



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/042
Judgment No.: UNDT/2022/062
Date: 23 June 2022
Original: English

Before: Judge Joelle Adda
Registry: New York
Registrar: Morten Michelsen, Officer-in-Charge

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George Irving

Counsel for Respondent:
Jonathan Croft, ALD/OHR, UN Secretariat
Lucienne Pierre, ALD/OHR, UN Secretariat

Introduction

1. The Applicant contests the decision to impose on her a disciplinary sanction of separation from service, with compensation in lieu of notice, and with termination indemnity.
2. The Respondent submits that the application is without merit.
3. For the reasons stated below, the application is denied.

Facts

4. In response to Order No. 023 (NY/2022) dated 3 March 2022 the parties submitted agreed facts, which are set out in the following.
5. On or around 11 April 2012, the Field Personnel Division, Department of Field Support (“DFS”), was testing candidates for the position of Public Information Officer at the P-3 level with Job Opening No. 425628 (“the JO”).
6. The Applicant was a candidate (then at the P-2 level) who had been selected to undertake the testing phase of the recruitment exercise.
7. By email dated 11 April 2012 from DFS, the Applicant was provided with the test. The test the Applicant received from DFS consisted of two primary questions requiring written responses:

Question 1 How should UN peacekeeping operations develop and implement their public information strategies to most effectively reach target audiences, both local (host country) and international? What are the main elements to be taken under consideration? (b) Which digital communications tools and emerging technologies could be useful for public information in the field? What are their advantages? (c) What limitation do you think could affect the use of these new communications tools in the field? (d) Which more “traditional” means of communication could also be appropriate and effective in a peacekeeping?

Question 2 You are a Public Information Officer in a UN peacekeeping mission and you receive a request from Headquarters in New York to organize all media arrangements for an upcoming visit of the Under-Secretary-General (USG) for Peacekeeping Operations. The USG is scheduled to meet the Head of State, the Foreign Minister, and other senior government official; preside over a mission

ceremony at which medals will be awarded to serving peacekeepers; and attend a ribbon-cutting ceremony at the opening of a health clinic that has been rebuilt by one of the military contingents of UN peacekeepers in the area.

Please list the steps you would take in organizing/coordinating all public information aspects of the visit and propose ways to maximize the potential media (local and international) to the visit of the senior UN official.

Please draft a press release announcing the USG's visit.

8. The test was to be completed in no more than 3 hours from opening and was to be submitted no later than 6:00 p.m. Greenwich Mean Time ("GMT") on 12 April 2012. The instructions also stipulated that failure to submit a response within the designated time frame would result in exclusion from the exercise.

9. The instruction email indicated, *inter alia*, that the Applicant's response would be sent anonymously to a United Nations Public Information Expert and that successful candidates would be invited to participate in a telephone interview during the first two weeks of May 2012. The Applicant was to provide, at the time of submission of her test, a location and current telephone number where she could be reached.

10. On 12 April 2012 the Applicant posted a solicitation for assistance on PeoplePerHour, a website which connected writers and editors to clients. The Applicant's solicitation stated as follows: "looking for a long-term writer for a well-known international organization. For the first partnership, I would expect you to do a test which is going to take place today at 4pm, 12 April in London time. The duration of the test is one and an [sic] half hour. It requires quick research, drafting and analysis skills. Answer of the question no more than 800 words. He/she should be experienced in drafting media/communication campaign strategy for the important global events and know how to develop public information materials for print, electronic or broadcast media in some conflict countries".

11. On 12 April 2012, Mr. X a freelance journalist based in the United Kingdom was using PeoplePerHour. Mr. X expressed interest in the Applicant's solicitation. Using United Nations email address, on 12 April 2012, at 18:01, the Applicant sent Mr. X a quotation from the test for the JO.

12. The Applicant modified the question slightly, removing references to the United Nations and indicating instead that the matter related to “European Commissions”. The subject line of the Applicant’s email to Mr. X stated “please send it back in one and a half hour”.

13. Mr. X completed Question 1 of the test and on 12 April 2012, at 7:28 p.m., emailed his work to the Applicant, thanking her for the opportunity and noting that he had included the original question. Mr. X further stated that he found the task to be challenging. The Applicant paid Mr. X for his work; the cost was approximately USD20 per hour.

14. On 12 April 2012, via email, the Applicant submitted her exam responses to the United Nations, using much of Mr. X’s work in her response to Question 1. With her submission to the United Nations, the Applicant provided two telephone numbers by which she could be reached, including her cell phone and noted that she was located in Afghanistan.

15. The Applicant submitted her test response after the stated deadline. She was not selected for the position.

16. In May 2017, the Applicant was reassigned to the Office of Counter-Terrorism at United Nations Headquarters.

17. On 1 July 2019, the Office of Internal Oversight Services (“OIOS”) received a report of possible misconduct implicating the Applicant.

18. By email dated 25 July 2019, OIOS sent the Applicant a request for an interview regarding, *inter alia*, allegations that she had engaged a person external to the United Nations to prepare a response for her as part of a recruitment examination exercise. Attached to OIOS’s email was a document entitled “OIOS Pre-Interview information sheet – Subject”. Therein, it was expressly stated, *inter alia*, that the Applicant was not to disclose details about the investigation to any other person.

19. On 31 July 2019 and 8 August 2019, OIOS interviewed the Applicant.

20. On 9 November 2020, the Applicant received the allegations of misconduct, dated 30 October 2020 (“Allegations Memorandum”).

21. By email dated 1 December 2020, the Applicant requested an extension of time to provide comments, stating that she would be taking one month of medical leave.

22. On 1 December 2020, the Applicant’s request for an extension was granted and she was afforded until 30 December 2020 to provide comments.

23. On 28 December 2020, the Applicant requested a second extension, until 7 February 2021, to provide comments, again citing medical reasons. With this message, the Applicant indicated that she was represented by legal counsel but did not identify her counsel by name.

24. On 29 December 2020, the Applicant’s request for an extension until 7 February 2021 was granted.

25. On 5 February 2021, the Applicant requested a further extension of time until 7 March 2021, again citing medical reasons. The Applicant’s request was granted, and she was informed that her comments were due 7 March 2021.

26. On 5 March 2021, the Applicant requested a further extension of time to provide comments, informing the Administrative Law Division (“ALD”) that another request for medical leave was pending. ALD granted the Applicant’s request, providing her until 9 April 2021 to comment on the allegations of misconduct. Noting that in her 28 December 2020 email, the Applicant had indicated that she had legal counsel, ALD advised the Applicant that if she was unable to respond to the allegations on her own, she should do so with the assistance of counsel.

27. By email on 9 April 2021, the Applicant informed ALD that she had been instructed by her doctor to focus on her health. She also stated: “I regret that this precludes my working on the response myself or with any legal personnel while I am in recovery”. The Applicant stated that a sick leave extension was pending and that ALD should consult with the Division of Healthcare Management and Occupational Safety and Health (“DHMOSH”).

28. By email dated 11 May 2021, the Applicant was informed that she would receive one final extension of time, until 23 June 2021, to provide comments on the allegations.

29. On 16 June 2021, the Applicant received an automated e-mail indicating that her sick leave for the period from 1 June 2021 to 30 June 2021 had been certified by Medical Services.

30. The Applicant did not submit comments in response to the allegations of misconduct. As stated above, she was informed by email dated 11 May 2021 that her comments were due by 23 June 2021 and that no further extensions of time would be provided.

31. On 25 June 2021, the Applicant received an e-mail response from a doctor with DHMOSH indicating that sick leave had been approved until 30 June 2021 and that she was not to work while on sick leave.

32. On 28 June 2021, the Applicant received a letter from the ASG/OHR advising her that she was being separated from service with compensation in lieu of notice and with termination indemnity.

Consideration

Standard of review in disciplinary cases

33. 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).

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

34. In the sanction letter, the Under-Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”) informed the Applicant that it was established, by clear and convincing evidence, that in April 2012, during a recruitment process for the JO, the Applicant enlisted the assistance of a private individual using a commercial online platform, for a test for a position with the Organization. It was further stated that the Applicant provided the first of two test questions to that individual for completion, and when submitting her answer to the test to the Organization, the Applicant included much of the answer the individual had provided. The USG/DMSPC concluded that the Applicant’s actions violated staff regulation 1.2(b) and amounted to misconduct.

