UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2021/016
Judgment No.:	UNDT/2022/085
Date:	21 September 2022
Original:	English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

MIHYAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

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

Introduction

1. By application filed on 12 March 2021, the Applicant, a staff member of the United Nations Department of Safety and Security ("UNDSS"), contests the decision to impose on him the disciplinary measures of written censure and loss of two steps in grade.

Facts and procedural history

2. The Applicant commenced employment with the United Nations Development Programme ("UNDP") in New York in 2005.

3. On 1 June 2018, in accordance with the Secretary-General's management reform, the Applicant's contract was transitioned to a United Nations Secretariat staff contract. At the time of the transition, the Applicant held a fixed-term appointment with UNDP as a Field Security Coordination Officer at the United Nations Assistance Mission for Iraq ("UNAMI") at the P-4, step XII level, that was due to expire on 24 February 2020.

4. On 23 September 2018, the Applicant transferred to UNDSS as a Security Adviser in Kuala Lumpur, where he is currently stationed.

5. In 2016, the Applicant was involved in a recruitment process for the hiring of a Local Security Assistant ("LSA") with UNDSS in Sulaymaniyah, Iraq. At the relevant time, he reported directly to Mr. H. K., who was the most senior security officer in the Kurdistan Region of Iraq and responsible for UNDSS offices located in Erbil, Sulaymaniyah and Duhok.

6. Following receipt of an allegation that the Applicant improperly interfered with the above-mentioned recruitment exercise, the Office of Audit and Investigations ("OAI"), UNDP, conducted an investigation between March 2018 and January 2019.

7. On 15 February 2019, the Director, OAI, UNDP referred the Applicant's case to the Office of Human Resources ("OHR") for appropriate action. The referral was based on an investigation report dated 15 February 2019, together with supporting documentation.

8. By memorandum dated 28 September 2020, the Applicant was requested to respond to formal allegations of misconduct. On 22 October 2020, the Applicant submitted his comments on the allegations of misconduct.

9. By letter dated 16 December 2020, the Applicant was informed that, based on a review of the Applicant's entire dossier, including his comments, the Under--Secretary-General for Management Strategy, Policy and Compliance ("USG/DMSPC") had concluded that it had been established by clear and convincing evidence and, in any case, by a preponderance of the evidence, that the Applicant had engaged in misconduct. 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 rule 10.2(a)(i) and (ii), having found no aggravating or mitigating circumstances.

10. On 12 March 2021, the Applicant filed the application mentioned in para. 1 above.

11. On 15 April 2021, the Respondent filed his reply.

12. On 20 May 2021, the Applicant filed his comments on the Respondent's reply.

13. By Order No. 67 (GVA/2022) of 23 June 2022, the Tribunal convoked the parties to a case management discussion ("CMD") which took place, as scheduled, on 6 July 2022. At the CMD, both parties agreed that the case could be determined on the written pleadings without holding a hearing on the merits.

14. By Order No. 72 (GVA/2022) of 7 July 2022, the Tribunal ordered the parties to file closing submissions.

15. On 18 July 2022, the Respondent filed his closing submission.

16. On 27 July 2022, the Applicant filed his closing submission.

Consideration

Scope and standard of judicial review

17. As per well-settled case law of the internal justice system, judicial review of a disciplinary case requires the Tribunal to consider the evidence adduced and the procedures utilized during the course of an investigation by the Administration (see, e.g., *Applicant* 2013-UNAT-302, para. 29). In this context, the consistent jurisprudence of the Appeals Tribunal (see, e.g., *Haniya* 2010-UNAT-024, para. 31; *Wishah* 2015-UNAT-537, para. 20; *Ladu* 2019-UNAT-956, para. 15; *Nyawa* 2020-UNAT-1024, para. 48) requires the Dispute Tribunal to ascertain in this case:

a. Whether the facts on which the disciplinary measures were based have been established;

b. Whether the established facts legally amount to misconduct;

c. Whether the disciplinary measures applied were proportionate to the offence; and

d. Whether the Applicant's due process rights were respected during the investigation and the disciplinary process.

18. The Tribunal will address below these issues in turn.

Whether the facts on which the disciplinary measures were based have been established

19. The disciplinary measures in the present case are written censure and loss of two steps in grade.

20. It is well-settled case law that the standard of proof applicable to a case where the disciplinary measures do not include separation or dismissal is that of preponderance of evidence, i.e., more likely than not that the facts and circumstances underlying the misconduct exist or have occurred (see sec. 9.1(b) of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process); see also *Suleiman* 2020-UNAT-1006, para. 10).

21. Moreover, in determining whether the standard of proof has been met, the Tribunal "is not allowed to investigate facts on which the disciplinary sanction has not been based and may not substitute its own judgment for that of the Secretary-General". Thus, it will "only examine whether there is sufficient evidence for the facts on which the disciplinary sanction was based" (see *Nadasan* 2019-UNAT-918, para. 40).

22. In the present case, the facts on which the disciplinary measures were based are twofold:

a. Count One: Improper interference with a recruitment exercise; and

b. Count Two: Failure to report potential misconduct of Mr. H. K.

<u>Improper interference with a recruitment exercise</u>

23. According to the sanction letter, the Applicant was sanctioned for having improperly interfered with the recruitment exercise for the position of LSA Sulaymaniyah, including through:

a. Moving Mr. D. F. A. into the long list of candidates although UNDP Human Resources ("HR") had marked his application as "not under consideration" for lack of the requisite work experience;

b. Acting on Mr. H. K.'s instruction to include Mr. D. F. A. in the shortlist of candidates for the LSA Sulaymaniyah position, even though Mr. D. F. A. did not meet the selection criteria; and

c. Sharing the log-in details for the UNDP HR online platform with Mr. H. K. when he had never been given such access.

24. The Tribunal is satisfied that the Administration has established to the requisite standard that the Applicant improperly interfered with the recruitment exercise for the LSA Sulaymaniyah position as is explained below.

25. After a careful review of the parties' submissions and having heard the parties at the CMD, the Tribunal notes that the Applicant does not dispute the fact that on 17 February 2016, after logging in with the UNDP HR guest credentials, he moved Mr. D. F. A.'s application from "not under consideration" to the long list, and subsequently added him to the shortlist. Furthermore, the Applicant did not deny the fact that he shared the log-in details for the UNDP HR online platform with Mr. H. K., although he argues that UNDP HR provided him with guest user log-in details to review long list of candidates without classifying the credentials as strictly confidential, confidential, or sensitive in handling, and that UNDP HR did not indicate that Mr. H. K. as a hiring manager should not have access to all candidates' names and profiles.

26. The Tribunal is not convinced by the Applicant's arguments in this respect. The documentary evidence on record shows that the Applicant was involved in the recruitment process precisely because Mr. H. K. had recused himself from reviewing the long list of candidates so that he could participate in the subsequent interview stage, and that access to the UNDP recruitment platform was only required for the purpose of reviewing the candidates already placed in the long list by UNDP HR, and shortlisting the candidates that would be invited to sit the written exam.

27. Also, unlike all other communications relating to the recruitment process, the UNDP HR email conveying the guest user log-in credentials was only communicated to the Applicant. Similarly, Mr. H. K.'s request to receive access to the recruitment platform was made by Mr. H. K. directly and only to the Applicant, in a separate email thread. As such, the Applicant was or should have been aware that Mr. H. K. did not have access to the UNDP HR platform. However, instead of consulting with UNDP HR on whether he should provide access to Mr. H. K., the Applicant simply handed over to him the guest log-in credentials within one hour of receiving them.

28. The Tribunal finds that the Applicant's attempt to justify his actions does not stand. To justify his actions, the Applicant claims that he always acted on instructions from his supervisor and hiring manager, Mr. H. K., who should be accountable for his instructions to him, and that a waiver on work experience required was granted for Mr. D. F. A. and his recruitment was authorized by the UNDP Country Manager after the waiver.

29. However, in the Tribunal's view, the fact that the recruitment was completed under an exceptional waiver does not excuse the Applicant's conduct. In particular, the waiver was requested and provided only in respect of Mr. D. F. A.'s "shortfall of experience". Also, the UNDP Country Manager was not informed of the irregularities in the selection process.

30. Moreover, although the documentary evidence on record shows that the Applicant received and acted on instructions from Mr. H. K. to include Mr. D. F. A. in the short list of candidates to advance to the next stage of the selection process, and shared with him the log-in credentials to the UNDP recruitment database, the Tribunal considers that acting under the instructions from one's supervisor does not have any impact on the establishment of the facts, nor does this excuse the Applicant from the alleged conduct.

31. Accordingly, the Tribunal finds that there is evidence that the Applicant improperly interfered with the recruitment exercise for the position of LSA Sulaymaniyah.

<u>Failure to report potential misconduct of Mr. H. K.</u>

32. The sanction letter shows that the Applicant was also sanctioned for his failure to report the potential misconduct of Mr. H. K. in respect of his instructions to include Mr. D. F. A. in the short list, even though his application was marked by UNDP HR as "not under consideration".

33. The Tribunal notes that the Applicant does not dispute the fact that he did not report potential misconduct on the part of his supervisor. However, he claims that there was no clear and convincing evidence to show that Mr. H. K. had potentially committed misconduct in respect of his instructions to include Mr. D. F. A. in the short list. To support his claim, he specifically argues that Mr. H. K. was not subject to disciplinary action or sanction, that UNDP HR and Mr. H. K.'s direct supervisors were mindful of Mr. H. K.'s instructions to include Mr. D. F. A. in the short list, and that at no stage of the recruitment process, did UNDP HR identify any potential misconduct by Mr. H. K. or advise that the selection process should have been cancelled or the position re-advertised.

34. However, contrary to the Applicant's assertion, the evidence on record shows that the Organization investigated separately Mr. H. K.'s conduct with respect to the recruitment at issue and informed him that had he remained in service, a disciplinary sanction would have been imposed. Moreover, there is no evidence that UNDP HR and Mr. H. K.'s direct supervisors were aware of Mr. H. K.'s instructions to the Applicant to include Mr. D. F. A. in the short list. Instead, the contemporaneous documentary evidence shows that Mr. H. K. emailed the Applicant his instructions separately, without copying anyone else.

35. In light of the foregoing, the Tribunal concludes that the Administration has established to the requisite standard of proof the facts on which the disciplinary measures were based.

Whether the established facts legally amount to misconduct

36. In assessing whether the established facts legally amount to misconduct, "due deference [should] be given to the Secretary-General to hold staff members to the highest standards of integrity and the standard of conduct preferred by the Administration in the exercise of its rule-making discretion. The Administration is better placed to understand the nature of the work, the circumstances of the work environment and what rules are warranted by its operational requirements" (see *Nadasan*, para. 41).

37. The Tribunal further recalls that staff rule 10.1(a) provides that:

> Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

38. Having found in paras. 24 to 35 that the Applicant improperly interfered with the recruitment exercise for the position of LSA Sulaymaniyah and failed to report potential misconduct of Mr. H. K., the Tribunal recalls the basic rights and obligations of staff, as per the relevant Staff Regulations and Rules:

> **Regulation 1.2**
> **Basic rights and obligations of staff**
>
> …
>
> **General rights and obligations**
>
> …
>
> (b) 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;
>
> …
>
> (i) Staff members shall exercise the utmost discretion with regard to all matters of official business. They shall not communicate to any Government, entity, person or any other source any information known to them by reason of their official position that they know or ought to have known has not been made public, except as appropriate in the normal course of their duties or by authorization of the Secretary-General. These obligations do not cease upon separation from service;
>
> …
>
> **Use of property and assets**
>
> (q) Staff members shall use the property and assets of the Organization only for official purposes and shall exercise reasonable care when utilizing such property and assets;

> **Rule 1.2**
> **Basic rights and obligations of staff**
> …
>
> **General**
>
> …
>
> (c) Staff members have the duty to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action and to cooperate with duly authorized audits and investigations. Staff members shall not be retaliated against for complying with these duties.
>
> …
>
> **Specific instances of prohibited conduct**
>
> …
>
> (i) Staff members shall not intentionally alter, destroy, falsify or misplace or render useless any official document, record or file entrusted to them by virtue of their functions, which document, record or file is intended to be kept as part of the records of the Organization.

39. Thus, the Tribunal finds that the Administration correctly determined that:

a. By moving Mr. D. F. A. to the long list of candidates, despite UNDP HR having marked his application as "not under consideration" for lack of the requisite work experience, the Applicant did not demonstrate the highest standards of integrity, in violation of staff regulation 1.2(b), and intentionally altered and/or falsified the records entrusted to him by virtue of his functions, in violation of staff rule 1.2 (i);

b. By acting on Mr. H. K.'s instruction to include Mr. D. F. A. in the shortlist of candidates for the LSA Sulaymaniyah position even though Mr. D. F. A. did not meet the selection criterion of work experience, and by sharing the log-in details for the UNDP HR online platform with Mr. H. K. when he was not formally provided such access, the Applicant did not demonstrate the highest standard of integrity and did not utilise the assets of

the Organization with the requisite care, in violation of staff regulations 1.2(b) and 1.2(q);

c. By sharing the log-in details for the UNDP HR online platform with Mr. H. K., when he had never been given such access, the Applicant also failed to exercise the utmost discretion in matters of official business and communicated information that was known only by him due to his official position to a person not authorised to receive such information, namely Mr. H. K. Thus, his actions were inconsistent with staff regulation 1.2(i); and

d. By not reporting the potential misconduct by Mr. H. K. in respect of his instructions to include Mr. D. F. A. in the short list, the Applicant did not abide by his obligations under staff rule 1.2(c).

40. Accordingly, by his conduct, the Applicant breached staff regulations 1.2(b), 1.2(i) and 1.2(q), and staff rules 1.2(c) and 1.2(i), and the established facts amount to misconduct under Chapter X of the Staff Rules.

Whether the disciplinary measures applied were proportionate to the offence

41. Regarding whether the two disciplinary measures imposed on the Applicant, i.e., written censure and loss of two steps in grade, are proportionate to the offence, the Tribunal is mindful that "the matter of the degree of the sanction is usually reserved for the Administration, who has discretion to impose the measure that it considers adequate to the circumstances of the case, and to the actions and behaviour of the staff member involved" (see *Portillo Moya* 2015-UNAT-523, para. 19).

42. "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" (see *Samandarov* 2018- UNAT-859, para. 24).

43. In this respect, the Tribunal recalls that staff rule 10.3(b) provides that "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct". Therefore, a sanction should not be "more excessive than is necessary for obtaining the desired result" (see *Sanwidi* 2010- UNAT-084, para. 39). In this respect, the Appeals Tribunal in *Sanwidi* further clarified that:

> The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective. This entails examining the balance struck by the decision-maker between competing considerations and priorities in deciding what action to take.

44. Accordingly, when choosing the appropriate sanction from a set of permissible sanctions, the decision-maker must consider the totality of the circumstances of the case, including all aggravating and mitigating circumstances (see, e.g., *Applicant* UNDT/2010/171, para. 27; *Portillo Moya* UNDT/2014/021, paras. 56, 57; *Samandarov* UNDT/2017/093, para. 39). In *Rajan* 2017-UNAT-781, para. 48, the Appeals Tribunal held that:

> 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.

45. The Tribunal must, therefore, determine whether in light of all the circumstances, the sanctions of written censure and loss of two steps in grade imposed on the Applicant for the misconduct, were proportionate to the offence.

Whether the Administration properly considered aggravating and mitigating factors

46. The Appeals Tribunal has consistently held that the Secretary-General "has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose" (see, e.g., *Nyawa* 2020-UNAT-1024, para. 89; *Ladu* 2019- UNAT-956, para. 40). However, when exercising such discretion, the Secretary-General must consider all relevant factors (see *Kennedy* 2021-UNAT-1184, para. 63).

47. In the present case, the Tribunal notes that, in determining the sanction, the USG/DMSPC considered that there was no aggravating or mitigating factors applicable in the Applicant's case. Specifically, the annex to the sanction letter states that:

> With respect to [the Applicant's] request that [his] long unblemished record of service to UNDSS be considered in mitigation, it is noted that a career free from disciplinary investigations is the minimum expectation for international civil servants. As such, this factor cannot be considered in mitigation. The lack of financial gain to [him] or loss to the Organization as a result of the recruitment was not raised against [him] in the Allegations and is, thus, inapplicable in the instant case. Last, [it is noted that,] whereas under other circumstances, [his] acting under the instructions of [his] supervisor could have been considered a mitigating factor, the fact that [he] failed to report misconduct on the part of [his] supervisor, also renders this factor inapplicable in the instant case.

48. In opposing the Administration's determination, the Applicant specifically argues that the Administration ignored and/or gave no weight to the following relevant factors:

a. He has over 23 years of long and unblemished service with the Organization including in several hardship duty stations and war zones;

b. There is no personal gain on the part of the Applicant, or loss to the Organization;

c. He was acting on the instruction of his supervisor, who was also the hiring manager;

d. The shortlisting of candidates was not part of his usual work, and he could not be expected to appreciate all the relevant considerations and ethics;

e. There was an operational basis for his conduct. His actions were endorsed by the hiring managers and UNDP Country Manager;

f. He was only responsible for shortlisting candidates, but was not involved in the rest of the recruitment process;

g. None of the hiring managers or the UNDP Country Manager were found to have committed acts of misconduct or sanctioned in respect of the recruitment at issue; and

h. The UNDP OAI Report No. 2225 on UNDP Malaysia, dated 16 October 2020, showed that procedural irregularities occurred in similar recruitment cases in the UNDP Malaysia Office but no OAI investigations were conducted.

Factors allegedly not considered by the decision-maker

49. In relation to the factors listed in para. 48 d. to h. above, the Respondent argues that it would have been impossible for the decision-maker to consider them as mitigating factors because the Applicant had not advanced any of them with his comments in the disciplinary process. While the Tribunal considers that it is the Administration's responsibility to investigate and consider all relevant factors, it finds that these factors wouldn't have constituted mitigating factors.

50. First, in relation to the Applicant's familiarity with the recruitment process, the evidence on record shows that he testified before the investigation panel that UNDP HR guided him through his involvement in the recruitment process. Moreover, it is well-settled that staff members are presumed to know the Regulations and Rules applicable to them and that ignorance of the law cannot be invoked as an excuse to justify the failure to comply with them (see, e.g., *Vukasović* 2016-UNAT-699, para. 14; *Kissila* 2014 UNAT-470, para. 24).

51. Second, there is no evidence that the alleged operational requirement would have compelled the Applicant to commit misconduct. Also, the fact that the minimum work experience requirement was ultimately waived does not mean that the Applicant's actions were endorsed by the hiring managers and UNDP Country Manager. Indeed, as discussed in para. 29, while granting the waiver, the UNDP Country Manager had no knowledge of the Applicant's conduct.

52. Third, the fact that the Applicant was only responsible for shortlisting candidates but was not involved in the rest of the recruitment process is not relevant. Indeed, the sanction letter shows that he was sanctioned only for the extent of his involvement in the recruitment process.

53. Fourth, regarding other staff members involved in the recruitment at issue, contrary to the Applicant's assertion, as discussed in para. 34, Mr. H. K.'s involvement in the recruitment process was the subject of a separate investigation and disciplinary process. Furthermore, there is no evidence of unsatisfactory conduct on the part of other hiring managers or the UNDP Country Manager that would have warranted the initiation of investigation and disciplinary proceedings against them.

54. Finally, turning to the UNDP OAI Report No. 2225, the Tribunal considers that the burden of proof to establish its relevance for the case at hand lies on the Applicant. However, apart from a general assertion, the Applicant fails to establish how the alleged recruitment irregularities that might have occurred in another duty station is comparable to his conduct or has an impact on the assessment of the sanction proportionality in his case. Also, the Tribunal does not have any other source of information, nor any further details about the reason why an investigation did not take place. As such, the Tribunal considers that the UNDP OAI Report No. 2225 is irrelevant to the present case.

Factors allegedly not properly considered by the decision-maker

55. Nonetheless, the Tribunal is concerned that the Administration failed to properly consider the following relevant factors.

56. With respect to the Applicant's long satisfactory service, the Tribunal finds that the Administration failed to consider it as a mitigating factor. In this regard, the Tribunal recalls that a long period of service will usually be a mitigating factor, unless acts of misconduct are of such a serious nature that no length of service can rescue an employee who is guilty of them from the harshest of disciplinary measures (see, e.g., *Yisma* UNDT/2011/061, para. 35; *Applicant* UNDT/2022/048, para. 276).

57. In the present case, the Applicant has around 20 years of long and unblemished service with the Organization including in several hardship duty stations and war zones. The misconduct in the present case is not of such a serious nature that would allow the Administration to disregard it.

58. Turning to the lack of financial gain, the Tribunal notes that the Administration considers that the Applicant was never accused of having obtained any financial gain and is, thus, inapplicable in the instant case. In this respect, the Tribunal recalls that "the constitutive elements of an offence must be considered separately from mitigating and aggravating factors" (see *Turkey* 2019-UNAT-955, para. 40), and as such, the Administration conflated the constitutive elements with mitigating factors. Moreover, the investigation report shows that OAI did not find any evidence that the Applicant had any relationship or friendship with Mr. D. F. A., or that the Applicant received any favour in return for his actions with respect to the recruitment at issue. As will be further discussed in para. 65, no resulting personal gain was considered as a mitigating factor in a similar case in the past.

59. In relation to the Applicant's acting under the instructions of his supervisor, the Tribunal notes that the Administration considers that "under other circumstances, [his] acting under the instructions of [his] supervisor could have been considered a mitigating factor, the fact that [he] failed to report misconduct on the part of [his] supervisor, also renders this factor inapplicable in the instant case". In doing so, the Administration again erroneously conflated the constitutive elements of an offence with mitigating factors. The Tribunal fails to see why the Applicant's failure to report his supervisor's potential misconduct could have

rendered inapplicable a mitigating factor, namely his acting under the instructions of his supervisor.

60. Therefore, the Tribunal finds that the Administration failed to properly consider the above-mentioned mitigating factors in the present case.

Whether the disciplinary sanction was consistent with past practice

61. It is well-settled that the principles of equality and consistency of treatment in the workplace, which apply to all United Nations employees, dictate that where staff members commit the same or broadly similar offences, the penalty, in general, should be comparable (see, e.g., *Sow* UNDT/2011/086, para. 58; see also *Baidya* UNDT/2014/106, para. 66; *Applicant* UNDT/2017/039, para. 126).

62. Indeed, "there is no gainsaying that, for the interest of justice and the principle of legal certainty, the Administration should be consistent with its own administrative practices when similar situations are at stake, follow parity principles in determining the sanction and make reference to other cases based on analogous facts and principles, if need be" (see *Appellant* 2022-UNAT-1216, para. 60).

63. Turning to the present case, the Tribunal notes that the sanction letter merely states that the USG/DMSPC "considered the past practice of the Organization in matters of comparable misconduct". However, it did not set out any specific "past practice of the Organization" nor did it analyse the specific nature of the actions that were considered. In his reply, the Respondent argues that the Organization takes cases involving improper processes and/or use of UN databases/platforms and failure to report misconduct seriously.

64. The Tribunal is concerned about the Administration's inadequate and improper analysis of the nature and gravity of the conduct at issue. Having perused the evidence on record, the Tribunal finds that, under the instruction of his supervisor, the Applicant essentially improperly interfered with the recruitment exercise for one position, and he failed to report his supervisor's potential misconduct.

65. After a careful review of the Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour from 1 July 2009 to 31 December 2020, the Tribunal identified two cases involving improper interference with the recruitment exercise that may be comparable to the present case (see table below). In those cases, the disciplinary measures imposed were written censure and a fine of one month's net base salary, which are less severe than those imposed in the present case.

Time period	Type of misconduct	Description	Disposition
From 1 July 2015 to 30 June 2016	Fraud, misrepresentation and false certification	A staff member sent a test to another staff member, in anticipation that the receiving staff member would review it prior to taking an examination for a recruitment exercise.	Fine of one month's net base salary and written censure
From 1 July 2017 to 31 December 2017	Fraud, misrepresentation and false certification	A senior staff member altered written records held in connection with a recruitment process. There were mitigating factors, including an early admission, no resulting personal gain and no effect on the outcome of the recruitment process.	Censure and a fine of one month's net base salary

66. Moreover, while it may be argued that in the present case, the Applicant failed to report his supervisor's potential misconduct, it is undisputed that he acted under the instruction of his supervisor after repeated recruitment exercises had failed to recruit a suitable candidate. In this respect, the Tribunal further notes that the

Organization's past practice on disciplinary matters also shows that, between 1 July 2011 and 30 June 2012, two staff members were imposed a sanction of censure and requirement to attend training for having acted under the instructions of their supervisor to contact potential vendors and irregularly engaged in communications with a vendor regarding specifications required by the Organization. In determining the sanction for the procurement irregularities in that case, the Organization considered that the two staff members acted under instructions of their supervisor but did not sanction them for failure to report the potential misconduct of their supervisor.

67. Accordingly, the Tribunal considers that the imposition of two concurrent sanctions, i.e., a written censure and the loss of two steps in grade also appears excessive considering past practice.

68. In light of the above, the Tribunal finds that in determining the sanction, the Administration failed to duly consider all relevant factors including mitigating factors and past practice and, as such, the cumulative imposition of a written censure and the loss of two steps in grade on the Applicant was excessive, unreasonable and disproportionate to the misconduct.

Whether the Applicant's due process rights were respected during the investigation and the disciplinary process

69. Staff rule 10.3, setting forth rules governing due process in the disciplinary process, provides in its relevant part that:

> (a) The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and had been given the opportunity to respond to those formal allegations[.]

70. The Tribunal is satisfied that the key elements of the Applicant's right to due process were met in the present case. The evidence on record shows that the Applicant was fully informed of the charges against him, was given the opportunity to respond to those allegations, and was informed of the right to seek the assistance of counsel in his defence. Moreover, before this Tribunal the Applicant did not take issue in this respect.

71. Accordingly, the Tribunal finds that the Applicant's due process rights were respected during the investigation and the disciplinary process.

Whether the Applicant is entitled to any remedies

72. In his application, the Applicant seeks the rescission of the contested decision and requests the retroactive substitution of the disciplinary sanction with a reprimand without loss of steps.

73. Having found that the disciplinary measures were excessive, unreasonable and disproportionate to the misconduct, the Tribunal is of the view that there has been a miscarriage of justice in the present case. As such, the contested decision must be rescinded, and the disciplinary measures must be set aside.

74. The Tribunal further recalls that a finding of unreasonableness, and consequent invalidity of a contested decision, will "give rise to the discretion to award specific performance, [i.e.], an order directing the Administration to act as it is contractually and lawfully obliged to act" (see *Belkhabbaz* 2018-UNAT-873, para. 80).

75. Considering that the Administration is better placed to weigh all relevant factors in determining an appropriate sanction, the Tribunal finds it appropriate to remand the case back to the Administration so that a proportionate sanction is imposed on the Applicant. The Administration is also reminded to take into consideration the past practice of the Secretary-General, as well as, all aggravating and mitigating circumstances.

Conclusion

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

a. The disciplinary measures imposed on the Applicant are rescinded;

b. The Applicant's case is remanded to the Administration for a proper determination of applicable sanction;

c. Considering the time that has elapsed, the re-determination of the Applicant's sanction must be completed within two months from the date this Judgment becomes final and executable; and

d. All other pleas are rejected.

(*Signed*)
Judge Teresa Bravo
Dated this 21st day of September 2022

Entered in the Register on this 21st day of September 2022
(*Signed*)
René M. Vargas M., Registrar, Geneva