UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/083
Judgment No.: UNDT/2020/193
Date: 17 November 2020
Original: English

Before: Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

MALHOTRA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Monika Ona Bileris

Counsel for Respondent:
Matthias Schuster, UNICEF
Kevin Browning, UNICEF

Introduction

1. The Applicant, a staff member with the United Nations Children's Fund ("UNICEF"), contests the decisions (a) to place her on administrative leave with full pay pending the completion of an investigation, (b) to impose on her a disciplinary measure of a written censure to be placed in her official status file for five years, and (c) to take an administrative measure of the removal of all supervisory functions from her for two years.

2. The Respondent submits that the Applicant's appeal of the decision to place her on administrative leave is not receivable and that the application is otherwise without merit.

3. By Order No. 141 (NY/2020) dated 24 September 2020, the Tribunal ordered the parties to file a submission to indicate if any of them wished any additional evidence to be produced. In their responses, the parties indicated that they did not wish a hearing on the merits of the case, and as per Order No. 141 (NY/2020), therefore filed their written closing statements on 21 October 2020.

Facts

4. In a letter of 21 November 2019 ("the sanction letter"), the acting Deputy Executive Director, Management ("the Deputy ED") explained why she had imposed the impugned decisions against the Applicant and indicated that she found that the following alleged facts had been "established by clear and convincing evidence":

> … In [the Director of the Division of Human Resources'] charge letter, [she] stated that the available evidence indicated that, on three (3) occasions, [the Applicant] shouted at a supervisee/colleague whilst it was reasonable to assume that such conduct would cause embarrassment and/or humiliation, particularly in view of the fact that others were able to hear and/or otherwise witness [the Applicant's] conduct. This was based on three (3) reported incidents in which it was alleged that: (1) on 13 March 2018, [the Applicant] shouted at [AA, name and title redacted] and a supervisee of [the Applicant]; (2) on 12

April 2018, in a meeting with [AA], [BB and CC, names and titles redacted], [the Applicant] spoke to [AA] in a manner that was rude, humiliating, and disrespectful; and (3) on 25 May 2019, during a telephone meeting with [CC and DD, names and titles redacted], [the Applicant] shouted at [DD].

5. The Deputy ED stipulated that the following facts were "not in dispute":

(i) At the times in question, [the Applicant] acted in a supervisory capacity to [AA and DD];

(ii) For several months prior to the meetings of 13 March 2018 and 12 April 2018, [AA] had been experiencing performance-related issues and engaged in conduct, including communicating with colleagues on matters that were outside his purview, that caused confusion and stress in [the Applicant's] office and exposed [her] office to reputational risks;

(iii) [The Applicant] told investigators that, during the 13 March 2018 meeting, [she] may have "expressed irritation" toward him;

(iv) On 12 April 2018, [the Applicant] witnessed [AA] having a conversation with [name and title redacted], and that, given his history of causing confusion and stress by communicating with colleagues on matters outside his purview, this concerned [the Applicant];

(v) Later that day, [the Applicant] called for a meeting with [AA, BB and CC];

(vi) [BB and CC] were both present during the meeting of 12 April 2018 with [AA];

(vii) During the meeting of 12 April 2018, "the issue (i.e., [AA's] communications with colleagues on matters outside his purview) became contentious";

(viii) While [the Applicant had] not anticipated that the matters discussed in the 12 April 2018 meeting would become contentious, [the Applicant] "appreciate[d] … it was not good to be making this a group conversation";

(ix) In the summer of 2017, [DD] enrolled in a Master's degree program requiring him to travel to Europe for one (1) week each month and did not notify UNICEF of this fact in October 2017 when he began his appointment with UNICEF;

(x) Shortly after his appointment, without consulting or informing [the Applicant], [CC, who was DD's] first-reporting officer, agreed to a flexible-working arrangement allowing [DD] to spend one (1) week per month outside of the office;

> (xi) [The Applicant] did not learn about [DD's] extended absences from the office or his flexible working arrangements until [she] noticed that he was not copied on several important matters relevant to his duties;
>
> (xii) [DD's] extended absences and flexible working arrangements affected the work of the section; and
>
> (xiii) On 25 May 2018, [the Applicant] held a telephone meeting with [DD] and [CC] after learning of his flexible working arrangements and absences from the office during which [the Applicant] admittedly "lost [her] cool" and "spoke sharply" to him.

6. Concerning the two incidents involving AA, the Deputy ED refers to the witness statements, which AA, BB and CC provided as part of the investigation conducted by the Office of Internal Audit and Investigations ("OIAI"). Further reference is made to seven other witness statements, and it was noted that "[w]hile not directly testifying to the three (3) incidents at issue here, these witness statements do indicate that the alleged misconduct was consistent with a pattern of behaviour observed and experienced by many of [the Applicant's] colleagues". It was, however, also indicated that "in contrast to these witnesses, four (4) witnesses stated that they had never witnessed [the Applicant] engage in such conduct". No explicit reference is made to any witness statement(s) regarding the third incident involving DD.

7. The Deputy ED described, summarized and commented on the Applicant's "comments on allegations" as follows:

> … On 24 July 2019, [the Applicant] provided 25 pages of comments on the charges of misconduct. [The Applicant] dedicated a considerable portion of [her] comments to detailing the various work-related disagreements and performance-related shortcomings of the complainants and the negative impact these shortcomings had on [her] professional relationship with them and on the office as a whole. [The Deputy ED has] accepted the veracity of [the Applicant's] comments in this regard. In [the Applicant's] comments, [she] also provided contrasting accounts of the three (3) incidents at issue and suggested that the work-related disagreements and performance related shortcomings are to blame for the "disparate accounts" put forward by [her] and the complainants. In view of the multitude of examples of [the Applicant's] conduct provided by other witnesses, and the consistency of the described conduct with the allegations of misconduct at issue in

> this matter, [the Deputy ED does] not accept [the Applicant's] assertion that these disagreements and shortcomings can fully, or even mostly, explain the disparate accounts between [her] and the complainants. [The Deputy ED does], however, find the performance shortcomings and work-related disagreements described by [the Applicant], and the impact these had on [her] and [her] office, to be mitigating circumstances in the instant matter.
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> … [The Applicant] also dedicated a considerable portion of [her] comments to critiquing the conduct of the investigation and alleging bias on the part of investigators. While [the Deputy ED does] not agree with [the Applicant's] comments in this regard, [the Deputy ED notes] that, following [the Applicant's] receipt of charges, [she was] afforded the opportunity to provide comments on the investigation report and evidence in [her] favour. All of [the Applicant's] comments and evidence, including all supporting documentation and critiques of the investigators and investigation report have been taken into consideration when making the instant decision.
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> … Finally, [the Applicant] also acknowledged that this process has brought to [her] attention "a number of problems in [her] management interactions with staff" and that [she] "took many missteps". [The Applicant] described the findings of the investigation report to be "sobering and humbling" and stated [her] surprise that [her] communications with colleagues were conveyed in ways that were the opposite of what [she] had intended. [The Applicant] accepted the fact that "there is also clearly a thread of a number of people with hurt feelings and diminished self-respect through their interactions with [her]…" [The Applicant] committed to amending [her] behaviour and expressed [her] willingness to receive guidance and acquiring new managerial skills to address these issues.

8. Based on the Deputy ED's factual findings, she concluded that the Applicant's "conduct [had been] unacceptable" without further qualifying whether this amounted to misconduct. The Deputy ED took note of "the work-related disagreements and performance-related issues detailed by [the Applicant] concerning the complainants, as well as the impact these issues had on the stress levels, reputation, and workload of [her] office" and considered "all of these to be mitigating circumstances". The Deputy ED further found that the Applicant's "willingness to acknowledge [her] managerial shortcomings, the negative impact these shortcomings have had on [the Applicant's] supervisees, and [the Applicant's] willingness to accept guidance in this regard [were] mitigating circumstances".

Consideration

The issues of the case

9. The Appeals Tribunal has consistently held that the Dispute Tribunal has "the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review", and "may consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed" (see *Fasanella* 2017-UNAT-765, para. 20).

10. In the present case, the Tribunal defines the issues to be adjudicated upon as follows:

a. Was the decision to place the Applicant on administrative leave receivable, and if so, lawful?

b. Was it lawful to impose the disciplinary sanction of placing a written censure against the Applicant for five years in her official status file?

c. Was the decision to impose an administrative measure of removal of all supervisory functions from the Applicant for two years lawful?

d. Should any of the contested decisions be unlawful, what relief, if any, is the Applicant entitled to?

The receivability of the decision to place the Applicant on administrative leave

11. The Respondent, in essence, submits that the decision to place the Applicant on administrative leave is not receivable as it was taken during a disciplinary process and not following it as per staff rule 11.2(b) and therefore the Applicant had to request a management evaluation of this decision, which she failed to do.

12. In response, the Applicant submits that the relevant decision "made up part of the investigative process, which was only concluded with the transmission of the disciplinary sanction, and as such is receivable". The Applicant further contends that she "did, in fact, request a management review of the administrative leave and noted explicitly the damage the administrative leave was doing to her career viability and reputation" in an email exchange on 21 October 2018.

13. The Tribunal notes that under staff rule 11.2(a) a staff member who wishes to "formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment … shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision". This requirement, however, does not apply to "a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process".

14. In the present case, it is evident that the decision regarding placing the Applicant on administrative leave was taken during—and not following—the disciplinary process. Under staff rule 10.2(a) and (b), the Applicant was therefore required to file a request for management evaluation, but when closely perusing the email correspondence of 21 October 2018 to which the Applicant refers, it is clear the Applicant did not do so.

15. Accordingly, the Tribunal confirms its findings in Order No. 141 (NY/2020) that the Applicant's appeal against the decision to place her on administrative leave is not receivable pursuant to staff rule 11.2(a).

Was the decision to impose against the Applicant the disciplinary sanction of placing a written censure for five years in her official status file lawful?

Standard of review in disciplinary cases

16. The Appeals Tribunal has consistently held the "[j]udicial review of a disciplinary case requires [the Dispute Tribunal] to consider the evidence adduced and

the procedures utilized during the course of the investigation by the Administration". In this context, [the Dispute Tribunal] is "to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence". See, for instance, para. 32 of *Turkey* 2019-UNAT-955, quoting *Miyzed* 2015-UNAT-550, para. 18, citing *Applicant* 2013-UNAT-302, para. 29, which in turn quoted *Molari* 2011-UNAT-164, and affirmed in *Ladu* 2019-UNAT-956, para. 15, which was further affirmed in *Nyawa* 2020-UNAT-1024.

17. The Appeals Tribunal has, however, underlined that "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" or otherwise "substitute its own decision for that of the Secretary-General" (see *Sanwidi* 2010-UNAT-084, para. 40). In this regard, "the Dispute Tribunal is not conducting a "merit-based review, but a judicial review" explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision" (see *Sanwidi*, para. 42).

18. Among the circumstances to consider when assessing the Administration's exercise of its discretion, the Appeals Tribunal has stated "[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion" (see *Sanwidi*, para. 38).

19. Specifically regarding disciplinary matters, the Appeals Tribunal has held that the Administration enjoys a "broad discretion [therein]; a discretion with which [the Appeals Tribunal will not lightly interfere" (see *Ladu* 2019-UNAT-956, para. 40). This discretion, however, is not unfettered. As the Appeals Tribunal stated in its seminal judgment in *Sanwidi*, at para. 40, "when judging the validity of the exercise of discretionary authority, … the Dispute Tribunal determines if the decision is legal,

rational, procedurally correct, and proportionate". This means that the Tribunal "can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse".

Whether the facts on which the sanction was based have been established?

20. The Applicant, in essence, submits that the OIAI did not properly establish as a matter of fact that she had told AA not to "talk to anyone" and that she had shouted at him, which she denies. Similarly, the Applicant submits that she never shouted at DD.

21. The Respondent submits that it "has been established by clear and convincing evidence that: (1) on 13 March 2018, the Applicant shouted at [AA], for whom she acted in a supervisory capacity; (2) on 12 April 2018, the Applicant again shouted at [AA]; and (3) on 25 May 2018, the Applicant shouted at [DD], for whom she also acted in a supervisory capacity". In specific, the Respondent contends that:

> a. On 13 March 2018, "the Applicant shouted at [AA] at such a volume 'that [it] could be heard in the corridor…'" and that "the Applicant conceded that it was 'very possible that [she] expressed irritation during this interaction'".
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> b. On 12 April 2018, AA "met with the Applicant in the presence of [BB and CC], and according to AA, the Applicant "intrusively questioned him about his conversations with other colleagues asking, at one point, 'why is this girl even talking to you?!'. BB and CC "provided similar accounts" as: (i) BB "stated, *inter alia*, that the Applicant 'openly accused [AA] of negatively effecting the work of the section by talking to people outside the section and … objected to his networking with some friends he had made…", and (ii) CC "described the Applicant's conduct as 'very rude, humiliating and disrespectful' and stated that it was apparent that 'it was extremely humiliating for [AA]'". The Applicant herself "conceded that the meeting 'became contentious' and that 'it was not good to making this a group conversation'".

c. On 25 May 2018, the Applicant "had a telephone meeting with [DD and CC] to discuss [DD's] flexible working arrangements and absences from the office" during which CC stated that the Applicant "completely lost control over her tone and behavior—she started shouting at the top of her voice at [DD]". Similarly, DD "stated that the Applicant raised her voice, accused him of lying, told him that he was unprofessional, and engaged him in a way that made him feel 'quite uncomfortable'". The Applicant "conceded that she "lost [her] cool" with DD and she "definitely spoke sharply" to him.

d. Eight other witnesses "informed [OIAI] that the Applicant shouted and/or raised her voice with staff members when upset, presented feedback in adversarial and disempowering ways, and directed insensitive and insulting remarks toward her supervisees". While not speaking directly to the three instances of misconduct at issue, "these statements indicate that the reported misconduct was consistent with a pattern of behaviour observed and experienced by many of the Applicant's colleagues and, therefore, lend credibility to the allegations of misconduct".

22. The Tribunal observes that the Appeals Tribunal has consistently held that, unless termination is the outcome of a disciplinary process, the Administration only has to establish a case of misconduct with the preponderance of evidence—and not by clear and convincing evidence (see, for instance, *Suleiman* 2020-UNAT-1006, para. 10). The evidentiary test is therefore less strict than what was otherwise stated by the Deputy ED and what the Respondent has argued throughout in the present case. The Tribunal, however, notes that at least when the imposition of a disciplinary sanction is under consideration, an alleged wrongdoer enjoys the presumption of innocence (see, for instance, *Ladu* 2019-UNAT-956, para. 16, and *Gisage* 2019-UNAT-973, para. 41).

23. According to the sanction letter, the factual basis for imposing the disciplinary sanction against the Applicant was therefore, in essence, that she had shouted at a "supervisee/colleague" at "three (3) occasions", namely on 13 March 2018, 12 April 2018 and 25 May 2018, respectively.

