UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2018/121
Judgment No.:	UNDT/2020/171
Date:	22 September 2020
Original:	English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

PAYENDA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Matthias Schuster, UNICEF

Introduction

1. The Applicant, a former Finance Assistant with the United Nations Children's Fund ("UNICEF") challenges the decision to dismiss him following the completion of a disciplinary process.

Facts and procedural history

2. In April 2017, the Applicant applied for the post of Finance Assistant at the UNICEF Afghanistan Country Office. The Applicant was selected for the position and joined UNICEF on 17 August 2017 with a fixed-term appointment.

3. On 24 May 2018, the Office of Internal Audit and Investigations ("OIAI"), UNICEF, was informed that when submitting his application for his current position, the Applicant had answered "no" to the question whether he had ever been the subject of investigation for misconduct. However, information had surfaced indicating that the Applicant, at the time of the submission, might have been the subject of an investigation for misconduct by his former employer, the International Organization for Migration ("IOM").

4. OIAI investigated these allegations and, in September 2018, UNICEF determined that the Applicant had misstated the truth in his April 2017 application and dismissed him from service.

5. The Applicant filed his application on 12 November 2018 and the Respondent filed his reply on 17 December 2018. At the request of the Tribunal, both parties confirmed that no oral hearing was required in this case and that the Tribunal may adjudicate the matter based on the record before it.

Parties contentions

6. At the outset, the Tribunal notes that the Applicant claims compensation for the harm caused by his placement on administrative leave without pay ("SLWOP"). The Respondent replies that this contention is not receivable because the Applicant did not raise it prior to filing his appeal.

7. On the merits of the case, the Applicant argues in essence that at the time of his April 2017 candidature, he was not aware that he was the subject of an investigation by IOM. He states that, to the best of his knowledge, he was not aware of any investigation pending against him either at the time of his resignation from IOM in July 2017 or of his separation from IOM in August 2017. Rather, he avers that the investigation was made known to him on 7 September 2017, when he was already an employee of UNICEF.

8. The Applicant acknowledges, however, that he participated in a fact-finding investigation and was interviewed by IOM investigators prior to submitting his candidacy for the UNICEF post. Nevertheless, he states that he was not formally notified that he was in fact the subject of the investigation and reiterates that he was never required to defend himself before 7 September 2017.

9. The Applicant claims that the evidence relied on by UNICEF to charge him with misconduct, i.e., a letter signed by the Legal Counsel, IOM, on 13 August 2018 confirming that he had been charged with misconduct on 26 January 2017, does not constitute clear and convincing evidence that he knew that he was under investigation.

10. The Respondent replies that the IOM Legal Counsel's letter dated 13 August 2018 establishes that, on 26 January 2017, the Applicant was served with a formal Notice of Allegations ("NoA") notifying him that he was the subject of allegations of misconduct, which he formally acknowledged. The Applicant, however, only provided a partial screenshot of said Notice.

11. The Respondent further states that in his 1 September 2018 letter in response to UNICEF's letter of allegations, the Applicant acknowledges that IOM investigators informed him that he was the subject of a misconduct investigation.

12. The Respondent concludes that there was clear and convincing evidence that the Applicant lied in his employment application. The Respondent further argues that the outcome of the IOM investigation is irrelevant to the facts in this case.

13. The Respondent further states that the established facts amount to misconduct under staff regulation 1.2(b) because, in lying in his job application, the Applicant did not uphold the highest standards of integrity required from international civil servants.

14. Finally, the Respondent argues that the sanction of dismissal was proportionate to the established misconduct. The Respondent avers that the Applicant intentionally misstated the truth in his job application. It was, therefore, well within UNICEF's discretion to determine that such conduct was of sufficient gravity to warrant the Applicant's dismissal.

Consideration

Scope of judicial review

15. After a careful analysis of the evidence and legal arguments raised on file, the Tribunal has identified the following legal issues to be addressed in the case at hand:

a. Whether the decision to place the Applicant on SLWOP is receivable;

b. Whether the decision to dismiss him from UNICEF was lawful;

c. In assessing the lawfulness of said decision the Tribunal has to ponder if the Administration has met the standard threshold of "clear and convincing evidence "in relation to the facts attributed to the Applicant;

d. Whether those facts amount to serious misconduct;

e. If the Applicant was afforded his fair trial rights in the context of the investigation and disciplinary proceedings and;

f. If the applied sanction is proportional to the gravity of the offense.

Receivability

16. As a preliminary issue, the Tribunal has to decide if the decision to place the Applicant on SLWOP pending the outcome of the investigation is receivable.

17. With respect to the Applicant's apparent challenge of the above decision, the Appeals Tribunal in *Gisage* 2019-UNAT-973 (paras. 29-31), recalled its well-established jurisprudence that under staff rule 11.2(c), a decision to place a staff member on special leave is only reviewable by the Dispute Tribunal if the Applicant has timely sought management evaluation of such decision.

18. The Tribunal notes that the Respondent has pointed out in his submissions that the Applicant failed to timely request management evaluation of said decision and, therefore, it cannot be subject to judicial review at this stage of the proceedings.

19. After a careful reading of the file, the Tribunal has indeed not identified any request for management evaluation of said decision.

20. The Tribunal recalls that pursuant to staff rule 11.2(a) (emphasis added):

> A staff member **wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment**, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), **shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision**.

21. The Tribunal confirms that a request for management evaluation is a legal and jurisdictional requirement of a compulsory nature that neither the parties nor the Tribunal can waive.

22. Indeed, the purpose of management evaluation is to allow the Organization to correct itself or to provide acceptable remedies to the parties in cases where, upon review, it determines that an administrative decision is unlawful or that the correct procedure was not followed.

23. The Tribunal recalls that a request for management evaluation is a *sine qua non* condition to have access to the internal justice system as per article 2.1 and 8.1.c) of its Statute and staff rule 11.2(a). Access to justice is not an absolute right and procedural limitations, such as this one, are compatible with the nature and scope of access to justice, provided that they are prescribed by law and do not impair the very essence of such right.

24. Pursuant to staff rule 11.2(b), there are only two situations where the requirement to request management evaluation does not apply: disciplinary cases and decisions taken pursuant to advice obtained from technical bodies as determined by the Secretary-General.

25. The Appeals Tribunal in *Thomas et al* (2020-UNAT-991) has confirmed that a request for management evaluation is a compulsory step if a staff member wishes to contest an administrative decision which is not of a disciplinary nature or has not been taken pursuant to the advice of a technical body.

26. As a consequence, the Tribunal rejects as irreceivable *ratione materiae* the Applicant's challenge to the decision to place him on SLWOP pending an investigation.

Standard of review in disciplinary cases

27. The Tribunal will now turn to the analysis of the disciplinary sanction of dismissal that was applied to the Applicant following an internal investigation by OIAI, UNICEF.

28. The general standard of judicial review in disciplinary cases requires the Dispute Tribunal to ascertain: (a) whether the facts on which the disciplinary measure was based have been established; (b) whether the established facts legally amount to misconduct; and (c) whether the disciplinary measure applied was proportionate to the offence (see, for example, *Abu Hamda* 2010-UNAT-022, *Haniya* 2010-UNAT-024, *Portillo Moya* 2015-UNAT-523, *Wishah* 2015-UNAT-537).

Standard of proof

29. The Tribunal has to assess if the facts attributed to the Applicant were established according to the pre-established standard of proof.

30. In this regard, the Tribunal recalls the Appeals Tribunal's consistent case-law that when dismissal is at stake (such as in the case at hand) the allegations brought up against a staff member need to be supported by "clear and convincing evidence". Indeed, in *Molari* 2011-UNAT-164 (para. 30), the Appeals Tribunal held that:

> Disciplinary cases are not criminal. Liberty is not at stake. But, when termination might be the result, we should require sufficient proof. We hold, that when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of evidence but less than proof beyond a reasonable doubt–it means that the truth of the facts asserted is highly probable.

31. For the sake of clarity, the Tribunal recalls the sequence of events:

a. On 9 November 2016, the Inspector General, IOM, sent a Confidential Memorandum to the Applicant informing him *inter alia* that an investigation had been launched and that data would be retrieved from his "working computer(s) and IOM issued mobile devices" (Annex 5 to the application);

b. On 25 January 2017, an Investigator, Office of the Inspector General ("OIG"), IOM, emailed confidentially the Applicant inviting him for an interview on a matter reported to the OIG and on which it was believed that the Applicant had "pertinent information". The Applicant responded to this email the following day (see Annex 4 to the application);

c. On 26 January 2017, IOM served the Applicant with a formal NoA concerning "acts constituting fraud or abuse of assets or funds leading to financial loss to the Organization in relation to the disbursement of cash/reintegration grants" (see Annex 2 to the Respondent's reply, i.e., 13 August 2018 letter to UNICEF from the Legal Counsel, IOM);

d. On 29 January 2017, the Applicant signed the NoA and on 31 January 2017, OIG Investigators interviewed him about the allegations in question (see also Annex 2 to the Respondent's reply); and

e. In April 2017, when applying for a UNICEF position, the Applicant answered "no" to the question whether he had ever been the subject of an investigation for misconduct.

32. It is clear that, at the time of his application to the post in UNICEF, the Applicant was already aware that he was the subject of an investigation for misconduct by his former employer, IOM. The Tribunal finds no reason to question the veracity of the information provided by the Legal Counsel, IOM, because the Applicant has not provided any evidence to rebut it. Moreover, the Tribunal does not find the Applicant's version credible.

33. The Tribunal is therefore persuaded that the Applicant indeed misrepresented facts in his application to the post in UNICEF, and that the facts in support of the allegations against him were established as per the appropriate standard of clear and convincing evidence.

Misconduct

34. After having concluded that the facts of the case were established by clear and convincing evidence, the Tribunal will now examine if those facts amount to misconduct.

35. In *Rajan* 2017-UNAT-781 (paras. 36-38), the Appeals Tribunal stated that staff regulation 1.2(b) makes it clear that, as a core value, staff members must uphold the highest standards of integrity and honesty. The Appeals Tribunal went on to indicate that dishonest conduct, by definition, implies an element of intent or deception. Deliberate false statements or representations are in themselves dishonest. The failure to reply correctly to a prominent and very relevant question in an application form amounts to a false answer from which dishonesty normally may be inferred. The Appeals Tribunal found that a false answer in an application form is *prima facie* proof of dishonesty, shifting the evidentiary burden to the maker of the statement to adduce sufficient evidence of innocence.

36. Staff regulation 1.2(b) provides that "[s]taff 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." Bearing in mind not only the internal case law but also the content of this legal provision, the Tribunal has no doubts that the Applicant's behaviour amounts to misconduct as he deliberately failed to provide correct information to UNICEF.

Proportionality

37. In light of the above, the Tribunal now will turn to the proportionality of the sanction applied to the Applicant, i.e., dismissal.

38. While assessing the proportionality of the sanction, the Tribunal has to consider the overall features of the case, the context in which the facts have occurred, the Applicant's attitude towards those facts and the impact of the sanction.

39. On the case at hand, the Tribunal does not see any justification for the Applicant's behaviour. He has not provided any reason for such attitude nor has he shown any regret.

40. As a consequence, the Tribunal was not able to identify any errors in the exercise of UNICEF's discretion in deciding to dismiss the Applicant.

41. On the contrary, the Applicant not only misrepresented the facts at stake but, also, when confronted with his behaviour he tried to cover it up. This attitude clearly demonstrates his inaptitude as an international civil servant and a lack of compliance with the Organization's highest standards of integrity.

42. Therefore, the Tribunal is satisfied that the sanction is proportional to the seriousness and gravity of the offence.

Due process

43. In relation to the Applicant's due process rights in the course of the investigation and the disciplinary proceedings, the Tribunal recalls that the burden of proof in this respect lays on him. The Tribunal notes that the Applicant has not identified any procedural flaw that may have impacted his defence rights.

44. Moreover, after analysing the file and the investigation's report, the Tribunal is satisfied that the Applicant was notified of the allegations made against him and given the opportunity to respond to them, which he did.

45. Consequently, the Tribunal has not found any procedural flaw in the course of the disciplinary proceedings held against the Applicant.

Conclusion

46. In light of the foregoing, the application is rejected, and the sanction is confirmed.

(*Signed*)
Judge Teresa Bravo
Dated this 22nd day of September 2020

Entered in the Register on this 22nd day of September 2020
(*Signed*)
René M. Vargas M., Registrar, Geneva