



**Before:** Judge Francesco Buffa

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

NAIR

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Sétondji Roland Adjovi, *Etudes Vihodé*

**Counsel for the Respondent:**

Jacob van de Velden, AS/ALD/OHR, UN Secretariat

Jonathan Croft, AS/ALD/OHR, UN Secretariat

## **Introduction**

1. The Applicant, Chief Human Resources Officer (“CHRO”) at the United Nations Economic Commission for Africa (“UNECA”), challenges the Administration’s decision to impose on him disciplinary and administrative measures.

## **Procedural background**

2. The Applicant is the CHRO at UNECA. He serves on a fixed-term appointment at the P-5 level, and is based in Addis Ababa, Ethiopia.

3. On 15 July 2021, the Applicant filed an application to challenge the Respondent’s decision to impose the disciplinary measures of a loss of two steps in grade, and deferment for two years of eligibility for consideration for promotion in accordance with staff rules 10.2(a)(ii) and (vi), and administrative measures of training for, at least, three months in the human resources section of another department or office of the Organization and mentoring for a period of, at least, 12 months by a senior human resources professional.

4. The Respondent filed his reply on 19 August 2021.

5. On 3 August 2022, the Tribunal issued Order No. 100 (NBI/2022) to inform the parties of its decision to adjudicate this matter on the basis of their written submissions. To that end, the parties were invited to file their closing submissions simultaneously on 16 August 2022. The Applicant and Respondent filed their respective closing submissions as directed.

## **Facts and Submissions**

6. The Applicant entered into service of the Organization on 31 October 2016 as CHRO at UNECA.

7. On 12 June 2017, a staff member of UNECA, N, contacted the Applicant with an inquiry pertaining to the electronic performance assessment (“ePAS”) of another staff member. The latter was a supervisee of the former.

8. The Applicant was away from the duty station at the time, so he forwarded the email to the Officer-in-Charge (“OiC”) of the Human Resources Management Service (“HRMS”) requesting that N be provided with “the necessary guidance.”

9. On his return to the duty station, the Applicant realised that the OiC did not respond to N’s email.

10. On 21 June 2017, the Applicant responded to N with information regarding policies of the Organization.

11. N wrote two emails in response to the Applicant on the same day. The second email reads:

You wrote and I quote “Insofar as your inference about the applicability of Staff Regulation 1.2(b) and Staff Rule 1.2(i) are concerned, they may be correct with regard to the need for probity, integrity, honesty and truthfulness. However, to extend the inference to cover the Performance Management and Development System is a stretch.” May I suggest that you leave the determination of whether the extension of the provisions of the SR to Performance Management is a stretch to OHRM (since I have reported the matter to OHRM in view of your long silence) and to the Ethics Office. Plagiarism, theft of intellectual property or intellectual assets is a serious matter. I suspect that you have not studied the issue very well; I suggest that you should. You should also seek the advice of the lawyers on applicable jurisprudence.

12. The Applicant responded to N as follows:

You assume that everyone in the organisation waits to receive and respond to your mails and queries with a sense of urgency that need not be accorded to any other item. We received your query and processed it in the order of priority of items, which need not be explained to you.

Since you have written to OHRM, let OHRM get back to you. But that will not bar ECA HR from providing its point of view, which shall also be communicated to OHRM.

I am always happy to receive feedback, which I have stated earlier has to be value adding, which unfortunately again is not. We will seek advice from lawyers on matters of jurisprudence if we doubt our own capability to read and interpret the law. Amongst many other pressing matters, we also process queries such as your own,

which we suspect is an outcome of having a lot of time on hand, a luxury that we are not afforded.

13. Communication between the two staff members then degenerated, with emails going back and forth late into the evening on 21 June and the next day.

14. On 23 June 2017, N initially lodged a complaint of harassment and abuse of authority against the Applicant. However, his complaint was not investigated to give opportunity to UNECA management to address his allegations.

15. On 30 June and 6 July 2017, the Applicant also lodged a complaint of harassment, abuse, intimidation, and disparagement against N. Both complaints were filed based on emails exchange of messages between N and himself.

16. The then Executive Secretary of UNECA (“ES/UNECA”) approved the launching of a fact-finding investigation under the provisions of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

17. The Investigation Panel completed the report in December 2017 and subsequently the case was referred to the Assistant Secretary-General of Human Resources.

