UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/004
Judgment No.: UNDT/2022/015
Date: 17 February 2022
Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

EGIAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Isavella Maria Vasilogeorgi, ALD/OHR, UN Secretariat
Lucienne Pierre, ALD/OHR, UN Secretariat

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

Introduction

1. The Applicant, a staff member with the Security Council Affairs Division, Department of Political and Peacebuilding Affairs ("SCAD/DPPA"), New York, appealed the decision to impose on her the disciplinary measures of written censure and loss of two steps in grade for misconduct.

2. The Respondent replies that the application is without merit and should be dismissed.

3. For the reasons stated below, the application is rejected.

Relevant facts and procedural history

4. On 7 March 2016, the Applicant assumed the role of Director at the D-2 level with SCAD/DPPA.

5. On 21 January 2019, YB, the former Chief, Security Council Practices and Charter Research Branch ("SCPCRB"), SCAD, at the D-1 level, filed a formal complaint of prohibited conduct against the Applicant. The complaint alleged, *inter alia*, that the Applicant created a hostile work environment and misused United Nations resources.

6. Following YB's complaint, the Executive Officer, DPPA initiated a fact-finding investigation by a panel ("investigation panel") on allegations of misconduct

concerning the Applicant pursuant to ST/SGB/2008/5 ("Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority").

7. On 16 May 2019, the investigation panel completed its investigation.

8. On 19 July 2019, the Under-Secretary-General, Political and Peacebuilding Affairs, DPPA ("USG/DPPA"), referred the Applicant's case to the Office of Human Resources ("OHR") for appropriate action.

9. On 25 November 2019, the Under-Secretary-General for Management Strategy, Policy and Compliance ("USG/DMSPC") informed the Applicant of the allegations of misconduct against her (the "allegations memorandum"). The Applicant was notified of the opening of a disciplinary process against her and was given a deadline to submit her response to the allegations.

10. On 11 March 2020, the Applicant submitted her comments on the allegations of misconduct.

11. By letter dated 29 October 2020, the Applicant was informed that, based on a review of the entire dossier, including her comments, the USG/DMSPC had concluded that it had been established by a preponderance of the evidence that the Applicant had engaged in prohibited conduct (the "sanction letter"). The Applicant was also informed that the USG/DMSPC had decided to impose the disciplinary measures of written censure and loss of two steps in grade, in accordance with staff rules 10.2(a)(i) and (ii), having found no aggravating or mitigating circumstances.

12. On 27 January 2021, the Applicant filed an application with the Dispute Tribunal contesting the disciplinary measures imposed on her by the USG/DMSPC.

13. By Order No. 106 (NY/2021), the Tribunal directed the parties to submit any requests for additional evidence, including testimonial evidence. In the case no oral evidence was to be requested, the Tribunal directed the parties to inform it of its wishes for a hearing to be held.

14. On 29 November 2021, the parties duly filed their submissions informing the Tribunal that they did not request a hearing in this matter and that the case could be adjudicated on the papers.

Consideration

Standard of review in disciplinary cases

15. 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, *Turkey* 2019-UNAT-955, *Ladu* 2019-UNAT-956, *Nyawa* 2020-UNAT-1024). When termination is a possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable (see, for instance, *Molari* 2011-UNAT-164, and *Ibrahim* 2017-UNAT-776). For any other disciplinary measure, the applicable standard of proof under sec. 9.1 (b) of ST/AI/371, is preponderance of the evidence (more likely than not that the facts and circumstances underlying the misconduct exist or have occurred).

Whether the facts on which the disciplinary measure was based have been established

16. The sanction letter concluded that the Applicant: (a) created a hostile work environment towards YB; and (b) unreasonably interfered in a recruitment exercise relating to a temporary job opening at the P-2 level in SCPCRB ("the P-2 TJO"). The USG/DMSPC concluded that the allegations against the Applicant were established by a preponderance of the evidence and that the Applicant's actions constituted misconduct in violation of the Staff Rules and Regulations.

17. The Tribunal will examine whether the underlying facts of these two charges are established by preponderance of evidence.

First charge—creating a hostile work environment towards YB

18. In relation to the finding of the Applicant's misconduct against YB, there are several incidents which formed the basis of the disciplinary measure against the Applicant. Each incident is considered in turn below.

Making disparaging and demeaning remarks against YB

19. The sanction letter states:

> It is established that you made negative comments about [YB] before the latter's arrival in SCAD, specifically in respect of [YB]'s background in IT and her placement, rather than selection, in SCAD. [O] confirmed having had such a discussion with you in private. In her witness statement, [S] also mentioned that you were aware of rumours circulating in OUSG/DPA about [YB]'s bad reputation. Inevitably, YB became aware of these negative comments made by her FRO.

20. The Respondent relied on the testimony of O, who recounted a discussion held in private with the Applicant. O stated that the Applicant commented to him, before YB's arrival in SCAD, that YB was imposed on the Applicant and that she had a terrible reputation. The Administration stated in the sanction letter that "[t]he creation of a hostile work environment is not premised on the staff member concerned directly hearing and/or perceiving negative comments made about them by others. Further, repeating uncorroborated statements about other staff members is not merely repetition of facts, but rather repetition of rumours, which can also lead to the creation of a hostile work environment". On this basis, the Administration found that the Applicant had created a hostile work environment by making negative comments about YB.

21. The Applicant submits that the decision maker erroneously relied on irrelevant evidence that was not present in the record. The Applicant states that the decision maker weighs the evidence of S as supporting the above allegation on the basis that it showed the Applicant was aware of negative rumors about YB. The Applicant states that evidence of awareness is not evidence that the Applicant made disparaging remarks. Therefore, the decision maker considered an irrelevant factor. The Applicant states that S at no point gave evidence of the Applicant being aware of the negative rumors about YB. Instead, S gave evidence that her personal opinion was that YB was not suitable for the post but did not indicate sharing this view with the Applicant. The Applicant further notes that S indicated that she was informed that YB leaked information to the Inner City Press to the Applicant's detriment but specifically indicates that she did not share this information with anyone other than O.

