



**Before:** Judge Teresa Bravo

**Registry:** Geneva

**Registrar:** René M. Vargas M.

PAPPACHAN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Felix Ross

**Counsel for Respondent:**

Marisa MacLennan, UNHCR  
Francisco Navarro, UNHCR

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

## **Introduction**

1. On 11 October 2017, the Applicant, a staff member of the Office of the United Nations High Commissioner for Refugees (“UNHCR”), filed an application with the Tribunal contesting the decision of the High Commissioner to impose on him the disciplinary measures of loss of three steps in grade and deferment, for a period of three years, of eligibility for consideration for promotion.

## **Procedure before the Tribunal**

2. On 14 November 2017, the Respondent filed his reply to the application.

3. On 19 February 2018, the Applicant filed a rejoinder.

4. On 9 April 2019, a Case Management Discussion (“CMD”) was conducted. Another case with parallel facts and similar pleadings, namely, Case No. UNDT/GVA/2017/087 (Bhatia), was joined for the purpose of the CMD.

5. A hearing on the merits took place from 7 to 9 May 2019. Case No. UNDT/GVA/2017/087 (Bhatia), was joined for the purpose of the hearing. The Applicant, his Counsel and Counsel for the Respondent participated at the hearing. Ten witnesses, including the Applicant, provided testimony.

6. On the last day of the hearing, the Applicant submitted additional evidence without using the proper format. The Tribunal then granted the Applicant leave to file such evidence in the proper format and his observations, if any, in this respect. The Applicant filed the evidence and his comments therein on 15 May 2019. The Tribunal also granted the Respondent leave to file comments in relation to the additional evidence, which he did on 30 May 2019.

## **Facts**

7. The Applicant currently serves as an Assistant Human Resources/Administrative Officer at the G-7 level, in UNHCR, New Delhi.

8. In 2013, UNHCR introduced a recruitment initiative called the “Entry-Level Humanitarian Professional Programme” (“EHP”) to identify the talent required to meet its current and future operational demands. Any eligible person, including staff members in the General Service category aspiring to posts in the Professional category, could apply to this programme. Successful candidates were matched to P-2 level posts and deployed to the field.

9. The EHP competitive process comprises a series of tests and interviews. The first stage of the process is a psychometric test conducted through a web-based exam administered by a third party. Candidates receive an email inviting them to take the test within a specific period of time. Within that period, candidates may sit the test from any computer connected to the internet. Candidates who pass the psychometric test proceed to the second stage of the process. They are invited to sit a language test, which is also administered through the internet.

10. In June 2016, the Applicant applied for the EHP and on 17 June 2016, he received an invitation to sit the psychometric test. He was required to complete this test between 17 and 21 June 2016.

11. Some colleagues from the UNHCR Office in India had also applied for the EHP. The Applicant became aware that one of these colleagues, Ms. T. S., was scheduled to take the psychometric test on 20 June 2016.

12. According to the investigation report (see paras. 17 and 21 below), the Applicant invited Ms. T. S. to take the psychometric test in his office and she agreed. On 20 June 2016, after the celebrations for the World Refugee Day, Ms. T. S. came to the Applicant’s office to take the test. Mr. A. B. was also present in the Applicant’s office when she arrived.

13. During the investigation, Ms. T. S. testified that “she started her exam and at first, [the Applicant] was reading the questions with her while [Mr. A. B.] was taking pictures of the computer screens with an [iPad]. When [she] got to [the test section with] questions related to mathematics, Mr. [A. B.] started reading the questions and it was [the Applicant] who was taking pictures with the [iPad]”.

14. On 21 June 2016, the Applicant completed his psychometric test. He later received an invitation to take the English language test anytime between 7 and 12 July 2016. In the meantime, the Applicant found out that another colleague, Mr. P. K., was scheduled to take the English language test on 9 July 2016.

15. According to the findings of the investigation report, the Applicant invited Mr. P. K. to take the test from his house on 9 July 2016. Mr. P. K. agreed. While Mr. P. K. was completing his test, the Applicant took pictures of the questions appearing on the computer screen with his iPad. The investigation report also indicates that the Applicant and Mr. A. B. “exchanged information (cheated) concerning the language tests (both oral and written) between 9 and 12 July 2016”.