24. Concerning the meeting on 13 March 2018, the Tribunal notes that AA, who was one of three staff members to file a complaint of misconduct against the Applicant, was the only witness who stated that the Applicant had shouted at him. The Applicant has consistently denied that she did so and has only admitted that she may have "expressed irritation" toward him. According to the Deputy ED's account of the facts, AA even stated that the Applicant's shouting was so loud that it could be heard by others in the corridor. However, it does not follow from the sanction letter that any other witnesses had confirmed this statement.

25. With regard to the 12 April 2018 meeting, according to the Deputy ED's account of the facts, no one present at this meeting—AA, BB, CC or the Applicant—stated to the OIAI investigation that the Applicant had shouted at anyone during the meeting. Rather, CC had reported that the Applicant had spoken to AA "in a manner that was rude, humiliating, and disrespectful" and CC had been "very uncomfortable with the tone and the overall tenor of the conversation". This is also confirmed by the Deputy ED's summary of the charge letter (as quoted above) in which no mention is made of the Applicant having shouted at anyone at this meeting; rather, it is indicated that the Applicant only stated that "the issue became contentious" and that she "appreciate[d] … it was not good to be making this a group conversation".

26. As for the meeting on 25 May 2018, no reference is made in the sanction letter to any witness statements reaffirming that the Applicant shouted at DD. This is only done in the Respondent's submissions to the Tribunal. While CC, who also had filed a misconduct complaint against the Applicant, in her testimony stated that the Applicant shouted "at the top of her voice" at DD during this meeting, DD, who did not file any complaint, merely stated that the Applicant had "raised her voice", which is evidently less than shouting. The testimonies are therefore not congruent, and the Applicant denies having shouted at DD during the meeting, only admitting that that she "lost [her] cool" and "spoke sharply" to DD.

27. The circumstance, to which the Deputy ED refers, that some witnesses testified that the Applicant had shouted at staff members at other occasions by itself makes no

difference as these occasions are not under review in the present case. Also, the Tribunal notes that according to the Deputy ED, four other witnesses, on the other hand, countered this allegation and denied ever having experienced such behavior on the part of the Applicant.

28. Consequently, the Tribunal finds that according to the Deputy ED's own account of the facts, the Applicant allegedly only shouted at colleagues/supervisees at two, and not three, occasions, namely at the 13 March 2018 and 25 May 2018 meetings, and that the two testimonies to this effect were both given by staff members who had already filed misconduct complaints against the Applicant, namely AA and CC. These two witnesses therefore had a vested interest in the outcome of the disciplinary process, and the evidentiary weight of their testimonies is therefore to be assessed in this light. Also, it is telling that according to the Deputy ED's own account, no other witnesses—even though they were present at both occasions—stated that the Applicant had actually shouted at either AA or DD.

29. Also, the Deputy ED based her decision on the fact that "it was reasonable *to assume* that such conduct would cause embarrassment and/or humiliation, particularly in view of the fact that others were able to hear and/or otherwise witness [the Applicant's] conduct" (emphasis added). Rather than a fact, this is—in the Deputy ED's own words—an assumption, and therefore holds no evidentiary value, which means that it has not been established that either AA or DD were embarrassed and/or humiliated by the Applicant's actions at the relevant meetings.

30. On the preponderance of the evidence, the Tribunal therefore finds that by the Deputy ED's own account of the facts in the sanction letter, the Deputy ED had failed to demonstrate that the Applicant shouted at AA and DD as otherwise stated by the Deputy ED in her decision, as well as in the manner which the Respondent describes in his submissions. Accordingly, the facts on which the sanction was based have not been lawfully established (see *Turkey*, *Ladu* and *Gisage* above).

Whether the established facts amounted misconduct and the disciplinary measure applied was proportionate to the offence

31. The Applicant submits that "the facts established by OIAI did not amount to misconduct, and even if they did, the sanctions were disproportionate to the alleged misconduct".

32. The Respondent contends that "[t]he established conduct constituted humiliating, embarrassing, and otherwise demeaning words and actions that reasonably caused offence and humiliation to both [AA and DD] and, therefore, constituted misconduct". The disciplinary measure imposed, a written censure, is further "the lightest available to the Respondent under the Staff Rules and was proportionate to the Applicant's established misconduct".

33. The Tribunal notes that under the applicable UNICEF executive directive in force at the time of the contested decisions, CF/EXD/2012-005 (Disciplinary process and measures), a precondition for imposition of a disciplinary sanction against a staff member is that s/he had been found culpable of misconduct following a disciplinary process (see sec. 4.3). Although sec. 1.4 of CF/EXD/2012-005 states that the stipulated list of misconduct offences is not exhaustive, if a UNICEF staff member is then found guilty of misconduct without reference to any of the listed offences, the definition of the offence must be so specific and precise that—as a matter of access to justice—it would allow the relevant staff member to prepare an application to the Dispute Tribunal in accordance with sec. 5 of CF/EXD/2012-005.

34. The Tribunal notes that in the Deputy ED's sanction letter, the only qualification that she makes of the Applicant's sanctionable behavior is that the Applicant's "conduct [had been] unacceptable". The Deputy ED does not qualify whether the Applicant's actions amounted to misconduct or indicate what category of misconduct the Applicant had allegedly committed as per art. 1.4 of CF/EXD/2012-005. Similarly, in the Respondent's submissions, he also simply contends that "[t]he established conduct constituted humiliating, embarrassing, and otherwise demeaning

words and actions that reasonably caused offence and humiliation to both [AA and DD]" without stating what category of misconduct to which this amounts, although he does, at least, reach the conclusion that this alleged behavior "constituted misconduct". Also, the Tribunal notes that in the Deputy ED's sanction letter, it was not stated that AA and DD were actually humiliated or embarrassed by the Applicant's conduct but only that this was the assumption.

35. The Deputy ED's decision is therefore flawed as the basic reason and legal foundation for imposing the disciplinary sanction of written censure placed in the Applicant's official status file for five years is missing.

36. The OIAI investigation report dated 24 May 2019 was, however, titled, "Investigation report on harassment and abuse of authority by a staff member at the programme division", and the Tribunal will therefore examine the case as a case on harassment and abuse of authority, which are actions that are considered misconduct under art. 1.4 of CF/EXD/2012-005.

37. The applicable definitions of harassment and abuse of authority are found in UNICEF's executive directive, CF/EXD/2012-007 (Prohibition of discrimination, harassment, sexual harassment and abuse of authority),

38. Under sec. 1.1(b) of CF/EXD/2012-007, harassment is defined as follows:

> Harassment is any improper and unwelcome conduct that has or might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to abuse, demean, intimidate, belittle, humiliate or embarrass another person or which create an intimidating, hostile or offensive work environment. It includes harassment based on any grounds, such as race, religion, color, creed, ethnic origin, physical attributes, gender or sexual orientation. Harassment normally involves a series of incidents.

39. Whereas, pursuant to sec. 1.1 (d) of CF/EXD/2012-007, the definition of abuse of authority is the following:

> Abuse of authority is the improper use of a position of influence, power, or authority against another person. This is particularly serious when a person uses, or threatens to use, his/her influence, power, or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment, and such conduct can include (but is not limited to) the use of intimidation, threats, blackmail or coercion.

40. The Tribunal notes that as it has found that the Respondent has not established the facts on which the sanction was based to the applicable standard, it is left with the description of facts by the Deputy ED, which were presented as "not in dispute" and quoted above. In accordance therewith, (a) during the 13 March 2018 meeting, the Applicant told the investigators that she may have "expressed irritation" toward AA; (b) at the 12 April 2018 meeting between the Applicant, AA, BB and CC, an issue "became contentious" and the Applicant admitted that "it was not good to be making this a group conversation"; and (c) on 25 May 2018, in the telephone meeting with CC and DD, the Applicant "lost [her] cool" and "spoke sharply" to DD.

41. Based on the above, the Tribunal finds that it cannot be held that the Applicant either harassed AA and/or DD or abused her authority as per the definitions set out in secs. 1.1 (b) and (d) of CF/EXD/2012-007. The established facts therefore do not qualify as misconduct and the disciplinary sanction is accordingly unlawful, rendering the issue of proportionality immaterial.

Was the decision to impose an administrative measure of removal of all supervisory functions from the Applicant for two years lawful?

Standard of review of an administrative measure

42. The legal framework provided by the Respondent provides no provisions as to how and on what basis a decision to impose an administrative measure of removal of all supervisory functions from her for two years is to be taken.

43. The Appeals Tribunal has, however, given some general guidance on decisions to impose administrative measures. In *Yasin* 2019-UNAT-915, para. 47, the Appeal Tribunal held that because of the "adverse impact on the concerned staff member's career" of an administrative measure, "it must be warranted on the basis of reliable facts, established to the requisite standard of proof, namely that of 'preponderance of evidence' [reference to footnote omitted] and be reasoned in order for the Tribunals to have the ability to perform their judicial duty to review administrative decisions and to ensure protection of individuals, which otherwise would be compromised".

44. Further, in *Elobaid* 2018-UNAT-822, in line with the above quoted judgment in *Sanwidi*, the Appeal Tribunal held that "[i]n administrative procedures, however, as the measure … is not as consequential as a disciplinary action, the scope of the adversarial principle—while it must also respond to the needs of transparency, proportionality and fairness—is limited to informing the staff member concerned of the Administration's intention and allowing him or her the opportunity to comment on the respective action" (see para. 26). The Appeals Tribunal added that as "[a]n administrative measure is less formal [than a disciplinary sanction] and is usually done with alacrity and is thus more flexible in order to better respond to the Organization's needs of efficiency" and that "[i]t is a real exercise of discretion" (see para. 27).

Did the Administration lawfully exercise its discretion when imposing the administrative measure?

45. The Applicant submits that as she "is subject to the annual Senior Staff Rotation Exercise" and "less than five years from retirement", the disciplinary sanction "coupled with not being able to supervise staff for two years almost completely cut the Applicant out of the running for a post as there are few, if any, D-level positions that do not involve managing staff" and that the imposed measures were "meant to highlight and correct a certain behaviour, then the measures were completely excessive".

