



Before: Judge Alexander W. Hunter, Jr.

Registry: Geneva

Registrar: René M. Vargas M.

KIRIELLA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Elizabeth Gall, BMS, UNDP

Introduction

1. The Applicant contests the disciplinary measure of demotion imposed on him following two incidents of misconduct established by an investigation by the Office of Audit and Investigations (“OAI”), United Nations Development Programme (“UNDP”).

Summary of relevant facts

2. On 1 January 2018, OAI notified the Applicant, a Field Security Associate at the United Nations Department of Safety and Security (“UNDSS”), Sri Lanka, that, based on a preliminary assessment, he was under investigation for abuse of authority in relation to an incident reported by the Lady Security Officer (“LSO”), UNDP compound in Colombo, which allegedly took place on 16 August 2017. The investigation was conducted between November 2017 and May 2018, pursuant to the UNDP Legal Framework for Addressing Non-Compliance with UN Standards of Conduct and the OAI Investigation Guidelines.

3. On 27 July 2018, OAI sent its draft investigation report to the Applicant for comments.

4. On 31 July 2018, the Applicant provided his comments to the draft investigation report.

5. On 9 August 2018, OAI issued its final Investigation Report (No. S-R-18/44) charging the Applicant with abuse of authority and other failures to comply with the UN Standards of Conduct at the UNDSS in Sri Lanka (“First Report”). On the same day, OAI submitted the case to the Legal Office (“LO”), Bureau Management Services (“BMS”), UNDP, for review and consideration for disciplinary or administrative proceedings.

6. On 4 October 2018, the Security Advisor (“SA”), UNDSS, and the Deputy Security Advisor (“DSA”), UNDSS, reported an incident of workplace harassment by the Applicant at the UDNP Colombo compound.

7. By letter dated 8 October 2018, the Officer in Charge (“OiC”), BMS, UNDP, informed the Applicant that in addition to the OAI’s findings in its First Report, the latest incident of 4 October 2018 suggested reoccurrence of conduct. As a result, the Applicant was placed on Administrative Leave With Pay (“ALWP”) until 9 November 2018.
8. On 5 November 2018, the Applicant’s ALWP was extended for the first time, lasting until 21 August 2020 after multiple extensions.
9. On 19 December 2019, OAI issued its Investigation Report No. S-R-19/77 into allegations of workplace harassment against the Applicant at UNDSS Sri Lanka (“Second Report”).
10. By letter dated 28 April 2020 (“Charge Letter”), the Assistant Administrator and Director, BMS, UNDP, informed the Applicant that he was being charged with misconduct based on the two separate OAI investigations and reports.
11. On 11 June 2020, the Applicant responded to the allegations of misconduct in the Charge Letter.
12. By letter dated 19 August 2020, the Acting Associate Administrator, UNDP, informed the Applicant that following a review of the record, including the two OAI investigation reports and the Applicant’s response and supporting documents to the Charge Letter, it was determined that his actions rose to the level of misconduct requiring the imposition of disciplinary measures. Accordingly, he received a demotion to the GS-5 level with deferment of eligibility for promotion for two years, pursuant to UN Staff Rules 10.1(a) and 10.2(a)(vii).
13. On 21 August 2020, the Applicant was called to report for active duty following his period of ALWP.
14. On 16 November 2020, the Applicant filed an application contesting the above-mentioned disciplinary measure.
15. On 18 December 2020, the Respondent filed his reply.

16. On 10 January 2022, the present case was assigned to the undersigned Judge.
17. By Order No. 6 (GVA/2022) of 19 January 2022, the Tribunal asked the parties to provide comments on the necessity of an oral hearing and to identify the material issues of facts that need to be determined.
18. On 26 January 2022, the Respondent responded that an oral hearing was not required in this case.
19. On 28 January 2022, the Applicant formally requested an oral hearing but without offering any basis for it.
20. By Order No. 14 (GVA/2022) dated 31 January 2022, the Tribunal advised the parties that it did not identify any material issues of fact requiring a fact-finding oral hearing. Accordingly, the Tribunal informed them that it would be moving forward based on the papers and requested final submissions on the merits, if any.
21. On 5 February 2022, the Applicant filed his final submission.
22. On 7 February 2022, the Respondent informed the Tribunal that it would not make closing submissions and referred back to the facts pleaded in the reply.

Parties' submissions

23. The Applicant's principal contentions are:
 - a. The complaints of workplace harassment and abuse of authority against him were an act of retaliation by his Supervisor, the SA, UNDSS, in revenge for the Applicant reporting him for wrongdoings;
 - b. The Administration failed to provide a work environment where the Applicant was treated with dignity and respect, and to protect him from continued harassment by the SA;

- c. UNDP Policy on Harassment requires that any harassment or abuse of authority be dealt with promptly, justly, and effectively, but no such steps were taken to address the complaints filed by the Applicant against his Supervisor;
- d. The disciplinary measure imposed on the Applicant was given without proper investigation, thus, unlawfully; and
- e. The disciplinary measure imposed on the Applicant is disproportionate to the gravity of the allegations, as no loss or damage to the Organization or any person was caused by him.

24. The Respondent's principal contentions are:

- a. The Applicant's complaints of harassment against his Supervisor, the SA, UNDSS, and his claims regarding the lawfulness of his placement on ALWP are not receivable *ratione materiae*;
- b. The facts relating to the two incidents of misconduct that resulted in the disciplinary measure were established by the evidence:
 - i. In the First Report, it is well established that the Applicant abused his authority by requesting the Managing Director of a vendor to remove a staff member from her post without cause because she had made a complaint against him; and
 - ii. In the Second Report, it is well established that the Applicant behaved in a hostile and aggressive manner towards his Supervisors, which included verbal threats to their physical safety, and that such behaviour amounts to harassment;
- c. The Applicant's due process rights were respected throughout OAI's investigations, which complied with the applicable legal framework and Investigation Guidelines; and

- d. The disciplinary measure imposed on the Applicant is proportionate to the established misconduct.

Consideration

Receivability ratione materiae

25. The Respondent argues that the Applicant's complaints of harassment by his Supervisor and his claims regarding the lawfulness of his placement on ALWP are not receivable *ratione materiae*.

26. The Tribunal notes that the Applicant's management evaluation request was not clear on whether he was making allegations of misconduct against his Supervisor, which would need to be dutifully investigated, or citing performance or management issues to be addressed by management. Similarly, the Applicant did not provide any evidence that the matter of lawfulness of the decision to place him on ALWP was ever formally contested by him.

27. In fact, the application leads to the conclusion that the Applicant is contesting the disciplinary measure imposed against him over charges of misconduct.

28. Hence, any determination against the decision not to further investigate the Applicant's complaints of harassment against his supervisor or against his placement on ALWP must be subjected to its own mandatory process leading to judicial review which is not the case here.

29. Accordingly, the above-mentioned claims are not subject to review in the instant case and, as a result, are not receivable *ratione materiae*.

Merits

30. The UNDP Administrator has the discretion to impose the disciplinary measure that he considers adequate, having regard to the nature of the misconduct, the objective of punishment and deterrence, and other relevant considerations. The UNDP Administrator has the discretion to weigh aggravating and mitigating circumstances. In reviewing proportionality, the test applied by the Tribunal is

whether the measure is blatantly illegal, arbitrary or discriminatory or otherwise abusive or excessive.

31. Thus, when reviewing disciplinary decisions, the Tribunal may only examine:

- a. Whether the facts on which the sanction is based have been established;
- b. Whether the established facts qualify as misconduct;
- c. Whether the sanction is proportionate to the misconduct, and
- d. Whether the staff member's due process rights were respected during the course of the disciplinary procedure.

32. Accordingly, the Tribunal must individually examine each of the above factors to rule on the legal issues that emerge in this case.

Whether the facts have been established

33. The facts of this case arise from two separate investigations conducted by OAI in relation to two distinct incidents that occurred between August and September 2017 ("first incident"), and on 4 October 2018 ("second incident").

The first incident

34. According to the undisputed sequence of events, on 16 August 2017, a UNDSS driver informed the Applicant that the LSO, an employee of the security company SSI providing security services in the premises, had been monitoring his movements and informing them to a Radio Operator.

35. This alleged "report of movements" led to an altercation in the UNDP compound in Colombo involving the Radio Operator and the UNDSS driver, which was referred to and handled by the Applicant.

36. After being made aware of the LSO's involvement in the incident, the Applicant summoned her to a meeting in his office which resulted in his reprimanding her. According to the Applicant's interview with OAI, he told the LSO "to mind her business" and to not interact unnecessarily; he asked her who had given her permission to look into other people's affairs and he admitted having used "disrespectful language". The LSO felt humiliated and filed a complaint against the Applicant.

37. Moreover, the Applicant informed OAI that he learned about the LSO's complaint against him from the UNDSS Driver over a telephone call. He then admitted that, on 31 August 2017, during a meeting with the Managing Director ("MD"), SSI, he brought up the subject of the LSO's inappropriate behaviour.

38. According to the MD, SSI, however, in said meeting the Applicant actually told him to "get rid of" her, insisting she was a "troublemaker". In fact, in his interview with OAI, the MD, SSI, stated that the Applicant *demand*ed the removal of the LSO from her post. After an initial refusal, he felt threatened by the Applicant's insistence, including in relation to his company's contract with UNDP, and he ended up complying. This account is corroborated by contemporaneous evidence as shown in the correspondence between the MD, SSI, the SA, UNDSS, and the UN Resident Coordinator and UNDP Resident Representative ("RC/RR") dated 19 September 2017 and 22 September 2017.

39. In addition, the record shows that when the RC/RR became aware of the situation, she held a formal meeting with the Applicant to establish what due process was taken prior to the request to remove the LSO. According to the minutes of said meeting, it remained unclear what were the grounds for requesting the LSO's removal and why the matter was neither reported nor followed due process. After the meeting, the Applicant provided his viewpoints to the RC/RR by email dated 4 October 2017, which, however, were unsupported by documentary evidence. In his response to the Charge Letter, the Applicant acknowledged that the manner in which he dealt with the LSO was "inappropriate".

40. It follows from all of the above, that the Applicant's account of the incident was both not credible and inconsistent with the testimonies given by the LSO, the MD, SSI, the Local Security Assistant ("LSA"), UNDSS, as well as with contemporaneous documentary evidence.

41. Thus, substantial evidence on the record shows that the first investigation successfully established that the Applicant demanded, and temporarily succeeded on the removal of the LSO from her post at the UNDP compound due to personal reasons.

The second incident

42. According to a complaint filed by the Applicant's supervisors, the SA, UNDSS, and the Deputy Security Advisor ("DSA"), UNDSS, the Applicant verbally offended, threatened and harassed them during a meeting at the SA's office on 4 October 2017.

43. In their OAI interviews, the SA and the DSA both stated that the Applicant abruptly entered the office and started shouting at them. After the SA asked the Applicant to stop pointing his finger at him, the Applicant said words to the effect "it is my finger and I do what I want with this". After the shouting stopped and after being asked to leave, the Applicant told them, "I will end you both". Both the SA and the DSA understood that the Applicant had made a threat to use physical force against them. In addition, the SA affirmed that it was not the first time the Applicant behaved aggressively and that he feared for his safety.

44. Furthermore, the LSA, UNDSS, testified to witnessing the incident. He affirmed that the Applicant was shouting loudly, had aggressive body language, and was pointing his finger at the SA. The LSA thought that the Applicant would assault the Complainants.

45. In his interview with OAI, the Applicant claimed that the incident was just a heated work-related argument and that he neither shouted at either of the Complainants nor made any threats against them. In fact, the Applicant stated that the SA was the one yelling and behaving aggressively. When asked about the reported threats, the Applicant denied them and affirmed that those allegations were part of the SA's deliberate attempt to "kick him out of service". In support thereof, the Applicant provided the OAI with emails dated 16 March 2018 and 19 July 2018, which he had sent to UNDSS Senior Management reporting harassment by the SA.

46. The Tribunal notes, however, that the Applicant's account of the incident was not consistent with the mutually corroborating evidence from the SA, the DSA and the LSA.

47. It is clear from the established facts that the Applicant yelled and engaged in threatening behaviour during the reported incident. The threat was deemed serious enough to place him on administrative leave. Such conduct of harassment and threatening behaviour is inexcusable in the workplace, especially when one is engaged in the area of security and is expected to remain calm, collected, and professional under stressful or threatening situations.

48. By shouting at colleagues in the presence of others, the Applicant engaged in improper conduct that might reasonably be perceived as hostile or threatening. Even if troubled by what he perceived to be a frustrating work environment, such context does not justify the type of behaviour that he exhibited.

49. Notably, the Applicant had been previously reprimanded for using improper language towards a colleague, which shows a propensity for unprofessionalism and hostility in communications with colleagues.

50. The Applicant has demonstrated a propensity to engage in abuse of authority and workplace harassment not commensurate with the standards expected of a UN civil servant. As such, the Applicant should not be exercising authority at the level he was occupying.

51. The Tribunal is satisfied with the findings of the second investigation report, which fully established the facts reported by the Complainants, as well as establishing the Applicant's propensity for aggressive and hostile behaviour. As a result, the Tribunal is convinced that the second incident is established by clear and convincing evidence.

Whether the established facts qualify as misconduct

52. Regarding the first incident, the Applicant abused his authority.

53. It is well established that the Applicant engaged in retaliation by requesting the MD, SSI, to remove the LSO from her post without cause because she had lodged a complaint against him. The Applicant's conduct breached his obligation not to abuse his authority under staff regulation 1.2(a) and the prohibition under staff regulation 1.2(h) to use one's office for personal reasons to prejudice the position of those one does not favour.

54. The Applicant's abuse of authority also breached the Standards of Conduct for the International Civil Service, the UNDP Human Resources User Guide on Workplace Harassment and Abuse of Authority (January 2010), and the UNDP Legal Framework for Addressing Non-Compliance with UN Standards of Conduct (March 2018).

55. The Tribunal reminds the Applicant that it is always important to recognize the right of individuals to report what they consider to be improper behaviour without fear of retaliation.

56. Concerning the second incident, by shouting at colleagues in the presence of others, behaving in a hostile and threatening manner, and using verbal threats, the Applicant's behaviour amounts to harassment. The Applicant's conduct breached the prohibition of harassment in staff rule 1.2(f) and the prohibition of abuse and harassment at the workplace in sections 2, 4 and 5 of the UNDP Human Resources User Guide on Workplace Harassment and Abuse of Authority (May 2018).

57. Thus, the Tribunal is well convinced that the abuse of authority and harassment demonstrated by the Applicant qualify as serious misconduct.

Whether the sanction is proportionate to the misconduct

58. The disciplinary measure is both proportionate and lawful.

59. In imposing the subject disciplinary measure of demotion, the UNDP Acting Associate Administrator considered the precise circumstances of the two incidents, which involved serious misconduct by the Applicant.

60. The UNDP Acting Associate Administrator also considered aggravating and mitigating circumstances. The first incident of misconduct involved aggravating factors. The Applicant's actions against the LSO were motivated by retaliation and personal animus and involved an abuse of authority given the power imbalance between the Applicant and the LSO. As the misconduct involved a third party and service provider (i.e., SSI), the Applicant's actions had the potential to adversely affect the Organization's reputation.

61. The second instance of misconduct also involved aggravating factors.

62. The conduct took place in the presence of other colleagues in the security office. A threat by staff members who exercise security functions is particularly serious given their experiences with the use of force. Such staff members are responsible for preventing threats to the safety and security of others and deescalating conflict. Further, the Applicant was reprimanded in May 2010 for using improper language towards a colleague, which shows a propensity for unprofessionalism and hostility in communications to colleagues.

63. Relevant mitigating circumstances were considered. The Applicant's stated remorse for both incidents in his response to the Charge Letter was considered.

64. Finally, the imposed disciplinary measure of demotion with deferral of eligibility for consideration for promotion for two years, under staff rule 10.2(a)(vii), is not the most severe of the disciplinary measures that may have been imposed for the misconduct in question.

65. Misconduct of the nature committed by the Applicant may attract a range of disciplinary measures, including dismissal and termination in the most egregious cases. This disciplinary measure is in line with the past practices of the Secretary--General in other cases involving multiple instances of harassment, abuse of authority or acts involving aggressive behaviour and/or verbal threats to the safety of others (*see* Compendium of Disciplinary Measures, Practice of the Secretary--General in Disciplinary Matters and Cases of Criminal Behaviour from 1 July 2009 to 31 December 2020, cases 29, 136, 159, 210, 452, 458, 488, and 517). On the other hand, the Applicant did not provide any evidence from UNDP's or the Secretary--General's practices to support his claim of disproportionality.

66. The Applicant's contention that the disciplinary measure violates the ILO Equal Remuneration Convention, 1951 (No. 100) does not stand. The disciplinary measure is expressly provided for in staff rule 10.2(a)(vii).

67. Thus, pursuant to staff rules 10.1(a) and 10.2(a)(vii), a demotion to the GS-5 level with deferment of eligibility for promotion for two years is properly in order.

Whether the staff member's due process rights were respected

68. The Applicant's due process rights were respected during the investigation and disciplinary processes.

69. The Applicant was interviewed as a subject in the first and second investigations. The Applicant was given the opportunity to provide comments and countervailing evidence in response to the draft investigation reports. OAI considered the Applicant's comments in the draft of the first investigation report and annexed the comments to the final version. The Applicant did not provide any comments in response to the draft of the second investigation report.

70. The Charge Letter provided the Applicant with all supporting documentation, informed him of his right to seek the assistance of legal counsel, and invited the Applicant to comment on the allegations of misconduct. The Applicant's comments were duly considered.

71. The Applicant's claims that the first and second investigations were incomplete or improper do not stand. During the assessment phase, OAI properly determined that the circumstances warranted investigations into the allegations against the Applicant.

72. During the first investigation, the OAI investigators did not err by not interviewing the two persons present during the Applicant's meeting with the LSO on 16 August 2017. Investigators have the discretion to decide not to interview a potential witness on reasonable and proper grounds. The investigators properly exercised their judgment based on their appreciation of the case and the evidence gathered. One of the witnesses, the UNDSS Driver, had separated from UNDP in 2017. In any event, the Applicant admitted that he told the LSO in said meeting to "mind her own business". Second, the meeting was the backdrop to the misconduct that followed, namely the Applicant's retaliatory actions following the LSO's complaint against him.

Conclusion

73. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 1st day of April 2022

Entered in the Register on this 1st day of April 2022

(Signed)

René M. Vargas M., Registrar, Geneva