35. The Tribunal notes that the key facts establishing the disciplinary measure are undisputed between the parties. In this regard, the Applicant admitted during the investigation that she engaged in the conduct at issue, namely, that she hired Mr. X to complete a portion of an exam for which she was sitting, and that she submitted Mr. X’s work to the Organization in the context of the recruitment exercise. In addition to the foregoing, the Tribunal notes that another party witnessed the Applicant’s conduct and provided an account of the matter. In this regard, Mr. X provided an account consistent with that of the Applicant and admitted his role in the scheme, namely, that the Applicant hired him to draft a response to a question and that he did so. There is no dispute as to the test in question or that the Applicant submitted to the Organization a response which was substantially similar, and indeed nearly identical, to that provided by Mr. X. There is also documentary evidence in support of the facts, including copies of email exchanges between the Applicant and Mr. X.

36. The Tribunal therefore finds the record establishes the facts on which the disciplinary measure was based at the required evidentiary standard.

Whether the established facts amount to misconduct

37. Staff regulation 1.2(b) on basic rights and obligations of staff provides that staff members “shall uphold the highest standards of efficiency, competence and integrity. The concept of

integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status”.

38. As discussed above, the Tribunal found that there was a clear and convincing evidence that in April 2012, during a recruitment process for a Job Opening at the P-3 level, the Applicant enlisted the assistance of a private individual using a commercial online platform, for a test for a position with the Organization.

39. The Applicant argues that she did not act in bad faith and had no intention to cheat in the exam. The Applicant states that contacting an outside consultant cannot be properly considered an act of misconduct absent her intent to cheat on a test and was instead an isolated error in judgment. The Applicant submits that she was not intending to compete for the post and intentionally submitted her response late to take herself out of consideration. The Applicant states that this important detail was ignored in the contested decision, which is based on the generalized finding that she cheated on an exam. The Applicant further states that she did not admit to any act of misconduct. She admitted to and apologized for hiring Mr. X as a breach of good judgment but explained that there was no attempt to use these for the purpose of gaining an advantage in the competitive recruitment process. The Applicant states that her test submission was done after the closure of the exercise to comply with requirements for future participation and to get experience in taking written exams. In the Applicant’s view, absent the motive to cheat on a test, there is no clear breach of any rule or standard of conduct that prohibits seeking feedback when practicing for an exam.

40. The Respondent, on the other hand, states that the Applicant’s actions violated staff regulation 1.2(b). In the context of the recruitment exercise in which she was participating, the Applicant paid another individual to complete essentially half of the exam and submitted the work as her own. By hiring an outside individual, she not only obtained the benefit of another’s work, but gained time to devote to other test questions. All of this provided her with a potential competitive advantage over others taking the same recruitment exam and violated the relationship of trust necessary for a continued employment relationship.

41. The Tribunal finds that the Applicant failed to uphold a conduct befitting her status as senior international civil servant. The Applicant's actions, as established by the facts, violated staff regulation 1.2(b). By submitting answers to a test in the context of the recruitment exercise, the Applicant represented that she was the author of the answers. As evident in the facts, the Applicant had employed Mr. X to assist with the test and the Applicant provided the first of two test questions to that Mr. X for completion. When submitting her answer to the test to the Organization, the Applicant included much of the answer Mr. X had provided. The Applicant's actions lacked integrity, honesty and truthfulness and amounted to misconduct. As the Applicant nevertheless misrepresented the submission as her own, it is irrelevant that the Applicant's test submission was done after the deadline to submit it.

Whether the Applicant's due process rights were respected

42. The Applicant states her due process rights were not respected. She submits that she was "never given an opportunity to comment on the Investigative Report". The Applicant explains that due to her medical condition she remained for an extended period on sick leave from 2020 onward, during which time she struggled to meet the Respondent's deadlines. The Applicant claims that, due to the Respondent's behavior, she could not eventually provide comments in response to the allegations of misconduct. She concludes "[t]his resulted in a decision that was premature and based on incomplete information".