18. N’s complaint was later withdrawn.

19. On 14 August 2019, following notice of the administrative measure imposed on him, N submitted a new complaint, having a similar content of the previous one. He specifically alleged that,

a. several emails from [the Applicant] made him feel belittled and humiliated and that[he] “provoked” him into having the exchange.

b. the exchange of emails was “premeditated and improperly motivated” conduct since [the Applicant] being CHRO had access to his Official Status File (OSF) and [the Applicant] was aware of previous sanction brought against him and the conditions attached to it.

c. the abuse of authority by [the Applicant] by using “privileged and confidential information” about him to “influence and guide the outcome of an investigation in which he (N) was the Subject.” To

this Mr. N referred to part of the testimony made by [the Applicant] against him during a different investigation that took place in August 2017.

d. [the Applicant] used his authority as CHRO to “intimidate, use insider knowledge to ridicule and humiliate” him and that this has been the “most humiliating, demeaning and an extremely belittling experience of his United Nations experience.

20. An investigation panel was established on 7 October 2019. It conducted its investigation in Addis-Ababa, Ethiopia from 14 to 21 October 2019.

21. The Panel issued its investigation report issued on 5 June 2020. It concluded that during the exchange of messages in June 2017 with Mr. N, the Applicant used language that caused offense and humiliation to Mr. N. and his words were demeaning, intimidating and humiliating. The Panel also concluded that the exchanges of messages cannot constitute a onetime event as they happened during the course of several days in June 2017, and that the sequencing of messages is no justification for the use of insults containing aggressive and inappropriate words by both staff members. The Panel stated:

123. The use of such language by [the Applicant] is particularly troubling as he is expected to adhere and uphold the highest standards of conduct as Chief Human Resources and because of his expected knowledge of rules and regulations with regard to conduct and discipline matters. [the Applicant] did not seek a different way to resolve the conflict with Mr. [N] as escalating the matter to ECA senior managers but decided to engage in a war of insults with Mr. [N].

124. The Panel ascertains that [the Applicant] used his official position to access information about Mr. [N] which later was used in the exchange of messages in June 2017 and the subsequent fact-finding investigation.

125. There is clear and conclusive evidence that [the Applicant] continued handling Mr. [N] human resources matters after filing of his complaint in July 2027[sic] and there was no segregation of [the Applicant]’s duties in place which may have negatively impacted the handling of Mr. [N]’s human resources by [the Applicant].

126. Finally, the Panel concludes that there is clear and conclusive evidence that [the Applicant] consider Mr. [N] not fit for work in the Organization and there is prevalence of evidence that [the Applicant] used his official position and authority to influence the career of Mr. [N] which ended with his separation from the Organization.

22. The ES/UNECA referred the matter to the Assistant Secretary-General in the Office of Human Resources Management (“ASG/OHRM”) on 16 June 2020.

23. On 16 December 2020, the Director of the Administrative Law Division issued formal allegations of misconduct against the Applicant.

24. The Applicant responded to the allegations on 8 March 2021.

25. On 21 April 2021, the ASG/OHRM issued the Applicant with a sanction letter. The sanction read as follows:

[T]he Under-Secretary-General for Management Strategy, Policy and Compliance has decided to impose on you, with effect from receipt of this letter, the disciplinary measures of a loss of 2 steps in grade and deferment, for two years, of eligibility for consideration for promotion, in accordance with Staff Rules 10.2(a)(ii) and (vi), respectively, and administrative measures of training for, at least, three months in the human resources section of another department or office of the Organization and mentoring for a period of, at least, 12 months by a senior human resources professional, in both cases, to be arranged, and any expenses paid, by ECA.

26. The Applicant submits that he was incorrectly charged pursuant to the provisions of ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority) instead of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). While the investigation was correctly conducted based on ST/SGB/2008/5 and not ST/SGB/2019/8, both the charge and sanction letters claim that the Applicant violated ST/SGB/2019/8. Charging and sanctioning the Applicant based on the incorrect issuance is unlawful and a violation of the Applicant’s rights, and consequently the sanction issued cannot stand.

27. The Applicant further contends that he was charged and sanctioned by officials who did not have the authority to do so. The 16 December 2020 charge letter was authored by Ms. Aruna Thanabalasingam, Director, Administrative Law Division, Office of Human Resources and the 21 April 2021 sanction letter was authored by Ms. Martha Helena Lopez, ASG/OHR. The Applicant submits that

according to Annex IV of ST/SGB/2019/2 (Delegation of authority in the administration of the Staff Regulations and Rules and the Financial Regulations and Rules), only the USG of the Department of Management Strategy, Policy and Compliance (“DMSPC”), Ms. Catherine Pollard, has the authority for the disciplinary process. Absent formal delegation of authority at the time the Applicant was charged and sanctioned, any actions taken by both Ms. Lopez and Ms. Thanabalasingam were done without authority and were therefore unlawful.

28. The Panel was biased and failed to comply with its terms of reference. The Panel did not investigate the apparent contradictions and inconsistencies in N’s statements, emails and testimonies. Rather, it accepted the complainant’s allegations/claims at face value without any consideration of his motives, ignored N’s own emails to the Applicant and focused solely on the Applicant’s emails.

29. The Applicant submits that not only did the Respondent fail to consider relevant matters, and ignore those that are irrelevant, he also failed to meet the standard for harassment required by ST/SGB/2008/5.

30. The Respondent takes the position that the facts alleged amount to misconduct and that the Applicant’s actions violated staff regulation 1.2(a) and staff rule 1.2(f), and constituted harassment prohibited under ST/SGB/2019/8. By engaging in the behaviour for which he was charged, the Applicant “abused the possible avenues provided in the Organization’s policies which enable staff members to redress conflict informally and by doing so caused offense” to N.

31. The sanction imposed on the Applicant was not blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity. It was, instead, entirely proportionate to the established misconduct.

## Considerations

### *Procedural issues*

32. The Tribunal is aware that an official decision without the requisite delegated authority is axiomatically unlawful and cannot stand (paras. 13-16 of *Schwalm* Order No. 081 (NBI/2021) and *Schwalm* Order No. 134 (NBI/2021)).

33. In this case, however, while the Allegations of Misconduct were from Ms. Thanabalasingam, the decision was approved and authorized by the ASG/OHR.<sup>1</sup>

34. The Tribunal is therefore satisfied that the administrative decision whether to initiate a disciplinary process against the Applicant was to be referred to the ASG/OHR, in compliance with section 8 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process).

35. The application before the Tribunal included a Motion for Anonymity at paragraph 42. The Tribunal has considered the Applicant's Motion and finds no justification for it.

36. The Applicant has identified no special circumstances which would warrant the anonymization of this matter, apart from potential personal embarrassment and discomfort, which are not sufficient grounds to grant anonymity.

37. In *Buff* 2016-UNAT-639, the United Nations Appeals Tribunal ("UNAT") stated:<sup>2</sup>

As a preliminary matter, this Tribunal denies the Appellant's request for anonymity at the appellate level and affirms the Dispute Tribunal's respective denial. As stated in *Kazazi*, "Article 10(9) of the Appeals Tribunal Statute provides that '[t]he judgements of the Appeals Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal'". Our jurisprudence shows that the names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and accountability, and

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<sup>1</sup> R/3, Approval and authorization of Allegations of Misconduct. 16 December 2020.

<sup>2</sup> See also *Kazazi* 2015-UNAT-557; *Fedorchenko* 2015-UNAT-499; *Lee* 2014-UNAT-481; *Pirnea* 2014-UNAT-456; *Charot* 2017-UNAT-715.



personal embarrassment and discomfort are not sufficient grounds to grant confidentiality.

[T]he judgments of the Appeals Tribunal are published and made available to the Organization's staff and the general public. Public dissemination of the appellate judgments helps to assure there is transparency in the operations of the Appeals Tribunal. It also means, sometimes fortunately and other times unfortunately, that the conduct of individuals who are identified in the published decisions, whether they are parties or not, becomes part of the public purview.

38. The UNAT also expressly stated in *Buff* that “[the] theoretical fear of upcoming uncomfortable relationships between members of the staff as a consequence of not granting anonymity does not have merit.”<sup>3</sup> The Applicant's Motion for Anonymity is therefore dismissed.

39. The Applicant submits that he was incorrectly charged pursuant to the provisions of ST/SGB/2019/8 instead of ST/SGB/2008/5.

40. The Tribunal is aware that ST/SGB/2019/8 provides that “Investigations initiated prior to the entry into force of the present bulletin shall continue to be handled in accordance with the provisions of Secretary-General's Bulletin ST/SGB/2008/5. In all other respects, the present bulletin hereby supersedes ST/SGB/2008/5”.

41. In the case at hand, the Tribunal recalls that Mr. N filed a complaint against the Applicant on 23 June 2017, and that Mr. N withdrew the complaint soon after. After two years, a new complaint was filed by Mr. N against the Applicant.

42. The Tribunal notes that the investigation in the case was triggered by the complaint by Mr. N against the Applicant on 14 August 2019, which included information he had previously submitted in June 2017 but also information regarding the Applicant and his alleged conduct, including, but not limited to, abuse of authority, from August 2017.

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<sup>3</sup> See also *Adriantseheho* UNDT/2020/195, para. 76 and following.

43. It follows that the investigation process correctly followed the new rules in force at the time of the second complaint.

*Merits*

*The scope of judicial review in disciplinary cases*

44. 55. The Appeals Tribunal has held that judicial review is focused on how the decision-maker reached the impugned decision (see *Sanwidi* 2010-UNAT-084 and *Santos* 2014-UNAT-415). The Appeals Tribunal has also determined what the role of this Tribunal is when reviewing disciplinary cases (see *Mahdi* 2010-UNAT-018 and *Haniya* 2010-UNAT-024).

45. 56. In the case at hand, this Tribunal must examine the following issues:

- a. Whether the facts on which the disciplinary measure was based have been established according to the applicable standard;
- b. Whether the established facts legally amount to misconduct under the Staff Regulations and Rules;
- c. Whether the disciplinary measure applied is proportionate to the offence; and
- d. Whether the Applicant's due process rights were respected during the investigation and the disciplinary process.

46. As to the merits, the Tribunal is of the view that the Applicant's behaviour can be evaluated properly only by looking at the quarrel between Mr. N and the Applicant.

47. In particular, it is worth quoting some of the sentences extracted from the email exchanges, from which it emerges clearly the different attitude and behaviour of the Applicant and his antagonist in the quarrel.

4.43 pm N started the quarrel "I suspect you have not studied the issue very well. I suggest that you should"

5:03 pm N increased the tone “you have an exaggerated (and I submit empty) sense of your self-importance. An empty baseless superiority, I-know-it-all attitude that will get you into trouble sooner than later.... You write a lot of nonsense, outright drivel, which indicate that you have little if any knowledge or understanding of your remit;”

5:15 The Applicant tried to lower the tone “you (*sic*) threat and intimidatory tactics will not cut ice with HR, least of all with me;”

While N kept on insulting (5: 26 N “you have no intellectual (or in indeed administrative and practical) understanding of what integrity means;

5:29 N “I repeat that you are nothing but candy floss, an intellectual snowflake that will melt with the application of the smallest amount of heat ... that is the defense of a coward... but people like you, appointed well beyond your competency...”;

6:10 the Applicant replied “your insults, threats, intimidation do not really matter to me;

8:51 pm N continued saying “stop exposing your abysmal ignorance”, and the Applicant replied at 8:59 pm “it is truly embarrassing is to engage in this fruitless duel with someone your age, experience and education... I will certainly take up your offer for a drink someday. When you behave”

7:51 am of the following morning N, after recalling that the Performance Management system didn't foresee a disagreement between a FRO and a SRO and does not therefore provide guidelines for resolving them, soon attacked the Applicant saying “clearly, all these issues are above your intellect... you do not have the temperament, the emotional control/intelligence, the expertise and skills, the humility, the honesty and the Truthfulness and impartiality to be Chief of HRSS”;

8:35 am N “keep laughing and laugh out loud. Bellow. That will indeed reveal your mental status and invite the psychiatric and mental health intervention that you so badly need... Soon or later, your incompetence and lack of professionalism will catch up with you;”

8:49 the Applicant replied “rest assured I shall speak the truth. But does it behoove you to write in the manner that you do?” and at 10:21 “your lack of respect for any of the UN core values is evident from the crass language and mentality that you display;”

11:00 N said “you are completely and totally unfit, unsuited and I dare say temperamentally unqualified for the position you hold. ... so incompetent that you do not know how incompetent you are”, the Applicant answered in a firm way that “insults, acrimony, conflicts, disparagement .. as HR we shall not tolerate it one bit”, to which N

replied “cowards hide behind the skirt of their mothers. You are a coward for trying to hide behind HR... Mr. Incompetent of Incompetents, [the Applicant], a man immeasurably unsuited for the position he was appointed to””.