16. The Applicant did the oral part of his English language test on 11 July 2016 and the written part on 12 July 2016.

17. On 19 July 2016, the Inspector General’s Office (“IGO”) received allegations made against the Applicant and Mr. A. B. that they had cheated during the psychometric test of the EHP administered in June 2016. The IGO opened an investigation and assigned the case to an investigator.

18. From 6 September to 4 November 2016, the IGO investigator interviewed nine witnesses including the Applicant. On 3 November 2016, a notice of investigation was sent to the Applicant to advise him about allegations that prompted an investigation.

19. The Applicant was interviewed on 4 November 2016.

20. On 23 December 2016, the IGO shared the draft investigation findings with the Applicant and invited him to provide his comments and observations, which he did on 29 December 2016.

21. In the investigation report, dated 3 January 2017, the IGO concluded that “the evidence available support[ed] a finding that [the Applicant] committed misconduct by engaging in fraud through cheating and helping others cheat in the psychometric and language tests of the EHP”. The IGO also concluded that there was no evidence to substantiate the allegation of potential abuse of authority.

22. On 3 January 2017, the IGO transmitted the final version of the investigation report to the Director, Division of Human Resources Management (“DHRM”), who then decided to institute disciplinary proceedings.

23. By letter dated 20 January 2017, the Director, DHRM, transmitted the investigation report to the Applicant. He also informed him of the findings of the investigation and of his decision to institute disciplinary proceedings against him. The Applicant was invited to answer the allegations and to produce countervailing evidence, if any, within two weeks of receipt of the letter. He was also informed of his right to be assisted by counsel.

24. After a request for an extension of time, the Applicant provided his comments in response to the allegations of misconduct on 6 March 2017.

25. On 10 May 2017, the Director, DHRM, contacted the Applicant requesting his comments on an additional piece of evidence. In particular, the Director, DHRM, noted that the statement of telephone calls placed by the Applicant from his official phone showed that he had a telephone conversation with Mr. A. B. immediately before the latter submitted the written part of the English language test on 10 July 2016. On 16 May 2017, the Applicant responded that his telephone conversation with Mr. A. B. was unrelated to the English language test.

26. By letter dated 10 July 2017, the Applicant was informed of the High Commissioner’s decision to impose on him the disciplinary measure of “loss of three steps in grade and deferment, for a period of three years, of eligibility for consideration for promotion in accordance with Staff Rule 10.2 (a)(ii) and (vi)”. The Applicant received this letter on 20 July 2017.

### **Parties’ submissions**

27. The Applicant’s principal contentions are:

- a. The accusations against him are the effect of a conspiracy against him. The false allegations were levelled against him by a group of colleagues who were jealous of his progress in the EHP process and his growth within the Organization;

b. The Applicant denies the alleged facts. In relation to the alleged misconduct of 20 June 2016, he indicates that he could not have helped Ms. T. S. with her test because he came back to the office at 6.30 p.m. and monitored the cleaning activities at the office until 9 p.m.;

c. In relation to the alleged misconduct of 9 July 2016, the Applicant indicates that it was not possible for Mr. P. K. to have taken the test at his house in the morning of 9 July 2016 because at that time the Applicant was playing badminton with his friends. He notes that Mr. P. K. denied to have been at the Applicant's house on that day;

d. He did not exchange information with Mr. A. B. on the English language test. The calls and text messages that they exchanged between 8 and 13 July 2016 were all related to help Mr. A. B. had requested from the Applicant;

e. The investigator committed several grave procedural errors during the investigation that violated the Applicant's due process rights;

f. The allegations were mainly based on hearsay and the testimony of one witness, Ms. T. S. Therefore, the standard of proof required in disciplinary cases was not met;

g. There were no instructions with regard to the conditions under which the tests were to be taken and what resources and assistance candidates could use during the tests. There was also no control over how the candidates took the tests;

h. Taking pictures of the computer screen cannot be considered as unacceptable behaviour but rather as part of the preparation of one's test;

i. The "aggravating circumstances" considered by the Administration form part of the normal description of the alleged misconduct itself and should not be considered as aggravating factors;

j. The Administration did not consider several mitigating factors when deciding on the level of the disciplinary measure to be imposed, mainly that the Applicant did not have to take the language test as he was an internal candidate; and

k. The disciplinary measure imposed is disproportionate to the alleged misconduct.