46. The Applicant further contends that "[n]otwithstanding the illogical reasoning of removing a manager from her supervisory role so that she could, in the future,

become a better supervisor, this measure appears to have been applied with the specific intent of removing her from the Organization, as it was unlikely that a D-level staff member could find meaningful work when not allowed to supervise staff".

47. The Respondent submits that "eight other witnesses provided statements to the OIAI indicating that the Applicant engaged in a pattern of behaviour that included shouting and/or raising her voice at colleagues when upset, presenting feedback in adversarial and disempowering ways, and making insulting and insensitive remarks", and "by engaging in such conduct, the Applicant created a hostile work environment for other UNICEF personnel".

48. The Respondent further contends that the Applicant herself conceded to her faults as a manager and that "UNICEF has a duty to ensure a harmonious work environment and to protect its personnel from conduct such as the Applicant's". Consequently, "the Administration was not in a position to ignore the Applicant's serious managerial shortcomings, nor could it continue to subject the Applicant's supervisees to her supervision" and "to do so would have been unfair to UNICEF personnel and would have exposed UNICEF to reputational risk".

49. Firstly, regarding the "reliable facts" as per *Yasin*, the Tribunal observes that the factual account of the Respondent according to which eight witnesses had testified against the Applicant substantively differs from what was set out by the Deputy ED in the sanction letter in which was stated that,

> In addition to the three (3) specific incidents of alleged misconduct at issue here, at least seven (7) other witnesses, including some who spoke in your support, reported that [the Applicant] shouted and/or raised [her] voice with staff members when upset, presented feedback in adversarial and disempowering ways, and/or made insensitive and insulting remarks.[reference to footnote omitted] incidents at issue here, these witness statements do indicate that the alleged misconduct was consistent with a pattern of behaviour observed and experienced by many of your colleagues. In this regard, it is noted that, as is pointed out in your comments, in contrast to these witnesses, four (4) witnesses stated that they had never witnessed you engage in such conduct.

50. In this regard, the Tribunal notes that concerning the three specific incidents, with reference to the above, the only facts that have been established are those which the Deputy ED stated were "not in dispute", according to which at three different incidents, (a) the Applicant expressed "irritation" toward AA, (b) an issue "became contentious" which "was not good to be making [in] this a group conversation" with AA, BB and CC, and (c) she "lost [her] cool" and "spoke sharply" to DD. At the same time, the Tribunal also notes that the Applicant appears to have admitted to OIAI that she was not, at least always, a good manager, which was recorded as follows by the Deputy ED in the sanction letter and subsequently not objected to by the Applicant:

> [The Applicant] also acknowledged that this process has brought to [her] attention "a number of problems in [her] management interactions with staff" and that [she] "took many missteps". [The Applicant] described the findings of the investigation report to be "sobering and humbling" and stated [her] surprise that [her] communications with colleagues were conveyed in ways that were the opposite of what [she] had intended. [The Applicant] accepted the fact that "there is also clearly a thread of a number of people with hurt feelings and diminished self-respect through their interactions with [her]…" [The Applicant] committed to amending [her] behaviour and expressed [her] willingness to receive guidance and acquiring new managerial skills to address these issues.

51. Secondly, the Tribunal finds that the impact of an administrative measure on a staff member must, per definition, be less punitive than a disciplinary sanction, as also set out in *Elobaid*, paras. 26 and 27, as quoted above. Otherwise, the administrative measure could open a window to circumvent the exhaustive list of disciplinary sanctions in sec. 4.3 of CF/EXD/2012-005 and impose non-authorized, but disguised, disciplinary sanctions without granting the corresponding due process safeguards that necessarily follows a disciplinary process (in line herewith, see also *Elobaid*).

52. As for the present case, the Tribunal notes that posts at the D-1 level in the United Nations are typically senior manager positions and therefore involve extensive managerial responsibilities. By depriving the Applicant of undertaking any such responsibility for two years in UNICEF, she was evidently put in a very precarious situation, in particularly as she served on a fixed-term appointment and was on a

rotational scheme for senior staff. According to the Applicant's submissions, she is now also left without a United Nations job.

53. The administrative measure of depriving the Applicant of all her supervisory functions for two years, particularly in combination with a disciplinary sanction (the Tribunal takes judicial note that in a United Nations job application, she would normally have to indicate if she had previously been subject of disciplinarily process), might therefore with some degree of probability have led to her eventual separation from service with the United Nations, or at least, been a significant and contributing factor therein. The actual effect of the administrative measure on the Applicant's professional career might consequently have been harsher than the majority of the disciplinary sanctions listed in sec. 4.3 of CF/EXD/2012-005 in similar circumstances (for instance, loss of one or more steps in grade; deferment, for a specified period, of eligibility for within-grade salary increment; suspension without pay for a specified period; fine; deferment, for a specified period, of eligibility for consideration for promotion; demotion with deferment, for a specified period, of eligibility for consideration for promotion). Considering the Applicant's employment situation, this must also have been evident to the Deputy ED when she imposed the administrative measure.