22. The Applicant further argues that the decision maker erred in relying on exclusively on O's account that the Applicant mentioned rumours to him, to him alone

and to no one else. The Applicant denies this account of O, submitting that they did not have a relationship of confidence. The Applicant submits that, at best, this means two contradicting testimonies arose in regard to this allegation. The Applicant states that O's evidence corroborated that of the Applicant as to their relationship, noting that O described their interactions as "functional and transactional". O provided no explanation as to why the Applicant would have confided on this occasion. The Applicant further notes that O provided his evidence as an aside "O remembered the Applicant commenting separately, before YB's arrival at the Division, that the Applicant was imposed on her and that she had a terrible reputation." The Applicant states that O did not provide information about when or where the alleged conversation took place, who else was present and appears to have been asked no questions in this regard. The Applicant submits that there was therefore no independent evidence to support O's account.

23. The Tribunal is not convinced by the decision maker's finding. Firstly, there is no evidence on the record that the Applicant repeated uncorroborated statements. The only evidence relied on by the Administration is O's testimony referring to a private conversation about rumors. Secondly, it is understandable that rumors circulate when a new staff member joins a team, especially in the context where a staff member, such as YB, is transferred to a team without undergoing the usual competitive recruitment process. The Tribunal finds no evidence that the Applicant said directly to YB any words negatively prejudging her ability to carry her functions effectively.

24. The Tribunal further notes that according to the investigation report there was already in DPPA an unfavourable environment toward YB linked to her placement and her alleged unsuitability for the position, this even before her assignment started in

SCAD. The evidence on record does not indicate that the unfavourable perception of the placement of YB could be attributed to the Applicant. In this regard, the Tribunal notes that it is clear from S's interview with the Investigation Panel that in S's own opinion, YB was not suitable for the position.

25. Based on the above, the Tribunal concludes that it is not established that the Applicant intended to make demeaning and disparaging remarks about YB.

Making comments about the gender composition of the SCAD managers

26. The sanction letter states:

> You confirmed that you made a comment about the gender composition of the senior management of SCAD, before a number of staff members. That you did not have any malicious intent against YB does not mean that your comment was not perceived by your audience as negative, and that such perception was reasonable in the circumstances, including by both female D1 Chiefs, who were each concerned about and uncomfortable with it for different reasons.

27. The Tribunal notes that this incident stems from a SCAD wide personnel meeting in January 2017. In that meeting, it is undisputed that the Applicant commented on the gender composition of senior management at the D-1 level (one man, O, and two women, A and YB) stating that it "was not of [her] choice" and that she "would have preferred 50:50 representation". Both female D-1s reported that they felt uncomfortable by the comment, with YB feeling particularly disadvantaged, due to her placement in SCAD, as opposed to the other female D-1 (A), who had been competitively selected by the Applicant.

28. The Applicant acknowledges the relevant remark on the gender composition, but attributes no malicious intent to it, particularly towards YB. The Applicant denies that her comment could have been perceived as offensive or humiliating, stating that there is no evidence to support such perception.

29. The evidence on the record regarding this incident consists of the testimonies of YB, O and A. YB reported feeling particularly disadvantaged by the Applicant's comments on the gender composition due to her non-competitive placement in SCAD. O in his testimony remembered the Applicant's statement, particularly the Applicant's preference for a 50-50 representation because he belonged to the minority, but he did not remember that the Applicant looked at YB. A in her testimony recalled the town hall meeting and the reference to the issue of the gender balance and the 50-50 distribution. She also remembered another statement of the Applicant on that occasion referring to the gender distribution on the effects of "[m]aybe in one year time it will be not the same". The latter sentence led to A thinking, "I was selected, [YB] was placed; one of us will not be here next year. A stated that she was not afraid of losing her job but thought "what a message to give in front of everybody".

30. The Applicant argues that the accounts of YB and A are contradictory and mutually exclusive since YB interpreted the Applicant's comments as personally directed to her, while A interpreted the comment as not being personalized to either of them. The Applicant states that the decision maker identifies YB and A's discomfort as being for different reasons but fails to address that they both give conflicting and mutually exclusive evidence.

31. The Tribunal notes that the Applicant's comments about the gender composition of the senior management of SCAD is listed in the sanction letter as an act of harassment of YB. However, the record shows that YB was not asked a single question about this incident in her interview with the Investigation Panel. This means that there is no sworn evidence on the record in this regard. The incident is mentioned only in her complaint. In YB's complaint, which is not sworn and has the quality of "hearsay" evidence, she does not describe her response to this. She does not suggest that her reaction brought the action within the definition of harassment. She specifically identifies why the comment could not have been taken negatively by A who had been selected by the Applicant while YB was placed into her position. The Tribunal further notes that A herself does not indicate having been caused offence or humiliation but left only at wondering about the message. The Applicant's comment about preferring a 50-50 gender balance cannot itself, as alleged, be reasonably perceived as intending to harass, offend or humiliate YB. However, the Tribunal considers that such a comment could contribute to a pattern of behavior which creates a hostile work environment.

Comments at a meeting with a Member State

32. The sanction letter states:

> You confirmed that you brought attention to the fact that [YB] was not a lawyer during a SCAD meeting with the Permanent Mission of [Member State]. You stated that your comment when introducing [YB] was not "there are many brilliant legal minds working in Charter Research, [YB] is not one of them"; rather, that [YB] was the head of SCPCRB and that "we *also* have lawyers on the team" (emphasis added). Even so, this addition effectively acted as a highlighter that YB

> was not a lawyer. If having a legal background was not required for the work of SCPCRB or SCAD in general, as you also pointed out in relation to yourself and the other two Chiefs, then making that distinction would not have been necessary at the time. Further, confirming that you remained silent while [YB] was questioned on her lack of legal background by the Ambassador, is not indicative of not belittling or humiliating [YB]. Additionally, [O] and [A], who were present during the meeting, recalled the incident. You had not suggested to the Panel that a representative from the Permanent Mission should be approached for a witness statement and contacting the Permanent Mission to independently procure a statement on this matter may have further discredited SCAD.

33. In her comments to the allegations memorandum, the Applicant makes a limited admission that while introducing YB to the representatives of the Permanent Mission of a Member State at a meeting on 6 October 2017, she stated "we also have lawyers on the team at the Branch". The Applicant stops short of admitting that she specifically commented on YB's lack of a legal background, but claiming that YB not being a lawyer only came up by way of follow-up questions from the Ambassador of the Member State. The Applicant states that she remained silent during the follow-up exchange between YB and the Ambassador.

34. The Tribunal notes that the Political Coordinator of the Member State who was present at the meeting issued a Solemn Declaration stating that "[d]uring this meeting, I do not recall [the Applicant] making any inappropriate, derogatory, offensive or sarcastic remarks about any individual. In my experience [the Applicant] and her team have always been highly professional dispensing their duties with the requisite fervor befitting the Security Council".

35. O, who was present at the meeting, recalled the Applicant's remarks and stated that he remembered cringing when the remarks were made. O stated that he did not understand why the Applicant would make such remarks about the Chief of Branch she was introducing. O perceived the remarks as negative and odd on that occasion.

36. A who was also present at the meeting perceived the Applicant's remarks in a more balanced way. A's view was that the Applicant's remarks showed that the Applicant valued BM's (a Senior Political Affairs Officer at the P-5 level) legal opinion, even when YB was present.

37. Taking into consideration the differing testimonies of the exact remarks made by the Applicant and impact of those remarks during the 6 October 2017 meeting, there is an unsettled debate on the exact remarks said by the Applicant during the meeting. It is therefore difficult to establish by preponderance of evidence the exact remarks made by the Applicant. The Tribunal, therefore, does not consider that the Applicant's remarks at the meeting contributed to a hostile work environment.

Phone call from the Security Council Chamber to YB

38. The sanction letter states:

> You acknowledged that you placed a call from the Security Council Chamber to [YB], only to ask her to converse with [BM]. While [YB] did not refer to this episode in her complaint, [BM] perceived that [YB] felt uncomfortable and was displeased by your bypassing her. Perception of behaviour that can cause humiliation is within the scope of harassment, under the [United Nations] legal framework. While you justified your action on needing to provide a time-sensitive substantive response to a Security Council Member, your explanations as to why you did not directly call [BM] to get such response are not credible. You

> explained that you made a conscious decision to call [YB] and ask to speak to [BM], so as not to be accused of speaking with [BM] without [YB]'s knowledge. Therefore, you were conscious of the fact that by-passing [YB] could be perceived as humiliating; the fact that, in practice, you chose to do it in a "transparent" manner, does not alter the fact that [YB] was bypassed, that she felt uncomfortable and displeased about it, and that a third party had perceived it.

39. In the application, the Applicant points out that BM's statement is the sole source of evidence regarding the above incident. The Applicant states that BM recalled an occasion in 2017 about which YB was not happy that the Applicant called YB on her cellular phone and asked YB to put BM on the phone. The Applicant explains that she only did it to be transparent, without any malicious intent, due to the urgency of the matter and specifically so as to avoid any accusations of bypassing YB. The Applicant contends that since YB did not raise this incident in her complaint, then YB herself did not perceive it as harassment; therefore, this incident is not within the scope of ST/SGB/2008/5.

40. The Respondent states on the other hand that the relevant fact is established not only by the witness testimony of BM, but also by the Applicant's own admission. The Applicant provides inconsistent and uncreditable explanations as to why she did not directly call BM, but rather chose to contact YB on her cell phone and then side-line her. The Respondent argues that the effect of the call on YB was stark: as a direct witness to the incident, BM stated that she saw that YB felt uncomfortable and unhappy to be asked to pass her cellphone to BM, so that Applicant could speak with BM. The Respondent submits that perception of behavior that can cause humiliation is within the scope of the definition of harassment, under sec. 1.2 of ST/SGB/2008/5.

41. The Tribunal notes that YB did not complain about this incident in her complaint and therefore, the Administration is incorrect to argue that she could perceive the passing of the phone call to BM as harassment. The Tribunal finds the explanations given by the Applicant for her action plausible and concludes that this incident cannot be said to demean or harass YB.

Sidelining YB from SCPCRB-related decisions on the placement of two P-4 staff members

42. The sanction letter states:

> On the placement of the two P-4 staff members in [YB]'s branch, the email communications between you, [the Office of the Under-Secretary-General, "OUSG"], [O] and [YB] provide clear contemporaneous evidence of the duration and sequence of discussions and support the conclusion that you did not consult with [YB] on the matter. Your treatment of [YB] as compared to your treatment of [O] in the matter of the discussions for the downgrading and placement of two P-4 staff members in practice constituted sidelining of YB and it was reasonable for [YB] to perceive it as such.
>
> Your explanation with regard to the placement of the two P-4 staff members in [YB]'s branch is not satisfactory. You confirmed that the whole matter had to be handled expeditiously and that its handling was completed within two weeks. However, you elected to bring the matter of the placement to the attention of [O] one week before you did to [YB]'s, and discussed placement possibilities with him. On the contrary, you only included [YB] in the discussion when you had decided on the placement of the two staff members in SCPCRB, without consulting with [YB]. You also stated that [YB] and [O] did not warrant equal treatment, as they were not equally affected by the downgrading decision. While [O]'s branch was affected by the decision to downgrade the two posts, it is not clear why [O] was more affected than [YB], who had to overturn her staffing design to accommodate the two placements

> in her branch. Ultimately, you claimed that the placement decision was imposed by the OUSG, and thus, your actions should not be considered to be sidelining [YB].
>
> In your comments, you characterized [YB]'s emails on the P-4 placement issue, as well as other documents provided by [YB], such as her Notes to File, as indications that [YB] was predisposed to misinterpret any action and/or words taken by you as an attack against her. In support of this contention, you referred to the witness interview of [V], provided in the context of the fact-finding process regarding [BM]'s complaint. You effectively adopted the non-medical opinion of [V] that [YB] was "unstable" and "paranoid", and thus, you claimed that any evidence provided by [YB] should not be considered reliable. These claims are not corroborated by any evidence. No medical expert has provided any evaluation that [YB] suffered from "paranoia". Your claims regarding the credibility of [YB] as a witness are uncorroborated.