28. The Respondent's principal contentions are:

a. Since the disciplinary measures did not result in the Applicant's separation from service, the facts need only be established on the balance of probabilities or on preponderance of the evidence;

b. The allegation that the Applicant cheated on the psychometric test by photographing the questions that appeared on the screen while Ms. T. S. was completing her test has been established on the balance of probabilities. Indeed, Ms. T. S. admitted that she cheated and helped the Applicant cheat on the test. Two other staff members confirmed Ms. T. S.' account in a credible and consistent manner;

c. The allegation that the Applicant cheated on the English language test has been established on the balance of probabilities. Indeed, Mr. P. K. told several other individuals that he took the language test at the Applicant's house while the latter was taking photographs of the questions that appeared on the screen. Mr. P. P., Mr. A. K. and Ms. A. J. confirmed that Mr. P. K. volunteered this self-incriminating information to them on two separate occasions. Even if Mr. P. K. denied this allegation, his statement is not credible;

d. There were numerous communications between the Applicant, and Mr. A. B. between 8 and 13 July 2016, the dates around which they and Mr. P. K. took their English language test. The Applicant was unable to provide a credible explanation for those communications. He and Mr. A. B. also failed to provide their text messages to the IGO claiming that they had

deleted them. The Applicant was on the phone with Mr. A. B. while the latter was completing his test;

e. The High Commissioner correctly determined that the Applicant's conduct constituted fraud and was inconsistent with his basic obligations under staff regulation 1.2(b) and staff rule 1.2(b);

f. With his fraudulent behaviour, the Applicant attempted to obtain the questions in advance to gain time on a test designed to be completed within a very short period;

g. The High Commissioner has broad discretion in determining the most appropriate disciplinary measure. In determining the proportionality of the disciplinary sanction, he took into account both aggravating and mitigating circumstances;

h. The High Commissioner also considered the parity principle. The disciplinary measures imposed on the Applicant are more lenient than measures imposed on other staff members; and

i. The Applicant's due process rights were fully respected. He only named witnesses after he had received the letter charging him with misconduct. At that point, the investigation had ended and the disciplinary process had begun.

## **Consideration**

### *The scope of judicial review in disciplinary cases*

29. The Applicant challenges the decision taken by the High Commissioner to impose on him the disciplinary measures of loss of three steps in grade and deferment, for a period of three years. of eligibility for consideration for promotion.



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

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

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

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

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

33. Since separation from service is not at stake in the present case, the standard of proof applicable is "preponderance of evidence or balance of probabilities" (see *Benamar* UNDT/2017/025).

34. The Applicant was charged with having engaged in three acts of misconduct as follows:

- a. The first act was allegedly committed on 20 June 2016, when the Applicant and Mr. A. B. took pictures of Ms. T. S.' psychometric test with the Applicant's iPad;
- b. The second act allegedly occurred on 9 July 2016, when the Applicant invited Mr. P. K. to take the English language test at his house. The Applicant then allegedly took pictures of the screen with his iPad; and
- c. Thirdly, the Applicant was charged with having exchanged information about the content of the English language test with Mr. A. B. over the phone between 9 and 12 July 2016.

35. These facts were established during the investigation and confirmed at the hearing by the testimony of one direct witness, Ms. T. S., in conjunction with the testimonies of four other witnesses, namely Ms. I. S., Mr. P. P., Ms. A. J. and Mr. A. K.

36. The Tribunal is satisfied that the investigation report clearly states the facts and the alleged misconduct. It also provides substantial and critical assessment of the evidence presented to the investigator either in documentary or testimonial form.

37. The Applicant denies the charges arguing that a group of colleagues—who provided testimony during the investigation and at the hearing—were conspiring against him.

38. After consideration of the oral testimonies and of all the evidence on file, the Tribunal does not find any evidence of ill motivation on the part of the witnesses, and is satisfied that the facts related to the allegations against the Applicant are established to the required standard.

39. The Tribunal underlines that the witnesses who testified in court were all very clear, objective and presented a coherent version of the facts at stake as indicated below.

The allegation of cheating in the psychometric test

40. At the hearing, Ms. T. S. confirmed that the Applicant called her and asked her if they could do the test together, which she accepted. She also testified that she started her test and that, at first, the Applicant was reading the questions and Mr. A. B. was taking pictures of the computer screen with the Applicant's iPad. However, when she got to questions related to mathematics, Mr. A. B. helped her to answer the questions and the Applicant took pictures of the screen.

41. Ms. T. S. also told the IGO investigator and the Tribunal that she accepted to go to the Applicant's office because she thought they would be doing the test "at the same time", but then found herself in the awkward situation described above.

42. Ms. T. S. testified that the following day she mentioned what had happened to Ms. I. S. and Mr. P. P., because she was feeling uncomfortable with the situation. Ms. I. S. and Mr. P. P. confirmed this conversation.

43. The Tribunal is of the view that Ms. T. S.'s testimony is credible and found neither evidence of ulterior motives from her part nor any indication of bias. On the contrary, the evidence shows that it was the Applicant who was in a position to influence the witnesses since he was in a senior position, whereas Ms. T. S. was on a temporary appointment and left the office only few days later.

44. Moreover, the evidence also shows that this incident had consequences for Ms. T. S. as she received a written reprimand. As a consequence, the Tribunal agrees with the investigation report when it states that "[t]here were no valid reasons for Ms. [T. S.] to invent a story in which she would incriminate herself".

45. The Applicant argues that there is evidence that, on 20 June 2016, after the World Refugee Day celebrations, he returned to the office to do some housekeeping and supervise the cleaning activities. He also argues that a driver,

Mr. B. S., who was also in the office at that time, is a witness of the fact that he spent most of his time alone in his office and, as a consequence, he could not have done the test with Ms. T. S.

46. In this regard, the Tribunal notes that while the IGO investigator did not hear the testimony of Mr. B. S., the Tribunal heard his testimony at the hearing. The Tribunal found Mr. B. S.' testimony not credible and biased in favour of the Applicant for whom he has been working for the past ten years. In fact, Mr. B. S. showed that he had a "selective" memory since he could recall the precise time (to the minute) at which he saw the Applicant in his office at the time of the events but, when cross-examined, he couldn't recall other relevant, and more recent, details such as who assisted him to prepare his written statement for this Tribunal.

47. The Tribunal further notes that the documentary evidence shows that Ms. T. S. took her psychometric test from 6.47 p.m. to 7.42 p.m.. Also, the security records show that the Applicant and Mr. B. P. arrived in the office around 6 p.m. and left it after 8.30 p.m..

48. During the last day of the hearing, the Applicant presented evidence in the form of the electronic entry and exit records of the office to support his assertion, made for the first time in the judicial proceedings, that Ms. T. S. was not present in the office during the evening of 20 June 2016. On this issue, the Tribunal notes that while these records were in the Applicant's possession since 5 August 2016, he failed to submit them during the investigation and the disciplinary process. It is unfortunate that this evidence was only provided on the last day of the hearing and after the examination of the witnesses' testimonies, which prevented confronting the witnesses with it.

49. Nonetheless, the Tribunal finds that the records do not prove that Ms. T. S. was not in the office on 20 June 2016. Rather, they only show that, on that day, there was no record of her exit. Furthermore, a review of the evidence shows that the records are not reliable since they even contain records of a staff member's attendance who was no longer working in that Office.

The allegation of cheating in the English language test

50. As for the second act in which the Applicant was allegedly involved, i.e., having Mr. P. K. coming to his house to take the English language test while the Applicant was taking pictures of the computer screen with his iPad, the evidence in court corroborates the findings of the investigation report.

51. In fact, Ms. A. J., Mr. P. P. and Mr. A. K. testified under oath before the Tribunal and confirmed the same version of the facts they had previously told to the IGO investigator. They were coherent and objective and, once more, there was no evidence of bias nor were any reasons raised that may have led the Tribunal to conclude that they were colluding to harm the Applicant. Furthermore, the Tribunal underlines that Mr. A. K. testified before the Tribunal.

52. In addition to this, there is documentary evidence, namely the records of the Applicant's official mobile phone, that shows a series of phone calls and text messages exchanged between the Applicant and Mr. P. K. between 7 and 9 July 2016.

53. Unfortunately, the content of the text messages was not disclosed to the Tribunal nor to the investigator because they were "deleted" by the Applicant himself. This attitude raises suspicion, to say the least, about the Applicant's motives and what he was trying to hide.

54. These two facts, together with the testimonies of Mr. A. K., Mr. P. P. and Ms. A. J. are a clear indication that the standard of proof was met and that the Applicant is hiding his involvement in this act.

The allegation of exchanging information with Mr. A. B. concerning the English language test in a manner amounting to cheating

55. As for the third and last allegation of misconduct, i.e., the exchange of information between the Applicant and Mr. A. B. regarding the English language test between the 9 and 12 July 2016, firstly, the evidence on file as well as the evidence produced during the hearing show that Mr. A. B. and the Applicant not only work in the same New Delhi Office, but they also commute together, on a daily basis. This close relationship has been kept at least since 2010.

56. Secondly, there are written records that show an exceptional number of phone calls and text messages exchanged between the Applicant and Mr. A. B. on the dates around the English language test.

57. The existence of such records was pointed out to the IGO investigator by Mr. P. P., who confirmed this at the hearing. Mr. P. P. explained that it was part of his work to check the Applicant's telephone bills.

58. Bearing these facts in mind, the Tribunal finds it more probable than not that the Applicant and Mr. A. B. shared information on the English language test and most likely than not that they also engaged in the conduct described in the decision letter.

59. The Tribunal also notes that, when the Applicant and Mr. A. B. testified before the IGO investigator, they could not explain why they had had so many exchanges of phone calls and text messages between 9 and 12 July 2016. Furthermore, the Tribunal finds particularly suspicious, to say the least, that they deleted the text messages exchanged during that period.

60. Based on the evidence on file and the evidence produced at the hearing, it seems clear that the Applicant and Mr. A. B., after becoming aware of the content of the draft findings, concerted a common explanation for the above communication exchanges, namely that Mr. A. B. was calling the Applicant to seek his assistance in relation to the arrival of one of his relatives to New Delhi.

61. In view of the above, the Tribunal finds that the facts on which the disciplinary measures were based have been established on the balance of probabilities.

*Do the established facts amount to misconduct?*

62. The Tribunal has now to address if the established facts amount to misconduct.

63. Even though the Applicant denies the charges against him, he raises several arguments to demonstrate that the conduct described in the investigation report does not amount to misconduct, namely that:

- a. No clear instructions were given to the candidates on what they were allowed or not allowed to do in relation to the tests;
- b. Taking pictures of the screen cannot be considered as misconduct since it is an acceptable preparation for the test;
- c. Obtaining questions from others has to be considered as part of the preparation of one's test; and
- d. Candidates worked under the assumption that they were not taking the same tests and that this exchange was an acceptable preparation for it.

64. The Staff Regulations and Rules (ST/SGB/2016/1) applicable at the time of the incident, provide the following at staff rule 10.1(a):

Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

65. Article 1 of the staff regulations stipulates the duties, obligations and privileges of staff members. Staff regulation 1.2 specifies the "Basic rights and obligations of staff" and reads as follows in its relevant parts:

**Core values**

...

(b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

**General rights and obligations**

...

(f) [Staff members] shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations.