43. The Tribunal finds that the Applicant's procedural fairness rights were respected throughout the investigation and the disciplinary process. The Tribunal notes that on 31 July 2019 and 8 August 2019, the Applicant was interviewed in connection with the investigation and that the Applicant was provided with an audio-recording of each of her interviews. Following her interviews, the Applicant was given the opportunity to provide additional information, which she did. With the Allegations Memorandum, the Applicant was provided with OIOS's investigation report and supporting documentation, and granted the opportunity to comment on the allegations against her. The Applicant was informed of her right to seek the assistance of counsel. Upon the Applicant's request, over a nearly eight-month period, the Administration granted the Applicant five extensions of time to comment on the allegations to take into account the deterioration of the

Applicant's health. The Respondent also warned the Applicant that 23 June 2021 was the final deadline to provide comments on the allegations.

44. Since the main requirements of due process were met: 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 her defense, 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

45. 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".

46. The Administration has discretion to impose the disciplinary measure that it deems appropriate 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).

47. 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).

48. In the sanction letter, the Administration imposed on the Applicant the disciplinary measures of separation from service, with compensation in lieu of notice, and with termination indemnity, in accordance with staff rule 10.2(a)(viii).

49. 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 (including cases involving attempts to gain an unfair advantage in hiring exercises, and more specifically those involving testing). The USG/DMSPC considered that there was no aggravating or mitigating factors present in this case. The USG/DMSPC found that the Applicant's personal circumstances, such as her health, did not serve to mitigate her conduct.

50. The Applicant argues that the disciplinary measure imposed on her was disproportionate and failed to take into account critical mitigating factors. The Applicant argues that the assessment of her actions must be mitigated by her medical condition. In this regard, the Applicant submits that while performing her duties in her first peacekeeping mission between 2009 and 2012, the Applicant was operating in a war zone and due to exposure to a violent episode, she was suffering from Post-Traumatic Stress Disorder ("PTSD"). The Applicant states that her medical condition, in the context of her mental state at the time, according to her doctors, affected her decision-making in 2012 and continued to affect her. Thus, her action must be considered in the context of her mental state at the time, which was not the case. The Applicant believes that her treatment appears to be unduly harsh and uncaring. Consequently, the Applicant submits that her separation from service appears disproportionate and retaliatory.

51. The Tribunal does not deny that staff members may experience difficult circumstances in the course of their service for the Organization, and that the Applicant may be suffering from PTSD. However, there is no indication of a link between the Applicant's health condition and her misconduct in the context of the recruitment exercise.

52. The Applicant tries to rely on *Kennedy* 2021-UNAT-1184. In this judgment, the Appeals Tribunal, quoting *Rajan* 2017-UNAT-781, specified "a decision on the appropriate sanction for misconduct involves a "value-judgment and the consideration of a range of factors. The most important factors to be taken into account in assessing the proportionality of a sanction include the

seriousness of the offence, the length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency””. Among the factors that are relevant considerations, it quotes: “the staff member’s intent or whether the action was accidental, careless, reckless or deliberate. Factors relevant to this are whether the staff member made full, timely disclosure to a direct or indirect supervisor, the staff member’s self-awareness of the conduct, whether the staff member followed operational procedures in connection with the misconduct, whether the staff member engaged in the misconduct despite prior warning, whether the misconduct was fraudulent, manipulative or deceptive, whether the staff member acted alone or with others resulting in differing degrees of knowledge, participation and responsibility, whether the staff member organized and planned the conduct or whether it was the result of a rash action or temporary lapse of judgment, and whether the staff member concealed or attempted to conceal the misconduct or otherwise deceive or mislead the employer from discovering the misconduct”.

53. In the present case, the action was deliberate and fraudulent, and the staff member concealed the misconduct. Thus, the Tribunal finds that the Administration acted within the bounds of its discretion in finding that the Applicant’s misconduct was serious in nature. Her actions, submitting exam responses drafted by a third party to the Organization, falsely representing it was her own work, demonstrated a lack of integrity and disregard for the sanctity of the recruitment process. The Applicant’s actions further violated the relationship of trust necessary for a continued employment relationship.

54. 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

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

(Signed)

Judge Joelle Adda

Dated this 23rd day of June 2022

Entered in the Register on this 23rd day of June 2022

(Signed)

Morten Michelsen, Officer-in-Charge, New York