43. In regard to this incident, the Applicant states the decision maker incorrectly identifies the Applicant as the decision maker regarding the placements of the P-4 staff members. It is the head of entity who has placement authority. The decision to place the P-4 staff members was not taken by the Applicant. The Applicant adds that to suggest YB was sidelined from the decision making process and that this was unequal treatment by comparison to O is incorrect. O and YB were in different situations, which did not warrant identical actions from the Applicant. The Applicant explains that the effect for O's team was the loss of two staff members. He was not consulted about this, but he was informed, while YB's team was gaining two staff members. Here, as with other allegations, managerial discretion is interpreted as harassment in a manner that does not correspond with the facts. Discussing with one manager that he is losing some staff and then later telling another that they will be receiving two staff is not objectively harassing.

44. The Respondent contends that on the placement of the two P-4 staff members in SCPCRB, the email communications between Applicant, OUSG, O and YB provide clear contemporaneous evidence of the duration and sequence of discussions and leave no doubt that the Applicant did not consult with YB on the matter. The Respondent argues that the Applicant's treatment of YB as compared to her treatment of O in the matter of the discussions for the downgrading and placement of two P-4 staff members constituted sidelining of YB, and that it was reasonable for YB to perceive it as such.

45. The Tribunal notes that S, who was also involved in the recruitment process, stated that "[t]hey met in a rush on this issue because they only had a few months to implement the mandated decision. The first place where they looked for vacant posts was within the Division and there were two posts in YB's team. YB wished to regularize X, one of the temporary incumbents of the vacant P-4 posts in YB's team, and S obtained from the parent office an extension of his secondment". S added that it is probable that YB was brought on board when the decision was already taken. S explained in her testimony that the recruitment decision was the decision of the USG/DPPA, and since it was a lateral move within the Department, it was thus within his prerogative. S clarified that it was actually a placement, similar to the one that brought YB to SCAD. Therefore, from a managerial point of view, not to involve all the parties was probably not the best approach but there had been other such cases.

46. The Tribunal further notes that T, who was also involved in the recruitment process, explained that the situation concerning the abolition of the two P-4 posts in O's team was challenging and stressful. The Applicant sought assistance from the Executive Office ("EO") on the issue. T, in consultation with the Executive Office, after analyzing the staffing table for DPPA, made various proposals to the Director.

The instruction of the Executive Officer was to channel all communication regarding the downsizing to the Applicant and the Front Office. T looked at vacant posts in DPPA and was asked to narrow down the search to SCAD and found that only two posts in YB's team were potentially available for the exercise. One of the two P-4 Officers who had to move from the abolished posts was at the same time considered for a temporary position elsewhere. Thus, X, the temporary incumbent of one of the two posts considered available in YB's team, could remain against it. The other temporary incumbent, V, went on mission overseas and the second P-4 Officer on the abolished post, X, could move to YB's team without any major problem. T presented the final above scenario as for the positioning of the two staff affected by the abolition of posts. A meeting was then called with S, the Applicant, O and YB to present the decision taken by the Applicant. Calling the meeting, the Applicant just forwarded T's proposed scenario, and this may have given the impression that it was the EO's decision whereas it was in fact the Applicant's decision. T stated that this may have made him appear "responsible" for the decision while he had only proposed a scenario. During the meeting, YB expressed her concerns, mentioning the fact that her team was small and thus the decision to place two P-4s there had a big impact. At the same time, she indicated that there had been no request for her input in taking the decision. Subsequently, the Applicant mentioned that she had taken the decision at that point and it should be implemented. T mentioned that when YB was finally involved, they were down to one option but then initially, he had prepared and proposed several scenarios. T stated that even though there were some consultations, he felt that YB was not fully consulted during the process.

47. The Tribunal is not convinced that the Applicant's actions in this incident constituted harassment of YB. The Applicant was engaging in her managerial duties in regard to the downsizing process, including consulting relevant affected team members. She chose to discuss with one manager, namely O, who was losing some staff and then later telling another that they will be receiving two staff. The fact she did not make identical communications to the two directors is not objectively harassing behavior. There was clearly a scope for a more skillful approach available to the Applicant as a manager in this situation, but this incident does not amount to harassment of YB. Rather, the Tribunal finds that the Applicant's managerial style in this incident did contribute to creating a hostile work environment.

48. The Tribunal notes that the Respondent, as well as the sanction letter, tries to create a link between the placement of the two P-4 Posts and the comments made by the Applicant about YB's credibility as a witness, mentioning BM's view that YB was "unstable" and "paranoid". The issue at hand is not whether YB is paranoid (and the Tribunal notes that the Applicant never qualified her as such). The fact that the Applicant questions the credibility of YB is not it itself a proof that she sidelined YB.

Abuse of authority over YB by showing favoritism towards BM

49. The sanction letter states:

> You showed favoritism towards [BM] with respect to pressuring [YB] to initially approve BM's request for remote working arrangements before you provided final approval, as opposed to your handling of a concurrent request submitted by [YB]. Your statement that you approved [YB]'s request in less time than that of [BM] is contradicted by the evidence. [YB] submitted her request on 18 April 2019, a day before you were scheduled to be out of the office on annual leave. You

retracted your suggestion that the Officer-in-Charge have the discussions called for in the applicable policy, so that [YB]'s request could be readily approved. Instead, you deferred the discussion for more than ten days later, before approving [YB]'s request on 30 April 2019. On the contrary, and despite your claim regarding keeping a neutral position between [YB] and [BM], you expressed your support to [BM]'s request just hours after it was submitted to [YB]. In this respect, your insistence that you needed to personally discuss the relevant arrangements with [YB] is disingenuous; no discussions were had or required to be had between [YB] and [DM] before you indicated your agreement with [DM]'s request. Further in respect of showing favouritism towards [DM], your explanation that you had to act swiftly because you were dealing with a case of harassment of [BM] by [YB] is not satisfactory. To that point, you referred to the investigation report on the complaint of [BM] against [YB], where you claimed that harassment was established. This assessment is incorrect. Your actions cannot be justified on the assessment of a panel, which had not even been put together at the time that you put pressure on [YB] to approve the request. Further, the findings of that fact-finding panel are not as unequivocal as you present them to be.

The panel identified instances that [YB]'s conduct was not up to par with the required standards. At the same time, the panel also found that not all of [BM]'s complaints had merit, and that [BM]'s behaviour towards [YB] was questionable. Because harassing conduct was alleged, [YB]'s objection to the wording of [BM]'s request was reasonable. Your insistence that [YB] agree with BM's reference to "issues […] regarding the work environment", when such wording could be perceived as self-implication for [YB], ignored these valid concerns. Had you intended to keep a neutral position on this matter, you could have suggested that [YB] recuse herself from approving [BM]'s request, and approved it yourself as the Director of SCAD. Ultimately, the finding of whether misconduct in the form of harassment and/or abuse of authority over BM had actually occurred is within the authority of the USG/DMSPC, and not the panel. That finding being absent at the time of your pressuring [YB] to approve [BM]'s request indicated favouritism towards [BM].

50. The Tribunal notes that it is undisputed that BM, who was a P-5 staff member supervised by YB, made a complaint against YB. Following an investigation of that complaint, the panel found that "some of the allegations which the complainant (BM) has suggested were giving rise to feelings of intimidation or constituting a hostile or offensive work environment". The Respondent argues that this finding was absent at the time of the above incident.

51. The Tribunal considers that even if the finding in BM's complaint was yet to be established at the time when the remote working decisions were made, the Applicant was aware of the tensions between BM and YB. In the Tribunal's view, it is clear that the Applicant's actions were to counterbalance the tensions and cannot be perceived as an abuse of her authority over YB. The Tribunal agrees that the Applicant's insistence that YB agree with BM's reference to "issues […] regarding the work environment" was inappropriate. However, the fact that the Applicant tried to convince YB to grant BM's request did not imply that she was implicated in their conflict.

52. Furthermore, the record shows the requests for remote working from BM and YB were not identical and required differing levels of consideration. BM requested to work remotely from the duty station, while YB requested to work remotely outside the duty station and in another country. The Applicant states that BM was to remain in her post, while YB was requesting to move to Central America until she left on a temporary assignment. The Applicant states that BM's request was motivated by a desire to alleviate a work conflict, while YB's request was to benefit her transition to a different employing entity. The Tribunal agrees with the Applicant's argument that the Administration was misguided to require equal treatment of unequal requests and assumes misconduct in purported delay in addressing YB's request. It is quite clear that

the two remote working requests were not identical and therefore could reasonably require different considerations and timings in the considerations. The Tribunal finds that the facts in this incident do not establish that the Applicant abused her authority over YB, by showing favoritism towards BM.

Second charge—Unreasonable interference with recruitment process for P-2 TJO

53. The sanction letter states:

> […] it is established by preponderance of the evidence that you unreasonably interfered with the recruitment process for the TJO [Temporary Job Opening] at the P-2 level in SCPCRB and further side-lined [YB] by requiring her and her staff to undertake additional work in respect of an almost completed recruitment process.
>
> There is no dispute that the vacancy for the P-2 TJO was advertised on Inspira [the online United Nations jobsite] between 10 and 24 August 2018, that 383 candidates applied for the position, of whom 22 undertook a written assessment, followed by an interview for the 6 highest-scoring applicants. There is also no dispute that [YB] sent you a draft memorandum, dated 5 October 2018, recommending four candidates for consideration, with the top recommendation being an external candidate. Contemporaneous oral and written communications among you, [YB] and [GL] also confirm that, on 31 October 2018, you instructed that the recruitment exercise be cancelled and reopened only for internal candidates, for the following reasons: i) the ongoing efforts for the abolition of the G-to-P exams and the efforts to absorb staff from downsizing missions; ii) concerns regarding the qualifications of the first recommended candidate, who was external to the Organization; and iii) the non prior circulation of the vacancy only to SCAD staff members. There is also no dispute that you were advised by [GL] that, irrespective of the foregoing reasons, the recruitment process had been conducted in accordance with the applicable framework and that cancellation was not warranted.

You stated that you did not violate any regulation or rule when insisting on the cancellation of the P-2 recruitment exercise. You argued that the process followed by the staff members in [YB]'s branch in the recruitment exercise was inconsistent with the applicable legal framework, namely Staff Regulation 4.4 and ST/AI/2010/4 Rev.1, because the TJO was open to both internal and external candidates, and it was advertised on Inspira, when that was not required. Your explanation regarding this allegation is not satisfactory. While the Secretary-General has the discretion to limit a temporary vacancy only to internal candidates, but it is not required that such discretion be exercised each time a TJO becomes available. In the instant P-2 vacancy, it was not, and this did not constitute a violation of the Staff Regulation 4.4. Equally, Section 3.4 of ST/AI/2010/4 Rev.1 provides that, in addition to being posted on the Intranet or circulated internally by other available means, a "temporary vacancy announcement may also be advertised externally if deemed necessary and appropriate". The specific vacancy was posted on Inspira, where all vacancies become public for internal and external candidates alike. The legal framework provides for an option, which was exercised in this instance; the TJO advertising process was consistent with the rules. With regards to your refusal to approve the selection recommendation on three principled reasons, we accept your explanation that your actions were not guided by favouritism for any particular SCAD staff member who may have applied for the TJO. The record indicates that your main preoccupation was that a SCAD staff member, any SCAD staff member, preferably in the GS category, would be selected. Therefore, your first and third reasons reflect your personal preferences and have no bearing on the legitimacy of a process which was conducted with due regard to the legal framework governing it. With regards to your second stated objection on the recommended candidate's experience in human rights, we also find your explanations to be unsatisfactory. The vacancy specifically listed the following areas of expertise: "political science, international relations, law, disarmament, security, development management, conflict resolution or related area". Notwithstanding that human rights are part of the legal discipline, there is no doubt that they would fall under the "related area" portion of the vacancy. Therefore, your concerns about the suitability of the recommended candidate were

unfounded. The written records on file show that there was a the 3-month delay between the initial recommendation and the readvertisement of the TJO; this delay is due to all communications on the readvertisement, which are not referable only to [YB]. Emails between your office and [S] in January 2019 also show that you further delayed the recruitment process when you instructed [S] to allow an internal applicant who had not participated in the second written assessment to undertake it alone at a different date. The record shows that, throughout this period, staff members were frustrated with your approach and requested that you reconsider your decision.

You suggested that any delay in the conclusion of this recruitment exercise was the fault of [YB], who sought to overturn your decision not to approve the recommendation memorandum by approaching the Executive Office, of the Executive Officer who tried to "barter" with you for the same purpose, and of [S] who took the initiative to design a third written assessment. Your explanation is not satisfactory as it does not accord with the record. The recommendation memorandum was given to you on 5 October 2018. The vacancy closed on 24 August 2018. This means that in the intervening 42 days, [S] had successfully sorted through the 383 applications, shortlisted 22 applicants for a written assessment, blind double-graded it together with [YB], arranged and conducted interviews with 6 candidates and submitted a recommendation to you through [YB]. Considering the effort required for this process, your suggestion that the process did not unfold swiftly enough is not supported and seeks to claim there was a delay when there was none. The record demonstrates that you delayed the process by instructing [YB] to have the TJO cancelled during your 31 October 2018 meeting, even though you were aware of the critical and time-sensitive need for [YB]'s branch to have the position filled. To point, even when [YB] pleaded with you to accept any of the other three recommended candidates proposed, if your concern regarding qualifications would be alleviated, you still refused to do so, as you wanted an internal SCAD staff member to be selected instead. Effectively, you sidelined [YB] from one more decision regarding the management of SCPCRB.

> In this respect, you claimed that you had heard rumours that some internal candidates, who were excluded from the first selection exercise, were not satisfied with how their applications for the TJO had been handled and/or assessed, and that you wanted to ensure that their concerns were addressed lest there be litigation before [the Dispute Tribunal]. That, on the one hand, you requested the cancellation of an almost completed recruitment exercise on the basis of alleged dissatisfaction with the process, but on the other were dismissive of [S]'s efforts to ensure fair treatment of candidates participating in the second and third written assessments, is not a convincing explanation for your actions.
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> Further, you claimed that you were under no obligation to act in accordance with advice given by your subordinates and other colleagues. This argument is not persuasive. You repeatedly stated that, in respect of the P-5 recruitment, your actions were guided by the advice of the persons hired and paid to advise you and that, therefore, your taking such advice should exonerate you of all responsibility. In this instance, you are advancing an argument that you had no reason to follow advice, even though it was provided by colleagues acting in the same functions as those advising you in the matter of [a consultant, VR].
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> For more than 3 months and despite their visible frustration, critical operational needs and reasonable arguments to the contrary, the Executive Office, the hiring manager and [YB] had to expend additional efforts to satisfy your decision to cancel and re-advertise the TJO to internal candidates.
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> In sum, it is established by a preponderance of the evidence that you unreasonably interfered with the recruitment exercise for a P-2 level TJO vacancy within SCAD, by instructing [YB], at the end of the recruitment exercise, to have the TJO cancelled and readvertised only for internal candidates. Your instructions and delay sidelined [YB] from a decision directly affecting the management of SCPCRB. Consequently, your actions contributed to the creation of a hostile work environment for [YB] and other impacted SCPCRB staff members.

54. The Applicant challenges the finding of misconduct in relation to the P-2 TJO incident on the following grounds. She states that the allegations memorandum was

divided into three sections. The first dealt with the creation of a hostile work environment for YB. The next two sections dealt with misuse of United Nations resources and allegations of favouritism in recruitment. In the allegations memorandum, the P-2 TJO recruitment exercise was addressed not under the ST/SGB/2008/5 framework but instead as an issue of "misuse of resources". The Applicant argues that the investigation panel exceeded their mandate in this regard by investigating issues not covered by ST/SGB/2008/5 and by the complaint. The allegation put to the Applicant in the allegations memo was not that interference had created a hostile work environment for YB but instead that interference had resulted in misuse of resources for the Organisation. Instead of looking at misuse of United Nations resources, the decision maker pivoted and looked at the impact on individual staff members, their "visible frustration" at the Applicant's failure to follow their advice. The Applicant notes that the sanction letter finds misconduct on the basis that interference in the P-2 recruitment "contributed to the creation of a hostile work environment for YB and other impacted SCPCRB staff members". The Applicant states that creation of a hostile work environment through this recruitment process or for persons other than YB was never subject to investigation, never put to the Applicant in interview nor contained in formal allegations.

55. The Applicant submits that the misuse of United Nations resources and creation of a hostile work environment are completely different allegations. Essentially, the Applicant argues that she has never been offered an opportunity to defend herself against the misconduct found in this incident. The Applicant claims that this is a due process violation that vitiates this finding in the sanction letter.

56. The Respondent, on the other hand, states that contemporaneous emails between the Applicant, YB, and the Executive Officer of DPPA prove that the Applicant requested the cancelation of the P-2 TJO on the basis of her personal preferences. In her comments to the allegations memorandum, the Applicant incorrectly argued that the process followed in the recruitment exercise by YB and NS, Political Affairs Officer, SCPCRB/SCAD, was inconsistent with the applicable legal framework, because the TJO was open to both internal and external candidates, and was advertised on Inspira, when that was not required. As the Executive Officer of DPPA had already advised the Applicant, and as clearly reiterated in the sanction letter, the process followed was in full compliance with the applicable framework and a cancellation was not warranted.

57. The Tribunal finds that the Applicant's argument is not persuasive on this issue. In allegations memorandum the Applicant is clearly informed that she "unreasonably interfered in a recruitment exercise for a P-2 TJO vacancy in SCPCRB between October 2018 and January 2019 and misused UN resources in relation thereto". The letter mentions that this interference contributed to the sidelining of YB. The record shows that the Applicant took the opportunity to respond on all the aspects of this allegation. Therefore, the Applicant was afforded full due process in regard to this incident.

58. The record clearly shows that the Applicant's interference with the P-2 TJO exercise led to the sideling of YB and added considerable futile work to YB and the SCPCRB staff members. This finding is well established by the testimonies made by all the concerned witnesses and especially S's testimony. S stated that the Applicant essentially interfered because she wanted to recruit someone specific for the P-2 TJO

and that the Applicant canceled the selection process in order to recruit an internal candidate. The Tribunal finds S's testimony to be reliable, coherent and neutral to the other workplace dynamics occurring with the Applicant's team. The Tribunal finds the record establishes that the Applicant unlawfully interfered with a recruitment exercise. Through her unlawful interference, the record establishes that the Applicant wasted considerable resources and time of her team, while also creating a hostile work environment through her actions.

Whether the established facts amount to misconduct

59. Staff regulation 1.2(a) provides that "staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them".

60. Staff rule 1.2(f) provides that "[w]hile staff members' personal views and convictions, including their political and religious convictions, remain inviolable, staff members shall ensure that those views and convictions do not adversely affect their official duties or the interests of the United Nations. They 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. They shall avoid any action and, in particular, any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status".

61. ST/SGB/2008/5 defines harassment as "any improper and unwelcome conduct that 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 annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents. Disagreement on work performance or on other work related issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management".

62. ST/SGB/2008/5 defines abuse of authority as "the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or 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 which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority".

63. Section 3.2 of ST/SGB/2008/5 on the duties of staff members and specific duties of managers, supervisors and heads of department state that "managers and supervisors have the duty to take all appropriate measures to promote a harmonious work environment, free of intimidation, hostility, offence and any form of prohibited conduct. They must act as role models by upholding the highest standards of conduct. conduct are promptly addressed in a fair and impartial manner. […] Failure on the part of managers and supervisors to fulfil their obligations under the present bulletin may

be considered a breach of duty, which, if established, shall be reflected in their annual performance appraisal, and they will be subject to administrative or disciplinary action, as appropriate".

64. As discussed above, the Tribunal found that there was a preponderance of the evidence that the Applicant created a hostile work environment and that she unlawfully interfered with recruitment process for P-2 TJO. The Applicant failed to uphold a conduct befitting her status as senior international civil servant. The Applicant's actions, as established by the facts, were abuse of the Applicant's authority as Director at the D-2 level and constitute misconduct under the above-mentioned legal framework.

65. The Tribunal found that there was insufficient evidence to support the Administration's finding that the Applicant harassed YB. It is without doubt that they had between them an unpleasant and dysfunctional work relationship and that the work-related disagreements between the Applicant and YB were not skillfully responded to in the manner one would expect of two senior staff members at the Director level. However, the disagreements and disharmony between them did not constitute harassment of YB under ST/SGB/2008/5. The continued dysfunctional dynamic between the two Directors pointed instead to a failure of the leadership in SCAD/DPPA. Nevertheless, the creation of a hostile work environment and abuse of authority suffice to qualify the Applicant's behavior as misconduct.

Whether the Applicant's due process rights were respected

66. The Applicant states her due process rights were not respected. She states that the decision maker failed to consider arguments on conflict of interest on the part of the USG/DPPA and the Executive Officer of DPPA.

67. The Applicant contends that the USG/DPPA had a conflict of interest in presiding over an investigation relating to the recruitment of VR. These related to public criticism of the USG/DPPA's failure to take action against the Applicant in relation to that recruitment. This meant that it was in USG/DPPA's political personal interest for action to be taken against the Applicant. Such interest came into conflict with her obligation of independence in relation to the investigation.

68. The Applicant further contends that the Executive Officer of DPPA had a conflict of interest as he was intimately involved in establishing and assisting the investigative panel while at the same time acting as a witness of truth and disclosing that he was a confidant of the complainant. The Applicant states that this placed the Executive Officer of DPPA in two separate positions of conflict of interest. The Applicant also raised the Executive Officer's own evidence that YB's complaint was filed only because she was informed of the complaint filed by BM and wanted to defend herself. The Applicant noted that the complaint should have been confidential, and the evidence pointed to a breach of that confidentiality by the Executive Officer which further called into question his ability to provide independent support to the Investigative Panel. The Applicant states that the failure to identify and act on the alleged conflict of interest vitiates the contested decision.

69. The Applicant further contends that this alleged conflict of interest was significantly aggravated by the fact the investigation panel members were not staff

members. Instead as retirees, they were hired and paid by the responsible official. The Applicant states that having been so hired, the panel inexplicably chose to expand their mandate to a full investigation of exactly the issue in relation to which the USG/DPPA had a conflict of interest, the recruitment of VR.

Potential conflict of interest by the USG/DPPA

70. Having reviewed the record, the Tribunal finds that even if the Applicant's contention that the USG/DPPA was motivated by a political interest to clarify the interest in the recruitment of VR following the publication of an article on the issue in the Inner City Press, this issue is not directly related with the decision to investigate the Applicant.

71. There is no evidence to suggest that the USG/DPPA had a personal interest in the investigation of the Applicant. The letter dated 1 March 2019, signed by the USG/DPPA, informing YB that a panel is going to investigate her complaint, as well as the decision to investigate the complaint, are only about the grievances expressed by YB. YB's complaints did not include the recruitment of VR but referred to the issue indirectly as the "abuse of authority" allegedly committed by the Applicant by having accused YB of the leak in Inner City Press.

Potential conflict of interest by the Executive Officer

72. In regard to potential conflict of interest by the Executive Officer, the Tribunal notes that in his testimony to the Panel, the Executive Officer disclosed that he knew YB socially and for many years while working in another department. YB reached out to him recently to ask for advice on her situation in the office, in his capacity of the

Executive Officer and a known colleague with whom she had level of comfort. He further stated that, since he has been the Executive Officer, he saw YB only in the office and only concerning subjects related to her situation in SCAD and her forthcoming assignment. YB asked the Executive Officer for advice on what she should do moving forward. She came to see him around five times between January and February 2019. They discussed two main topics: (a) Her move to a new assignment: (i) Concerning the lien to the present post (two years), and (ii) the date of her release, which she wanted to expedite as quickly as possible due to her difficult situation in the office; (b) Problems she was encountering in the office, particularly after the incident around her leaving (possibly the meeting of 14 January 2019*).* Concerning the second topic, YB was wondering what to do from that moment to the date of her new assignment. She considered working remotely or taking a leave of absence, because she did not wish to be in the office. At that time, she made clear to the Executive Officer that she did not want to submit a formal complaint.

73. In light of the above, it was clearly inappropriate from USG/DPPA to appoint the Executive Officer to establish the panel. The Executive Officer was a material witness in the investigation and was interviewed by the investigation panel and was a close acquaintance of the complainant YB. The Tribunal considers this appointment to be procedural flaw.

74. However, as established by the Appeals Tribunal, not every procedural irregularity will render a disciplinary measure unlawful (see, *Sall* 2018-UNAT-889, quoted in *Karkara* 2021-UNAT-1172). There must be a link of causality between the alleged breach of due process and the decision. In this case, the Tribunal finds no such link. There is no indication that the Executive Officer's acquaintance with the

complainant had an effect on the choice of the members of the panel or on their role. There is no evidence that the panel was biased against the Applicant. In fact, the Tribunal notes that the panel proceeded to drop some of the charges against her.

75. As for the Applicant's complaint that the members of the panel were retirees, the Tribunal finds that it is totally irrelevant and does not prove at all any bias.

76. Since the main requirements of due process were met as the Applicant had been notified of the formal allegations of misconduct, had been given the opportunity to respond to those allegations, and had been informed of the right to seek the assistance of counsel in his defense, this procedural flaw did not taint the fact-finding process *ab initio*.

77. Therefore, the Tribunal is satisfied that the Applicant's due process rights were respected in this case.

Whether the disciplinary measure applied was proportionate to the offence

78. The principle of proportionality in a disciplinary matter is set forth in staff rule 10.3(b), which provides that "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct".

79. The Administration has discretion to impose the disciplinary measure that it considers adequate to the circumstances of a case and to the actions and behavior of the staff member involved, and the Tribunal should not interfere with administrative discretion unless "the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive,

discriminatory or absurd in its severity" (see *Portillo Moya* 2015-UNAT-523; and also *Sall* 2018-UNAT-889, *Nyawa* 2020-UNAT-1024).

80. The Appeals Tribunal held that "the Secretary-General also has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose" (see *Toukolon* 2014-UNAT-407). The Appeals Tribunal has further stated, "But due deference does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair". The Appeals Tribunal further explains that this means that the Dispute Tribunal should "objectively assess the basis, purpose and effects of any relevant administrative decision" (see *Samandarov* 2018-UNAT-859).

81. In the sanction letter, the Administration imposed on the Applicant the disciplinary measures of written censure and loss of two steps in grade for misconduct.

82. In the sanction letter, the USG/DMSPC gave consideration to the nature of the Applicant's actions and the past practice of the Organization in matters of comparable misconduct. The USG/DMSPC considered that there was no aggravating or mitigating factors present in this case.

83. The Tribunal finds that the Administration acted within the bounds of its discretion in finding that the Applicant's misconduct was serious in nature. She created a hostile work environment and she abused authority over a recruitment exercise, wasting considerable resources of the Organization to further her own personal preferences.

84. Moreover, having reviewed the compendium of the practice of the Secretary-General in disciplinary matters, the Tribunal finds that the imposed sanction is in line with the past practice of the Organization in matters of comparable misconduct.

85. In particular, the Tribunal notes that, in previous instances, staff members, who committed (non-sexual) harassment and abuse of authority, were sanctioned with one or more of the following disciplinary measures: (i) written censure, (ii) loss of one or more steps in grade; (iii) fine; (iv) deferment, for a specified period, of eligibility for consideration for promotion; and (v) demotion with deferment, for a specified period, of eligibility for consideration for promotion.

86. The Tribunal also notes that when a staff member with managerial responsibilities or in a senior position engaged in repeated actions constituting harassment or abuse of authority, the sanctions were more severe, ranging from loss of steps in grade to demotion.

87. In sum, considering the nature and gravity of the Applicant's misconduct, as well as the past practice of the Organization in matters of comparable misconduct, the Tribunal finds that the imposed disciplinary and administrative measures were adequate in light of the Administration's scope of discretion in this matter.

Conclusion

88. In light of the foregoing, the Tribunal rejects the application.

(Signed)

Judge Joelle Adda

Dated this 17th day of February 2022

Entered in the Register on this 17th day of February 2022

(Signed)
For:
Nerea Suero Fontecha, Registrar, New York