66. In *Ogorodnikov* 2015-UNAT-549, the Appeals Tribunal found that misconduct “must be viewed in terms of the nature of the mission, purpose and principles of the United Nations, and the impact [that the] type of misconduct can have on the Organization’s reputation, credibility and integrity”.

67. The fact that the Organization has outsourced the EHP tests does not allow candidates, and most importantly staff members, to engage in a behaviour that amounts to a breach of the core values of the Organization.

68. It clearly resulted from the testimony of the Chief of Section, Affiliate Partnership and Recruitment Section, Division of Human Resources (DHR), UNHCR, in Budapest, that each applicant was provided with an individual credential and password. He also stated that the questions in the tests were the same for all the candidates and that there were candidates from all over the world.

69. According to the evidence on file as well as the oral testimony of the above Chief of Section, each candidate received an individual email containing the instructions to be followed to complete the test in a certain period of time.

70. Therefore, by taking screenshots of the tests and having previous access to the questions, as well as by sharing information on the English language test, the Applicant gained an advantage over other candidates for whom the tests were unknown.

71. The Tribunal is of the view that, by having access to the questions prior to his own test, the Applicant had the opportunity to prepare the right answers for the tests and prepare himself in advance. This cannot be regarded as a “proper preparation for the test” since it goes far beyond the “normal” preparation that a candidate would do.

72. The Applicant’s behaviour is the reflection of an unethical conduct that goes against the core values and obligations of staff members enshrined in the Staff



Regulations, and led to an undue privileged situation in his favour to the detriment of other candidates who did not act as such. Consequently, the Tribunal finds that the Applicant's behaviour as per the established facts amounts to misconduct.

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

73. The Applicant questions the lawfulness of the investigation process alleging that:

- a. He was not sufficiently informed about the nature of the allegations in the notice letter. As a consequence, he could not properly prepare for the interview;
- b. The investigator made no effort to interview other staff present in the office on the evening of 20 June 2016. He also failed to interview the witnesses proposed by the Applicant in relation to the allegation of cheating on the psychometric test;
- c. The Administration ignored his pleas to examine exonerating evidence and, as a consequence, the report does not mention mitigating factors; and
- d. The standard of proof required in disciplinary cases was not met because the allegations were mainly based on hearsay.

74. In examining the lawfulness of a disciplinary process, the Tribunal will refer to the specific legal framework that was applied in the handling of the Applicant's case.

75. In *Messinger* 2011-UNAT-123, the Appeals Tribunal held that it is not the task of the Dispute Tribunal to conduct fresh investigations but rather to determine if there was a proper investigation into the allegations.

76. However, more recently, the Appeals Tribunal stated in *Mbaigolmem* 2018-UNAT-819 (para. 27, relevant part) that:

The right of a staff member to “appeal” an administrative decision imposing a disciplinary measure, in terms of Article 2(1)(b) of the UNDT Statute, is not restricted to a review of the investigative process. On the contrary, it almost always will require an appeal *de novo*, comprising a complete re-hearing and redetermination of the merits of a case, with or without additional evidence or information, especially where there are disputes of fact and where the investigative body *a quo* had neither the institutional means or expertise to conduct a full and fair trial of the issues.

77. The Tribunal has reviewed the investigation file on record and went even further since it allowed the Applicant to present all his witnesses, including Mr. B. S., a driver at UNHCR New Delhi Office who had not been heard before.

78. The onus is on the Applicant to provide proof of the lack of due process and how it negatively impacted the investigation and or disciplinary process. However, other than making the allegations, the Applicant has not provided substantial evidence that his due process rights were violated during the investigation and or the disciplinary process.

79. The Tribunal has carefully analysed the documents on file, specifically the “[s]ubject [n]otice of [i]nvestigation” dated 2 November 2016 that the Applicant is contesting.

80. The Tribunal recalls that a charge for misconduct comprises two different procedural stages with different due process rights.

81. The first stage starts with an investigation. At this point, the facts of the case are not yet established and, therefore, it is reasonable that the subject notice of investigation does not include a full description of those charges but only a general reference to it. The second stage starts when a disciplinary procedure is initiated.

82. Full procedural guarantees only come into play in the context of a disciplinary process, not earlier. This is in conformity with the jurisprudence of the Appeals Tribunal that held in *Powell 2013-UNAT-295* that:

24. During the preliminary investigation stage, only limited due process rights apply. In the present case, the UNDT was correct in finding that there was no breach of Mr. Powell's due process rights at the preliminary investigation stage in that, by 21 December 2004, Mr. Powell had been appraised of the allegations against him and had been given the opportunity to respond. (footnote omitted)

83. This jurisprudence was also reiterated in *Akello 2013-UNAT-336*, in which the Appeals Tribunal held that:

36. While the statutory instruments governing the investigation and disciplinary process in the present case are different instruments to those which governed the *Applicant* case (footnote omitted), our jurisprudence remains that due process entitlements, which every staff member has, come into play in their entirety once a disciplinary process is initiated. Furthermore, we have held in *Powell* that at the preliminary investigation stage, only limited due process rights apply. (footnote omitted)

84. In the case at hand, the evidence shows that, on 19 July 2016, the IGO received allegations made against the Applicant and Mr. A. B. that they had cheated during the EHP psychometric test administered in June 2016. The IGO opened an investigation and assigned the case to an investigator.

85. On 3 November 2016, the IGO sent the Applicant a notice of investigation that reads, in relevant part, as follows:

According to the information received by the IGO, you may have violated the Staff Rules and Staff Regulations of the United Nations and/or Administrative issuances. The possible misconduct, if proven, could lead to administrative and/or disciplinary action against you (the subject) in accordance with Chapter X of the Staff Rules.

- It is alleged that you might have engaged in fraud by cheating on official exams for the Entry-level Humanitarian programme (EHP).

86. From 6 September to 4 November 2016, the IGO investigator interviewed nine witnesses, including the Applicant who was interviewed on 4 November 2016. On 23 December 2016, the IGO shared the draft investigation findings with the Applicant and invited him to provide his comments, which he did on 29 December 2016. The IGO finalized the investigation report in the Applicant's case on 3 January 2017 (investigation report - INV/2016/055-A).

87. Based on the evidence available, the Tribunal finds that the Applicant was given the opportunity to provide his evidence during the investigation and the chance to comment on the findings of the investigation report. Once the disciplinary process started, he was also given the opportunity to respond to the allegations contained in the charge letter of 20 January 2017 and to produce countervailing evidence.

88. The Applicant claims that he was not given the opportunity to provide exonerating evidence and that, as a consequence, the report does not mention any mitigating factors. He also argues that the investigator made no effort to interview other staff present in the office on the evening of 20 June 2016 and that he failed to interview the witnesses proposed by the Applicant in relation to the allegation of cheating on the psychometric test.

89. According to the testimony of the investigator, the Applicant did not indicate any witness when he was called for the interview. The alleged witnesses that the Applicant refers to in his application, such as Mr. B. S. (the driver), only came into play much later, in March 2017 when the Applicant responded to the allegations contained in the charge letter of 20 January 2017. The Tribunal further notes that Mr. B. S.' written statement is dated 21 December 2017 and was submitted to the Tribunal in the course of the present proceedings.

90. The investigator explained to the Tribunal that once he became aware of the witness proposed by the Applicant, that is after the investigation process had been completed and the disciplinary process had started, he decided not to interview the proposed witness. The investigator testified that he considered that it was unlikely that such witness could recall, to the detail, the exact minutes in which he met the Applicant in his office on 20 June 2016.

91. Moreover, the investigator indicated that he had access to the security records and had the opportunity to check the entry and exit times of the Applicant, Mr. A. B. and Ms. T. S. on 20 June 2016, which show that the three of them left around 8.30 p.m., i.e., shortly after Ms. T. S. had finished the psychometric test.

92. The Tribunal also notes that the Applicant was not prevented from adding documents or presenting witnesses. In fact, the subject notice of the investigation states that:

17. You can submit to the IGO any information or document and/or make a written request for any witnesses you consider relevant to be interviewed. The IGO will follow up on such a request and interview these witnesses at its discretion if their testimonies may be relevant and central to the allegations.

93. The Tribunal recalls that during the investigation stage only limited due process rights apply. This means that the investigator has a certain margin of discretion, based on a critical assessment of the evidence produced, to decide what is relevant or not for the purpose of the investigation. The Tribunal also notes that the Applicant proposed Mr. B. S., as a witness, after the conclusion of the investigation.

94. Therefore, the fact that the IGO investigator did not interview this witness is not evidence of bias or procedural irregularity.

95. The Tribunal has already explained in para. 46 above why the testimony of Mr. B. S. was not credible when compared to the testimonies of others and to the documents on file; as a consequence, there is no further need to reiterate those arguments.

96. As for the alleged “absence” of mitigating factors, the Tribunal will address that point in relation to the proportionality of the sanction.

97. The Applicant raises again, but now in the context of a due process rights violation, that the standard of proof was not met because the evidence was based on hearsay. Contrary to the Applicant’s claim, the evidence was not based on hearsay. The Tribunal considered not only the self-incriminatory testimony of

Ms. T. S. but also the documentary evidence and the testimonies of Ms. I. S., Mr. A. K., Mr. P. P. and Ms. A. J.

98. Having considered all the documents and evidence produced in this case, the Tribunal concludes that throughout the investigation and disciplinary process, there is no evidence of bias or of any procedural irregularity and that, as a consequence, the Applicant's due process rights were not violated.

*Were the disciplinary measures applied proportionate to the offence?*

99. The Secretary-General has the discretion to impose a sanction on a staff member for misconduct. However, this discretion is not unfettered, for there is a duty to act fairly and reasonably in sanctioning staff members and issuing sanctions that are proportional to the alleged offence. One of the grounds under which the Tribunal may interfere with the Administration's discretion in sanctioning staff members is lack of proportionality.

100. The principle of proportionality means that a sanction should not be more excessive than is necessary for obtaining the desired result. The Tribunal is mindful 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 (see *Portillo Moya* 2015-UNAT-523). Once misconduct has been established, the level of sanction can only be reviewed in cases of obvious absurdity or flagrant arbitrariness (see *Aqel* 2010-UNAT-040).

101. The principle of proportionality is a general legal principle. Principles embody the essential dimension of law as a living social construct that can change over time and accommodate different social values. Consequently, proportionality can serve as an analytical tool for assessing how, in practice, authorities employ their margin of appreciation to delineate rights.

102. In the context of disciplinary cases, proportionality comes into play as an essential principle that guides the decision-maker when choosing the appropriate sanction—according to the gravity of an offence and the specific circumstances of a case—from a set of different possible ones.

103. Proportionality has to be understood as a limit to the discretionary power of the decision-maker in the name of fairness and equity. This implies that the decision-maker has to consider all aggravating and mitigating circumstances of a case.

104. The Tribunal considers that, bearing in mind the circumstances of the case, the cumulative application of two disciplinary sanctions was not excessive nor unreasonable.

105. In *Sanwidi* 2010-UNAT-084 (para. 39, in its relevant part), the Appeals Tribunal held that:

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.

106. After a careful analysis of the content of the letter dated 10 July 2017, whereby the contested disciplinary measures were imposed on the Applicant, the Tribunal notes that the Organization took into consideration the “satisfactory service record” of the Applicant since 2010 as a mitigating factor.

107. Bearing in mind that the Applicant’s behaviour manifestly violates the highest standards of integrity expected of a staff member and jeopardizes the “good image” of the Organization as a credible institution, the sanctions imposed on him were actually quite lenient.

108. In light of all the circumstances, the sanctions of loss of three steps in grade and deferment, for a period of three years, of eligibility for consideration for promotion imposed on the Applicant were proportionate to the offence committed.

**Conclusion**

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

The application is rejected in its entirety.

*(Signed)*

Judge Teresa Bravo

Dated this 27<sup>th</sup> day of June 2019

Entered in the Register on this 27<sup>th</sup> day of June 2019

*(Signed)*

René M. Vargas M., Registrar, Geneva