54. In conclusion, the administrative measure was not lawful as it was not, in accordance with *Yassin*, "warranted on the basis of reliable facts, established to the requisite standard of proof, namely that of 'preponderance of evidence'", and on the established facts before the Tribunal, the measure was not proportionate to the Applicant's established wrongdoings.

Ulterior motives

55. The Applicant also submits that the impugned decisions were tainted by "bad faith, bias, and ill-will against her". The Tribunal observes that the Appeals Tribunal has consistently held that a party who claims any such ulterior motive must be able to

substantiate her/his claim to be successful (see, for instance, *Parker* 2010-UNAT-012 and *Ross* 2019-UNAT-944), but finds that the Applicant has not been able to do so.

Remedies

The legal framework for relief before the Dispute Tribunal

56. The Statute of the Dispute Tribunal provides in art. 10.5 an exhaustive list of remedies, which the Tribunal may award:

> 5. As part of its judgement, the Dispute Tribunal may only order one or both of the following:
>
> (*a*) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (*b*) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

Rescission / specific performance

57. The Applicant requests that the impugned disciplinary and administrative decision be rescinded and further requests that "[s]he should be granted a two-year contract and placed in a post commensurate with her skills, training, and qualifications, as she would have been if her contract was renewed as it should have been".

58. The Respondent makes no direct submissions on the issue of rescission and/or specific performance, but generally contends that "the contested decisions were lawful" for which reason "the Applicant did not suffer any injury from the decisions and is not entitled to the relief sought in this regard".

59. With reference to the above, the Tribunal has found that the disciplinary sanction and the administrative measure were unlawful, and considering the seriousness of both decisions, the Tribunal finds that it is only appropriate to rescind them under art. 10.5(a) of its Statute. As neither decision concern "appointment, promotion or termination", no elective compensation *in lieu* is to be set by the Tribunal.

60. Regarding granting the Applicant a new two-year appointment, the Tribunal notes that as part of the present case, the Applicant has not appealed any administrative decision not to renew her fixed-term appointment or any non-selection decisions. The Tribunal therefore cannot rescind any non-renewal decision or order a renewal as specific performance.

Compensation for harm

61. The Tribunal notes that in *Kebede* 2018-UNAT-874, the Appeals Tribunal outlines the three basic prerequisites for compensation, namely, harm, illegality and nexus between the both, as follows (see para. 20):

> … It is universally accepted that compensation for harm shall be supported by three elements: the harm itself; an illegality; and a nexus between both. It is not enough to demonstrate an illegality to obtain compensation; the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on a cause-effect lien.11 If one of these three elements is not established, compensation cannot be awarded. Our case law requires that the harm be shown to be directly caused by the administrative decision in question.

62. The Applicant submits that her reputation and career were harmed, "leaving her unable to find a D-level job either within or outside of UNICEF as no one wants to hire a staff member with a censure who cannot supervise staff". She "unsuccessfully applied for 27 jobs internally and externally" and the "[t]here are rumours she is in trouble or was kicked out of UNICEF", and [her] "performance reviews were handled negligently and unprofessionally, and she was openly treated as someone being ushered out the door", which all "had a detrimental effect on her mental and physical health, which required her to seek professional medical care".

63. The Applicant further contends that she should further be awarded one-year net salary "for the damage done to her career and reputation", and "interest on all payments as of the date of her Application should be granted as a normal course of litigation".

Compensation for loss of income

64. The Respondent, in essence, contends that there is "no evidence of harm resulting from the contested decisions" and that the Applicant "has not established any connection between the alleged facts and the contested decisions". The Applicant's assertions "concern purported separate and distinct administrative decisions", by which the Tribunal assumes that the Respondent refers to non-renewal and non-selection decisions, and should she "wish to contest these decisions, she is required to first submit a written request seeking management evaluation of these decisions in accordance with Staff Rule 11.2(a)" for which reason "they are not properly before the Tribunal for consideration here".

65. The Tribunal finds that it would be beyond the scope of the present case to award the Applicant compensation for loss of income for the non-renewal of her fixed-term appointment or any non-selection decisions—as already stated above, no such decision has been appealed in the application and is therefore before the Tribunal for adjudication.

Reputational harm

66. The Respondent submits that the Applicant's claim for reputational damages "is vague and apparently based on hearsay" and that "[s]he has not provided any evidence in this regard nor has she demonstrated how the 'rumors' about which she was allegedly told relate to the contested decisions". The Applicant is "not entitled to the relief sought as she has failed to show any harm arising from the contested decisions or provided any evidence in this regard" and that "[t]here is no basis for her assertions that she has suffered damage to her career and reputation …".

67. The Appeals Tribunal set out some evidentiary standards for a claim for reputational harm in *Kallon* 2017-UNAT-742 (para. 68) as follows:

> … The evidence to prove moral injury of the first kind may take different forms. The harm to *dignitas* or to reputation and career potential may thus be established on the totality of the evidence [reference to footnote omitted]; or it may consist of the applicant's own testimony or that of others, experts or otherwise, recounting the applicant's experience and the observed effects of the insult to dignity. And, as stated above, the facts may also presumptively speak for themselves to a sufficient degree that it is permissible as a matter of evidence to infer logically and legitimately from the factual matrix, including the nature of the breach, the manner of treatment and the violation of the obligation under the contract to act fairly and reasonably, that harm to personality deserving of compensation has been sufficiently proved and is thus supported by the evidence as appropriately required by Article 10(5)(b) of the [Dispute Tribunal's] Statute. And in this regard, it should be kept in mind, a court may deem *prima facie* evidence to be conclusive, and to be sufficient to discharge the overall onus of proof, where the other party has failed to meet an evidentiary burden shifted to it during the course of trial in accordance with the rules of trial and principles of evidence.

68. With reference to the Tribunal's liability findings above, it follows from the Applicant's submissions, which the Tribunal accepts, that despite her professional experience and credentials and having applied for 27 other jobs, she has not been able to secure any new employment subsequent to being imposed the unlawful disciplinary sanction and administrative measure. As above, the Tribunal further takes judicial note of the fact that it is standard practice that a job applicant for a United Nations job will need to indicate in their job application whether they have previously been subject of a workplace disciplinary process and/or investigation. If having to do so, such stipulations will necessarily significantly devaluate a job candidature, in particular if it is a senior position requiring supervisory skills and competencies and the alleged disciplinary issue involved incidents in which the person had been found in fault thereof.

69. In light thereof, the Tribunal finds that in accordance with *Kebede*, the Applicant has appropriately established the necessary harm, illegality and nexus

therebetween in order to award her compensation for reputational damages. Also, with reference to *Kallon*, the Tribunal finds that it has, at least presumptively, been established that the unlawful impugned decisions had a significant adversarial impact on her reputation and therefore also on her other job applications, in particular those with the United Nations.

70. Taking into account the severity of the illegality combined with the Applicant's reputational damages and her distressed efforts to find new employment, the Tribunal finds the compensation award therefor should be set according to the highest levels and awards the Applicant three-months net-base salary in compensation. In line herewith the Tribunal refers to *Kallon*, para. 82 in which the Appeals Tribunal affirmed the Dispute Tribunal's award of USD50,000 that had primarily focused on "the impact of the treatment on [the applicant's] career" and the "state of [his] well-being".

Damage to mental and physical health

71. The Respondent contends that "she has produced no evidence to support this claim" and that "it was incumbent for the Applicant to provide such evidence without further prompting from the Tribunal".

72. The Tribunal notes that compensation for harm under art. 10.5(b) of its Statute is subject to evidence and that the Applicant has indeed not provided any evidence for her mental or physical harm resulting from the impugned decisions.

73. In the Applicant's submission dated 14 October 2020—without any further explanation and appending abundant evidence for her request for reputational damages—she "[r]eserve[d] her right to request (1) additional production of documents strictly as they relate to the issue of damages and (2) an oral hearing on damages, should the case proceed to that level". Subsequently, this reservation, which has no statutory or jurisdictional basis, was not reiterated in the Applicant's closing statement, which according to Order No. 141 (NY/2020) 24 September 2020, were "to summarize the submissions already on record".

74. The Tribunal therefore sees no reason to instruct the Applicant—once more—to provide evidence for her damages under art. 10.5(b) of its Statute. In line herewith, the Tribunal refers to the Appeals Tribunal in *Robinson* 2020-UNAT-1040 in which it held that (see paras. 36 to 37):

> … There is no obligation on the Dispute Tribunal to request evidence from the parties, particularly when both are represented by counsel who are presumed to be aware of the relevant law and appeal processes to ensure their client's interests are adequately represented. In *Ross* [2019-UNAT-926, para. 57], the Appeals Tribunal did not find that any alleged confusion from the *Kallon* [2017-UNAT-742] jurisprudence justified an award for moral damages supported only by the applicant's testimony. It also held in *Ross* that there was no duty on the Secretary-General to give the applicant "notice of jurisdictional developments" particularly when the applicant was a lawyer who had "ample opportunity to acquaint himself with the law as stated in *Kallon* …" [*Ross*, para. 59].
>
> … Therefore, the Dispute Tribunal did not err in law in refusing to award moral damages based solely on the Appellant's testimony. Also, the Dispute Tribunal proceeded fairly in not requesting further evidence from the Appellant. The Appellant had the opportunity before the Dispute Tribunal to apply to adduce additional evidence but failed to do so. There is no obligation on the Dispute Tribunal to independently seek this evidence.

75. The Tribunal therefore rejects the Applicant's request for compensation for damage to mental and physical health.

Conclusion

76. In light of the foregoing, the Tribunal DECIDES that:

a. The appeal against the decision to place her on administrative leave with full pay pending the completion of an investigation is not receivable;

b. The decisions (i) to impose on her a disciplinary measure of a written censure to be placed in her official status file for five years and (ii) to take an administrative measure of a removal of all supervisory functions from her for two years are rescinded;

c. The Applicant is awarded three months of net-base salary in compensation under art. 10.5(b) of the Dispute Tribunal's Statute;

d. The compensation amount shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Joelle Adda

Dated this 17th day of November 2020

Entered in the Register on this 17th day of November 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York