48. In the Tribunal’s view, the email exchanges show only a huge patience by the Applicant not to respond by the same tone to offences and vulgar provocations. Indeed, the Applicant’s communication were mainly reactionary.

49. The *first* fact-finding review report dated 20 December 2017 noted that, in his responses, the Applicant was not “entirely void of using language that, when placed out of context, could also be considered inappropriate.” The Panel found that “a picture emerged of a consistent pattern of communication, on the side of Mr. N, with many staff members, that could be described, at best, as arrogant, aggressive, dismissive and possibly provocative, and at worst as gravely insulting, intimidating, threatening and degrading”. The Panel concluded however that the Applicant’s complaint of harassment could be substantiated but that he himself as a CHRO could have avoided getting into the fray with Mr. N, knowing how easily this could escalate and drag on.<sup>4</sup>

50. The Tribunal believes that a completely different evaluation of the Applicant’s sentences derives if we put them in the context: the emails by the Applicant are indeed not stand-alone emails, but are in response to a grave provocation by Mr. N.

51. It is also singularly noteworthy that Mr. N, notwithstanding the fact that his conduct was (to use the wording of the Respondent’s reply at para. 24) “insulting and inflammatory and struck at the Applicant’s background”, received a lesser disciplinary sanction (and for conduct which included but was not limited to this matter).

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<sup>4</sup> See para 31 Application referencing Applicant’s Annex 9 FFP 26.

52. The Tribunal is of the view that the Applicant's behaviour deserves no disciplinary measure at all, of any type, even minor, as no misconduct at all occurred.

53. The Tribunal finds that the sanction in this case bears no rational connection or suitable relationship to the evidence on the record and the purpose of progressive or corrective discipline.

54. Further, other accusations against the Applicant (having used his official position to access information about Mr. N; partiality in dealing with matters impacting Mr. N's employment status and career) are generic and unsubstantiated. As CHRO, the Applicant would have access to information pertaining to all staff members. There is nothing on the record to show that the Applicant *abused* his access in respect of Mr. N.

55. The Respondent is however correct in saying that the Applicant's conduct was not a onetime emotional outburst, because he engaged in the dispute by emails over two days.

56. The Tribunal finds that the Applicant's reaction could be considered appropriate by a staff member being bullied, but not by the Chief of HR, who has the obligation to find solutions (to resolve conflicts) when personnel problems arise, and the tools to address issues of conduct. The Applicant could have stopped the email exchange sooner. Instead of disengaging, he repeatedly reacted and used hostile language; he did not need to respond as he did and he should not have resorted to the use of belittling or insulting language; he was not a model of appropriate behaviour (the same was the antagonist) and he would have been able to respond to the staff member more professionally. As the senior human resource professional, he could reasonably be expected to maintain a civil and respectful tone in his written communications.

57. In the view of the Tribunal, the Applicant's behaviour called for a corrective measure that was administrative but not disciplinary.

58. The Tribunal notes that, commencing 1 April 2022, the Applicant served his sentence for the administrative measures portion of the sanction under Ms. Deborah Ernst, Chief of Human Resources at the United Nations Office in Vienna, until 31 July 2022. The Applicant has already completed this training in Vienna and more under the mentorship of Ms. Ernst. The Applicant therefore complied with the administrative sanction, which has been fully implemented.

59. In conclusion, the application is granted only as it relates to the disciplinary measure. The disciplinary decision is therefore rescinded.

60. The Applicant must be placed in the same position he had before the sanction was applied.

### **Conclusion**

61. In light of the foregoing, the disciplinary decision is rescinded.

*(Signed)*

Judge Francesco Buffa

Dated this 7<sup>th</sup> day of October 2022

Entered in the Register on this 7<sup>th</sup> day of October 2022

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi