *Ibid.*, paras. 53-54; *Rajan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-781, para. 48 (internal citations omitted).

³⁸ *Ibid.*

³⁹ *Ahmad Shuaib Payenda v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1156, para. 38 (internal citation omitted).

⁴⁰ *Hassan Abdel Majid Saleh v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1239, para. 33.

44. In light of the foregoing, and considering the established dishonest behavior of Ms. Rizqy, we find that the UNDT did not err when it did not consider the amount of the false invoices as a significant mitigating factor in the circumstances.

45. As to Ms. Rizqy's second contention related to the principle of parity, we confirm that the test of proportionality not only relies on intrinsic aspects, related to the nature of the misconduct, its gravity, and all surrounding circumstances, but also entails another extrinsic aspect, that is the equality of treatment of staff members. This means that similar cases should, to the extent possible, be treated in a similar fashion, resulting in consistency in administrative practice.

46. However, the quest for perfect consistency should not override the principle of individualization in disciplinary cases, expressed by the UNDT in the impugned Judgment by the statement that "each case is determined on its own merits". Stating otherwise would render the discretion given to the Administration meaningless. In this regard, we noted in *Szvetko*:⁴¹

(...) [T]here are limits to the parity principle and perfect consistency will be difficult to achieve in a multiple agency Organisation operating in different contexts around the globe. No approach will provide clear cut answers as to what constitutes a suitable disciplinary sanction in every single case. The imposition of a sanction is not a mechanistic process which leads to easily predictable solutions. The Administration has to consider a wide range of often conflicting considerations which may be difficult to resolve. Sanctions applied in previous cases are no more than a guide, and the Administration, in accordance with the principle of deference, should enjoy a margin of appreciation to flexibly impose different sanctions provided they fall within a reasonable range of proportionate options. (...)

47. In the present case, we find that Ms. Rizqy's argument of discrimination is not convincing for three main reasons. First, as rightly stated by the UNDT, the disciplinary measure imposed on Ms. Rizqy of separation from service with compensation in lieu of notice and with termination indemnity was not the most severe. Second, Ms. Rizqy's strict reliance on the Compendium of Disciplinary Measures does not assist her in her claim, as in many cases of fraud, the outcome was summary dismissal, or separation from service without compensation in lieu of notice and without termination indemnity. Third, the Administration having on a previous occasion imposed a lesser sanction on a staff member involved in similar misconduct as that of Ms. Rizqy, represents no more than an exception to the general practice of imposing the sanction of separation from service with or without compensation in lieu of notice and

⁴¹ *Balint Szvetko v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1311, para. 57.

termination indemnity or summary dismissal, as is evident upon review of all the sanctions imposed for similar misconduct.

48. For these reasons, we do not find that the UNDT erred when it considered that the Administration had lawfully exercised its discretion in imposing the disciplinary sanction of separation from service with compensation in lieu of notice and with termination indemnity on Ms. Rizqy.

49. In light of the foregoing, the appeal must fail.

Judgment

50. Ms. Rizqy's appeal is dismissed, and Judgment No. UNDT/2023/056 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 28th day of June 2024 in New York, United States.

(Signed)

Judge Sheha, Presiding

(Signed)

Judge Ziadé

(Signed)

Judge Colgan

Judgment published and entered into the Register on this 13th day of August 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar