UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2021/011
Judgment No.: UNDT/2022/132
Date: 19 December 2022
Original: English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Marisa Maclennan, UNHCR
Sandra Lando, UNHCR
Elizabeth Brown, UNHCR

Introduction

1. By application filed on 26 February 2021, the Applicant, a former staff member of the Office of the United Nations High Commissioner for Refugees ("UNHCR"), contests the decision to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity.

Facts and procedural history

2. The Applicant joined UNHCR on 8 December 2016, as a Senior Performance Management Assistant (G-5) in Budapest. He was promoted to the G-6 level on 1 July 2019, and held a fixed-term appointment ending on 30 November 2020.

3. On 5 March 2018, the Applicant was placed on certified sick leave. On 12 March 2018 and 9 April 2018, he underwent two brain surgeries to remove a brain tumour.

4. In July 2018, in view of the Applicant's upcoming exhaustion of his sick leave entitlements, he was considered as a potential candidate for disability and the Medical Section requested a medical assessment of his fitness to work. Between 18 July and 17 September 2018, various specialists evaluated the Applicant's condition, and he underwent three different tests. After several medical assessments, the Applicant was declared fit to work.

5. In consultation with the Applicant's treating specialists, the Administration put in place working arrangements to facilitate his return to work. On 26 September 2018, the Applicant started teleworking. From 1 November 2018, the Applicant was teleworking at 50% and present in the office the remaining 50%. From 1 December 2018, the Applicant was solely working from the office.

6. According to the Applicant, he returned to work after the exhaustion of his sick leave entitlement. At the time, he was still suffering psychological symptoms as a consequence of his brain surgeries.

7. On 7 February 2019, the Inspector General's Office ("IGO") received allegations of workplace harassment, discrimination, and the creation of a hostile working environment by the Applicant.

8. On 18 April 2019, the IGO opened an investigation into the allegations that the Applicant made racist and homophobic comments about work colleagues and that he created a hostile working environment by making untruthful statements, acting aggressively, and making intimidating statements leading to concern about the physical safety of some colleagues.

9. From 21 to 22 May 2019, an investigation mission to Budapest was undertaken to gather evidence and conduct interviews. During the investigation, the IGO interviewed 20 staff members.

10. On 10 September 2019, the Applicant was interviewed as the subject of the investigation.

11. As of 11 November 2019, the Applicant was temporarily assigned to the Learning Solutions Unit at the G-6, step 1 level, as a Learning Development Associate.

12. On 13 December 2019, the IGO shared the draft investigation findings with the Applicant and took into consideration his comments, dated 30 December 2019, for the finalization of the investigation report dated 6 February 2020.

13. Following the investigation, the IGO concluded that the evidence supported a finding that the Applicant engaged in misconduct by making discriminatory and insulting comments, and by creating a hostile working environment.

14. By letter dated 29 April 2020, the Applicant was notified of the allegations of misconduct against him. On 19 May 2020, the Division of Human Resources ("DHR"), UNHCR, sent him a follow-up email because he had not acknowledged receipt of the letter. He was informed that his deadline to reply was 6 June 2020, and that if no response was received from him by this date, the disciplinary procedure would nevertheless proceed. The Applicant never replied.

15. By sanction letter dated 23 November 2020, the Director, DHR, UNHCR, informed the Applicant that after considering the investigation report and its annexes, the High Commissioner was satisfied that it had been established with clear and convincing evidence that the Applicant:

a. At work, had mood swings, engaged in outbursts of anger wherein he referred to colleagues as "idiots" and "stupid", and generally imposed his personal frustrations and negative emotional outbursts onto colleagues, and thereby, overall, created a hostile working environment for others;

b. Made a discriminatory and insulting comment at work to his colleagues about his then supervisor Ms. S. A., who is African, by calling her a "csoki kurva", a derogatory Hungarian expression that roughly translates to "chocolate whore";

c. Made a discriminatory and insulting comment at work to his colleagues about another of his colleagues, Mr. B. P., who identifies as part of the LGBTI community, by calling him "buzi", a derogatory Hungarian expression that roughly translates to the word "faggot" or "poofter", and made other discriminatory comments such as "he thinks he's gay and he can get away with it", "minorities get protection that we don't get, and that's why they do whatever they want" and "I cannot talk to him like to a real man"; and

d. Used, on multiple occasions, the Hungarian word "neger", a derogatory Hungarian term used to describe Black persons, and made other discriminatory comments towards African or Black persons, including that his former supervisor, Mr. A. E., only had his position because he is African while "he is not half as good as any European could be in this position", or words to that effect.

16. On 30 November 2020, on the last day of his one-year fixed-term appointment, the Applicant was notified of the decision to separate him from service with compensation in lieu of notice and without termination indemnity pursuant to staff rule 10.2(a)(viii).

17. On 26 February 2021, the Applicant filed the application referred to in para. 1 above.

18. On 1 April 2021, the Respondent filed his reply.

19. By Order No. 76 (GVA/2022) of 3 August 2022, the Tribunal convoked the parties to a case management discussion which took place, as scheduled, on 23 August 2022.

20. By Order No. 79 (GVA/2022) of 24 August 2022, the Tribunal instructed the Applicant, *inter alia*, to file relevant medical evidence, and invited the Respondent to file his comments on the Applicant's submissions.

21. On 7 September 2022, the Applicant filed his submissions pursuant to Order No. 79 (GVA/2022) including six annexes, namely:

a. Annex 1: a psychiatric evaluation by Dr. P. B. (psychiatrist), dated 24 September 2019;

b. Annex 2: a medical note from the Applicant's treating psychiatrist, Dr. L. H., dated 30 January 2020;

c. Annex 3: a psychological assessment, also dated 7 September 2022, by the Applicant's treating psychologist following his separation of service; and

d. Annexes 4-6: information on the Applicant's hospitalization and kidney stone surgery, and his communication to DHR, UNHCR, informing the office about his then health status.

22. On 21 September 2022, the Respondent filed his comments on the Applicant's submissions, requesting the Tribunal, *inter alia*, to:

a. Consider the authenticity and probative value of annexes 1, 2, and 3 to the Applicant's submissions of 7 September 2022; and

b. Grant his motion to adduce additional evidence.

23. By Order No. 88 (GVA/2022) of 5 October 2022, the Tribunal granted the Respondent's motion to adduce additional evidence and found it appropriate, for the fair and expeditious disposal of the case, to hold a hearing on the merits. It thus instructed the parties to call Dr. A. F. R., Chief, Medical Section, UNHCR, and Dr. L. H., the Applicant's treating psychiatrist in FirstMed, to testify in the present case.

24. On 17 October 2022, the Respondent filed a motion seeking a "waiver of confidentiality of [the] Applicant's medical file" and access to the Applicant's three additional medical reports from Dr. L. H., dated 7 September 2018, 19 October 2018, and 16 November 2018, then in the possession of the Medical Section, to produce them in the current proceedings.

25. On 18 October 2022, the Tribunal instructed the Applicant to file his comments on the Respondent's motion, if any, by 20 October 2022.

26. On 20 October 2022, the Applicant provided his waiver of confidentiality in relation to his three medical reports listed in para. 24 above, and submitted additional medical reports from Dr. L. H. on an under-seal basis.

27. By Order No. 93 (GVA/2022) of 21 October 2022, the Tribunal granted the Respondent's motion concerning the waiver of confidentiality of the Applicant's medical files, instructed the Respondent to file the Applicant's additional medical reports listed in para. 24 above by 24 October 2022, and admitted the additional medical reports from Dr. L. H. filed by the Applicant into the case record.

28. On 24 October 2022, the Respondent filed his submissions pursuant to Order No. 93 (GVA/2022) and, on the same day, he filed a motion for leave to file a bundle of documents for the hearing, annexing a document titled "Bundle of Documents for Hearing" (hereafter, "the Bundle").

29. By Order No. 95 (GVA/2022) of 24 October 2022, the Tribunal instructed the Applicant to file his comments on the Respondent's motion for leave to file the Bundle and to file, if he so wished, his separate bundle of documents.

30. On 25 October 2022, the Applicant filed his comments pursuant to Order No. 95 (GVA/2022), informing the Tribunal, *inter alia*, that he had no objection to the Respondent's motion for leave to file the Bundle and had no additional documents to file as a separate bundle. Accordingly, the Tribunal admitted the Bundle filed by the Respondent into the case record.

31. In his submission dated 25 October 2022, the Applicant also argued that "had the Administration considered all available information concerning [his] mental health [,] i.e. [,] fluctuating fear of death, physical and mental incapacity [,] in its possession, such information was likely to have affected [its] findings on the sanction imposed in [his] case".

32. On 26 October 2022, the hearing on the merits took place via video conference through Microsoft Teams. The Tribunal heard testimony in the following order:

i. Witness Dr. L. H., the Applicant's treating psychiatrist in FirstMed;

ii. Witness Dr. A. F. R., Chief, Medical Section, UNHCR; and

iii. The Applicant.

33. The parties made oral closing submissions on the same day.

34. Considering, *inter alia*, that the Applicant is self-represented, and that the Respondent raised several objections relating, *inter alia*, to the scope of the Tribunal's judicial review, and the Applicant's argument contained in his submission dated 25 October 2022, by Order No. 98 (GVA/2022) of 27 October 2022, the Tribunal instructed the parties to file their respective written closing submission, which they did on 10 November 2022.

Consideration

Procedural issue: anonymity

35. In the present case, the Applicant submits that his due process rights were not respected on the ground that the IGO did not investigate his medical history/condition to determine whether it caused, contributed, or more significantly mitigated his alleged actions. As such, the case file contains sensitive information related to the Applicant's medical condition, in particular, his psychological and mental health status.

36. In this regard, the Tribunal notes that art. 11.6 of its Statute states that "[t]he judgements of the Dispute Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal." It is thus well-settled law 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 personal embarrassment and discomfort are not sufficient grounds to grant confidentiality" (see *Buff* 2016-UNAT-639, para. 21). Nevertheless, a deviation from the principles of transparency and accountability is warranted if there are exceptional circumstances (see *Buff*, para. 23).

37. The Tribunal considers that, in the present case, the sensitive information regarding the Applicant's medical history and his mental health status constitutes exceptional circumstances that warrant granting anonymity. Therefore, the Tribunal finds it appropriate to anonymize the Applicant's name in the present case.

38. Accordingly, the Tribunal decides to anonymize the Applicant's name in the present judgment.

Scope of judicial review

39. As a preliminary matter, the Tribunal notes that the Respondent objects to its scope of judicial review. Specifically, he objects to the scope of the hearing, which aimed at "assessing the potential impact of the Applicant's health status at the time of the conduct at issue on his behaviour and his ability to control his emotions" (*Applicant* Order No. 088 (GVA/2022), para. 13). He further submits that the

Tribunal widens the scope of review to facts that were not before the decision- maker at the time of the contested decision and is attempting to make a medical conclusion based on new evidence.

40. In this respect, the Tribunal must recall that in cases of harassment and discrimination, it is not vested with the authority to conduct a *de novo* investigation into the initial complaint (see, e.g., *Luvai* 2014-UNAT-417, para. 58; *Messinger* 2011 -UNAT -123, para. 27). Indeed, as the Appeals Tribunal held in *Sanwidi*:

> 42. In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

41. Nevertheless, the Tribunal may determine if there was a proper investigation into the allegations (see, e.g., *Messinger* 2011 -UNAT -123, para. 27). In this regard, the Appeals Tribunal's jurisprudence has been consistent and clear since 2010 (see, e.g., *Ouriques* 2017-UNAT-745, para. 14; *Kennedy* 2021-UNAT-1184, para. 49), establishing that the Tribunal may "consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse" (see *Sanwidi*, para. 40).

42. As such, it is within the Tribunal's competence to hold a hearing or look at facts that were allegedly not before the decision-maker to determine whether relevant factors have been ignored. This is fundamentally different from a *de novo* investigation into the facts underlying the disciplinary measure at issue.

43. Moreover, *as per* the 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 Tribunal to ascertain in this case:

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.

44. Having reviewed the parties' submissions, the Tribunal notes that there is no real dispute on the facts underlying the disciplinary measure or whether these facts were rightfully characterised as misconduct under the Staff Regulations and Rules of the United Nations. Therefore, the Tribunal finds it unnecessary to further examine these issues. Rather, the matters at issue are the proportionality of the sanction imposed and whether the Applicant's due process rights were respected during the investigation and the disciplinary process.

45. The Tribunal further notes that under staff rule 10.3(b), due process in the disciplinary process requires that "[a]ny disciplinary measure imposed on a staff member …be proportionate to the nature and gravity of his or her misconduct".

46. In this respect, the Applicant submits that he was not accorded fairness and substantive due process in that the IGO did not investigate his medical condition to determine whether it caused, contributed, or more significantly mitigated his alleged actions, despite disclosure by the complainants that the Applicant exhibited unusual behaviour/mental health difficulties, and the Applicant disclosed that he had undergone brain surgeries.

47. In response, the Respondent contends that the Applicant's due process rights were fully respected. He specifically argues that the IGO was under no duty to inquire further into the Applicant's mental state because his mental health status was considered in light of the information provided, that the Applicant failed to timely raise the defence of mental health, and that, in any event, the new evidence demonstrates that the Applicant's medical condition was not material to the misconduct.

48. In light of the above, the Tribunal finds that the core issues before it are as follows:

a. Whether the IGO was duty bound to investigate the Applicant's medical condition;

b. Whether there was any factor that could have exempted the IGO from its obligation to inquire further on the Applicant's medical condition;

c. Whether the IGO properly investigated the Applicant's medical condition; and

d. Whether the disciplinary measure applied is proportionate to the offence.

49. Before examining these issues, the Tribunal will first elaborate upon the applicable rules and procedures governing investigations.

The applicable rules and procedures governing investigations

50. The Tribunal notes that ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) sets forth the general obligations of investigators, providing in its relevant part that (emphasis added):

> **Section 6**
> **Investigations**
>
> *Purpose and scope*
>
> 6.1 The purpose of an investigation is to gather information to establish the facts that gave rise to the allegation of unsatisfactory conduct. The investigator(s) should pursue *all* lines of enquiry as considered appropriate and collect and record information, both inculpatory or *exculpatory*, in order to establish the facts. The investigator(s) shall not make a legal determination about the established facts.

51. Moreover, given that the investigation at issue was conducted by the IGO, the Tribunal notes that UNHCR has issued relevant administrative instructions and guidelines governing investigations. In this connection, Administrative Instruction UNHCR/AI/2019/15 on Conducting Investigations in UNHCR provides in its relevant part that:

> **VI. Standards and Obligations**
>
> 23. IGO investigations are conducted according to professional and internationally recognized investigative standards. The purpose of the investigation is to search for the truth of a matter, looking for both inculpatory and exculpatory evidence, so as to produce a report providing a full, fair and clear picture of all the facts involving the alleged misconduct.
>
> 24. The IGO shall conduct investigations in a non-discriminatory and gender and culture sensitive manner. The IGO shall respect the rights of all participants, including the presumption of innocence toward the subject of an investigation, the principle of do no harm in respect to all participants and a victim-centred approach in respect to aggrieved individuals.
>
> …

> **IX. Investigation Process**
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> …
>
> **D. *Collection of evidence***
>
> 56. The investigator shall make every reasonable effort to search for relevant and obtainable inculpatory and exculpatory evidence.
>
> …
>
> **XII. Roles and Responsibilities**
>
> …
>
> B. *Persons performing the investigation function*
>
> 110. Persons performing the investigation function shall:
>
> a. Pursue all reasonable lines of enquiry, and search for and record relevant information and evidence, both inculpatory and exculpatory, in order to establish the facts;
>
> …
>
> e. Conduct investigations in a timely, efficient, thorough, and objective manner in compliance with this instruction[.]
>
> **XIII. Terms and Definitions**
>
> 111. The terms and definitions used in this Administrative Instruction follow:
>
> …
>
> ***Exculpatory evidence***: Any evidence that is favourable to the subject and tends to exonerate the subject from allegations of misconduct. It is the opposite of inculpatory evidence.

52. Accordingly, the IGO is obliged to investigate all relevant information and evidence, both inculpatory and exculpatory. All such information shall be disclosed to the subject of the investigation and to the decision-maker in line with the principles of procedural fairness and due process.

53. Moreover, "investigators must not be biased or mislead decision-makers in respect of the findings of fact or in respect of statements of the law. They should advise in their reports of limitations in respect of investigations, and of any evidence that would have been relevant but they were unable to obtain, expressing reasons" (see *Asghar* UNDT/2019/074, para. 39).

54. Indeed, considering that disciplinary measures such as dismissal and separation from service would often be based on an investigation report, the latter must be impartial, objective, factually correct and complete. To produce such an investigation report, investigators must exercise their functions and power with a high sense of accountability and responsibility, and they cannot ignore any relevant information that may have an impact on the outcome of the investigation.

Whether the IGO was duty bound to investigate the Applicant's medical condition

55. The Applicant argues that the IGO was duty bound to investigate whether the Applicant's medical condition caused, contributed, or mitigated the allegations he was facing.

56. The Respondent contends that there is no evidence that can causally link the misconduct with the Applicant's medical condition at the relevant time. He further submits that the new evidence demonstrates that the Applicant's medical condition was not material to the misconduct.

57. The Tribunal finds no merits in the Respondent's submissions in this respect for the following reasons.

58. First, having reviewed the parties' submissions, the Tribunal notes that the Applicant's medical symptoms closely resemble certain behaviour characterized as misconduct.

59. Indeed, the medical evidence on file, which was corroborated by Dr. L. H.'s testimony before the Tribunal during the hearing, shows that the Applicant was diagnosed with a serious brain tumour in March 2018, he underwent two brain surgeries on 12 March 2018 and 9 April 2018, and (still) suffered from posttraumatic stress disorder ("PTSD") and adjustment disorder. In particular,

according to the psychiatric note dated 30 January 2020, the authenticity of which was confirmed by Dr. L. H. during the hearing, the Applicant was referred for further treatment in the summer of 2018 due to "mood swings, irritation and problematic control of anger". Meanwhile, the sanction letter shows that the Applicant was sanctioned for, *inter alia*, the fact that:

> At work, [he] had mood swings, engaged in outbursts of anger wherein [he] referred to colleagues as "idiots" and "stupid" and generally imposed [his] personal frustrations and negative emotional outbursts onto colleagues, and thereby, overall, created a hostile working environment for others[.]

60. Considering that part of the misconduct closely resembled behaviour resulting from the Applicant's medical condition, the IGO should have investigated whether his medical condition could have caused or contributed to his alleged actions.

61. Second, the Tribunal is not convinced by the Respondent's submission that the new evidence demonstrates that the Applicant's medical condition was not material to the misconduct. In support of his submission, the Respondent specifically points out that when asked during the hearing whether the Applicant's medical condition could have caused him to make racist or homophobic statements, Dr. L. H. unequivocally replied, "of course not". In this respect, the Tribunal notes that the Applicant was not only sanctioned for having made racist or homophobic statements, but also for having had mood swings and engaged in outbursts of anger. Furthermore, various medical evidence on record did show that the Applicant had been diagnosed with PTSD and adjustment disorder, and that his ability to control his emotions and behaviour had been compromised.

62. Finally, the investigation record shows that the IGO was on notice that the Applicant's medical condition could be of relevance to his conduct at issue. Indeed, as shown by the investigation report on record, several witnesses mentioned that the Applicant had "mood swings" and mental health issues.

63. Specifically, Witness Ms. K. told the IGO that, when the Applicant had come back from medical leave, he told her that "he had a doctor's note from back home saying that because of the surgery and the whole situation", "he may not be in full control. Like he can overact, you know, because of any trigger, because he needs time to come back to his full psychological calm state" and he mentioned having a doctor's note confirming PTSD. Witness Ms. B. believed that the Applicant had genuine mental health problems and needed help and testified during her interview that "I think the best thing would be that he could get psychological treatment … He is very instable unfortunately … he is very depressed, and he has very extreme mood swings". Witness Ms. V. stated that initially they had had a good relationship, as the Applicant seemed to be a "smart, smiley, chatty person" but over time, she started to dislike his behaviour and she was "convinced that he [had] issues" and she thought he might have "mental issues".

64. Moreover, the evidence on record shows that the Applicant, on several occasions, mentioned his medical condition to the IGO. For instance, during the interview process, the Applicant mentioned to the IGO that he had "been recovering from a brain surgery that [he] had two times in 2018", and in his comments on his interview record, the Applicant referred twice to "a critical life-threatening disease". Also, in the context of reviewing the IGO's draft findings, the Applicant sent an email to one investigator on 30 December 2019, stating in its relevant part that (emphasis added):

> [I]t really saddens me at this point and shows how some colleagues may also fail to act inclusive towards a colleague who had suffered a ***deadly brain disease*** and survived. This seems to form a big basis of hypocrisy for some colleagues to me. While they claim to work for people of concern, they tend to forget to include the ones at home for whatever motives they might have. I would like to ask you also for your [advice], suggestion; ***what would a person do when they start work only 8 months after they were operated in their brain two times***. ***Of course, this person would have ventilations, mood swings, frustrations of a kind***, etc. Yet, [t]hese were not targeting to anyone specifically .... This is very much saddening that after having survived ***brain tumor***, I am reported to your authority ***for such reasons*** for which I am utterly saddened.

65. Therefore, the investigation record contains sufficient indications showing the potential relevance of the Applicant's medical condition to the conduct at issue.

66. Accordingly, the Tribunal finds that to fully discharge its duty to investigate all relevant information and evidence, both inculpatory and exculpatory, the IGO was obliged to investigate whether, and if so, to what extent, the Applicant's medical condition could have caused or contributed to the misconduct.

Whether there was any factor that could have exempted the IGO from its obligation to inquire further on the Applicant's medical condition

67. The Respondent contends that there was no reason for the IGO to investigate the Applicant's medical file because:

a. The Applicant told the IGO that "the only impact [of his brain surgeries] was physical";

b. The Applicant had been declared fit to work; and

c. The Applicant was already creating a hostile working environment and making discriminatory comments before his surgeries.

68. The Tribunal will examine below these issues in turn.

The Applicant's statement that "the only impact [of his brain surgeries] was physical"

69. The Tribunal notes that the Respondent sought to argue that the IGO had no duty to inquire further into the Applicant's mental state because he stated during the interview process that "the only impact [of his brain surgeries] was physical".

70. Having reviewed the evidence on record, the Tribunal considers that the Respondent has taken the Applicants' statement at issue out of context by ignoring the fact that in making it, the Applicant was responding to the IGO's question regarding whether the injury affected his memory.

71. Indeed, the investigation record shows that in investigating the allegations that the Applicant raised his voice a few times, and used curse words in the presence of other colleagues, the Applicant stated that:

> I've been recovering from a brain surgery that I had two times in 2018. And what I'm doing is trying to recover, focus on myself. And I do not think that I have been using curse words … Because I was going through a recovery process, and that's why I am not recalling if I have used any cursing words, or I increased my voice at all ... In fact, I was the silent – I mean, what I wanted to say, that I was very silent, I was very introverted, I was putting my music headset, and I'm sitting in front of my desk and trying to do my work. That's why I don't think that I've used any cursing words or increased my voice.

72. In this context, the IGO asked the Applicant to confirm, without disclosing any medical information as to the nature of his injury, whether such injury affected his memory. In response to this question, the Applicant stated that "it's been proven by medical documentation that there was no impact on my memory, due to the brain surgery. The only impact was physical which means that I lost my balance, and I tripped … it's medically proven that I do not have any damage on my memory due to the brain surgery".

73. Moreover, while the Tribunal acknowledges that it is within the IGO's discretion to assess the credibility of a witness and the persuasiveness of his or her evidence, such assessment must be consistent and impartial. In the present case, having concluded that the Applicant was not credible, the IGO and the High Commissioner disregarded his versions of events referenced in para. 71 above. The Tribunal fails to understand why the IGO could have reasonably relied upon the related contemporaneous statements in para. 72 above to excuse itself from the obligation to investigate all relevant information.

The argument that the Applicant had been declared fit to work

74. The Respondent points out that the Applicant told the IGO that he was "fit to work in all terms", and argues that given that he had been declared fit to work, the responsibility was on him to assert his mental state as potential exculpatory evidence.

75. The Tribunal notes that in his comments to the IGO draft findings, the Applicant wrote that despite his PTSD, he had "a medical documentation which proves that [he] was fit to work in all terms". In this respect, the evidence on record shows that in view of the Applicant's extended sick leave and almost exhaustion of entitlements, the Medical Section requested a fitness for work evaluation at FirstMed, the agreed occupational clinic that performs medical assessments for UNHCR staff members. It further shows that:

> On 18 July, 5 August, 15 August, 25 August and 17 September 2018, various specialists evaluated the condition of [the Applicant]. Furthermore, three different tests were performed on 8 August, 15 August and 9 September 2018. All medical reports indicated normal cognitive functions. The disease was properly treated and considered cured, although, it was difficult for [him] to cope with his condition. Based on these medical reports, [the Applicant] was declared fit to work.

76. As such, the Medical Section essentially evaluated the Applicant's cognitive functions while admitting that "it was difficult for [him] to cope with his condition".

77. The evidence on record also shows that the Medical Section possessed various medical reports from Dr. L. H. from a similar time period, showing that the Applicant had been suffering from PTSD and adjustment disorder, and that his ability to control his emotions and behaviour had been weak, and that he got easily irritated showing significant signs of rage and anger. Indeed, the medical report dated 25 August 2018 states in its relevant part that:

> After the neurosurgery interventions the patient has got better but still he has been suffering of certain visual, moving (physical balance) and psychological problems.
>
> As to his psychological state he has been irritated. Noises, voices, moving and smells irritate him but he tries to control his rage and anger.
>
> He complains about mood swings on the background of a fluctuating death fear. He feels a lot of anger and rage in different situation. He has begun to handle them with certain techniques and exercises to be able to control and regulate his daily life.
>
> …

> His [control] mechanisms are still a bit loose. He complains about being irritable feeling [inadequate] anger and age.

78. The medical evidence dated 7 September 2018 shows that:

> [The Applicant's control] mechanisms are still loose, he gets easily irritated showing significant [signs] of rage and anger.

79. Accordingly, the Tribunal finds that the fact that the Applicant had been declared fit to work is not sufficient to excuse the IGO from its obligation to investigate all relevant information including potential exculpatory evidence.

The argument that the Applicant was already creating a hostile working environment and making discriminatory comments before his surgeries

80. The Tribunal finds that there is no merit in the Respondent's claim that the Applicant was already creating a hostile working environment and making discriminatory comments before his surgeries.

81. To support his claim, the Respondent refers to portions of three witnesses' testimonies showing that "before the Applicant left on sick leave, there was a conflict between the Applicant and a former colleague", and that "[the Applicant] is not an easy person" and "from the beginning, when the Applicant showed 'his weakness or his incompetence', he would 'either become very negative' or 'a little bit exploding' and they would 'have to wait through his emotions'." Also, the Respondent submits that the Applicant made discriminatory comments before leaving on sick leave. In this respect, he argues that Witness Mr. H. thought the Applicant had used the term "buzi" in 2017, and inferred that he made racist comments towards Mr. A. E. before he left on sick leave, because Mr. A. E. left in September 2018 while the Applicant came back to the office in November 2018.

82. In this respect, the Tribunal first notes that much of the allegedly inappropriate behaviours contained in the above-referenced portions of three witnesses' testimonies in the first sentence of para. 81 above have not been considered to have reached the level of creating a hostile working environment by the IGO or the High Commissioner.

83. Second, the sanction letter is silent as to the timing of most of the incidents based on which the disciplinary measure was imposed. Having closely reviewed the investigation report, the Tribunal notes that the IGO did not establish the timing of relevant incidents except for the incident in which the Applicant called his former supervisor Ms. S. A. "*csoki kurva*" in Hungarian, translating to "chocolate whore" in March 2019. As such, neither the IGO nor the High Commissioner established the timing in relation to the Applicant's usage of the term "*buzi*" and making racist comments towards Mr. A. E. Indeed, in relation to the usage of the term "*buzi*", Witness Mr. H. testified before the IGO that "I think it was in 2017, I don't remember exactly", showing that he was not sure about the timing of the incident at issue.

84. Moreover, the psychiatric note on record suggests that the Applicant's medical condition could have caused problems in social or work settings including aggression and loss of social inhibition "before and during the operation" due to the physical and psychological trauma he went through and that "[t]he operation itself might also have some psychological consequences".

85. Considering the above, the Tribunal finds that there was no factor that could have exempted the IGO from its obligation to inquire further on the Applicant's medical condition upon being on notice of its possible relevance to the case.

Whether the IGO properly investigated the Applicant's medical condition

86. The Applicant argues that the IGO failed to investigate his mental history, thereby breaking its duty to investigate allegations with strict regard for fairness, impartiality, the presumption of innocence and due process.

87. Relying upon the majority opinion in *Ouriques* 2017-UNAT-745, the Respondent submits that the Applicant's mental health status was considered in light of "the information provided and the Administration was under no duty to inquire further into his mental state". Specifically, he argues that the Applicant failed to timely raise the defence of mental health and that UNHCR has a very strict confidentiality policy regarding medical files.

88. The Tribunal finds no merits in the Respondent's submissions in this respect for the following reasons.

89. First, there is no merit in the Respondent's argument that the Applicant failed to timely raise the defence of mental health. Indeed, as outlined in para. 64 above, the Applicant, on several occasions, mentioned his medical condition to the IGO and the investigation record contains sufficient indications showing the potential relevance of the Applicant's medical condition to the conduct at issue.

90. Moreover, "[a] suspected staff member has very limited rights in an investigation … Investigators are, however, fully in control of the investigation process, whereby they decide who will be interviewed or ignored and what evidence they shall seek, notwithstanding the suggestions of the suspected staff member. With this control goes significant responsibility and an utmost duty to act entirely fairly to suspected staff members, the Organization and any victims" (see *Asghar* UNDT/2019/074, para. 42).

91. Accordingly, the IGO bears the burden of fully investigating all relevant information, including whether the Applicant's mental health issues could have had an impact on his behaviours. By arguing that the Applicant failed to timely raise the defence of mental health, the Respondent attempts to shift the burden to the Applicant and, as such, failed to respect his right to be presumed innocent under sec. 24 of UNHCR/AI/2019/15.

92. Second, in relation to the Respondent's medical confidentiality claim**,** the Tribunal notes that UNHCR/AI/2019/15 provides in its relevant part that (emphasis added):

> 62. The IGO cannot compel the Ombudsman's Office, the Ethics Office, or the Staff Health and Wellbeing Service [("SHWS")] to release confidential records for the purpose of an investigation. Upon **receiving written consent** from the concerned UNHCR personnel to make such records available to the IGO, the decision whether or not to release the records and in what form shall be made by the concerned office in accordance with its own confidentiality considerations.
>
> …

> 64. Notwithstanding paragraphs 62 and 63, an investigator may preserve, consider and/or rely upon confidential records prepared by the Ombudsman's Office, the Ethics Office, or the Staff Health and Wellbeing Service **without consulting the concerned office** where the investigation concerns that office and/or its personnel as the subject(s). To the extent the records contain information that is subject to medical or counselling confidentiality, the IGO must **inform the Head of SHWS**. If the Head of SHWS is implicated in the investigation, the IGO must inform the Director, DHR.

93. Therefore, although medical records are confidential in principle, the staff member himself or herself may waive confidentiality by providing a written consent. Moreover, the IGO may consider or rely upon confidential medical records prepared by the Medical Services Division without consulting it but informing the Head of SHWS.

94. Accordingly, the IGO could have requested consent to have access to the Applicant's medical files upon being on notice of their possible relevance to the case prior to concluding the investigation. Otherwise, the investigators "should advise in their reports of limitations in respect of investigations, and of any evidence that would have been relevant, but they were unable to obtain, expressing reasons" (see *Asghar* UNDT/2019/074, para. 39).

95. However, in the present case, there is no evidence that the IGO sought to obtain the Applicant's consent to consult his medical files, which clearly show his medical history including being diagnosed with PTSD and adjustment disorder. The investigation report does not show either that the Applicant's medical files could have been relevant or the reasons for not being able to obtain them.

96. Third, the Tribunal considers that the present case is distinguishable from *Ouriques*. Indeed, in *Ouriques*, the applicant committed an act of physical assault, and he was separated from service with termination indemnity and with compensation in lieu of notice, which was not the most severe sanction. His mental health status was considered upon receipt of the information provided and the Administration considered his personal circumstances, namely "the exceptional amount of stress that he was experiencing at the time due to the illness of his father

and his wife", as a mitigating factor (see *Ouriques* 2017-UNAT-745, paras. 16, 21, and 22).

97. In contrast, in the present case, upon being on notice that the Applicant had two brain surgeries, that he had unresolved mental health issues when he returned to work, and that these were affecting his relationships at work, the IGO failed to pursue reasonable lines of enquiry in this respect or investigate whether the Applicant's mental health issues could have caused, contributed, or mitigated the conduct at issue pursuant to sec.110(a) of UNHCR/AI/2019/15.

98. Indeed, the investigation conducted by the IGO lacked any inquiry or step tending to substantiate the existence or seriousness of the Applicant's mental health issues. A proper inquiry should have been carried out regarding the Applicant's mental health issues after being informed by interviewed witnesses, *inter alia* that the Applicant had a doctor's note confirming PTSD, to establish what impact his medical condition had on his conduct at issue. However, the investigation was strictly circumscribed to the conduct itself, neglecting the alleged surrounding circumstances and relevant information. There is no evidence that the IGO conducted any investigation into the Applicant's mental health issues and its potential impact on the Applicant's behaviour. Simply put, all relevant facts and circumstances were not sufficiently investigated.

99. Finally, given its failure to properly investigate the Applicant's medical condition, the IGO failed in its duty to conduct a thorough investigation, to seek both inculpatory and exculpatory evidence, and maintain objectivity throughout the investigation process. The least that the IGO could have done was to seek information from the Medical Section. There is, however, no evidence that the Applicant's medical condition was properly brought to the attention of the decision-maker. Thus, the investigation procedure at issue was significantly incomplete, procedurally unfair, and unlawful. As such, solid inculpatory evidence was gathered, but it was less thorough regarding exculpatory evidence.

100. Accordingly, the Tribunal finds that the IGO failed to properly investigate the Applicant's medical condition upon being on notice of its possible relevance to the case prior to concluding the investigation.

Whether the disciplinary measure applied is proportionate to the offence

101. Regarding whether the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity imposed on the Applicant is 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).

102. However, "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).

103. 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 must not be "more excessive than is necessary for obtaining the desired result" (see *Sanwidi*, 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.

104. Accordingly, when choosing the appropriate sanction from a set of permissible sanctions, the decision-maker must consider all relevant factors (see *Kennedy* 2021-UNAT-1184, para. 63).

105. In the present case, given the IGO's failure to properly investigate the Applicant's medical condition, the decision-maker did not have all relevant information upon which to base the contested decision. Indeed, the Administration had no details of the nature, extent and effect of the Applicant's brain surgeries and/or mental health issues at the time of the conduct and could therefore not assess how far he was culpable for the alleged conduct, and how far his condition should mitigate the case. This had the effect that these fundamental considerations could not be properly appreciated as exculpatory or mitigating factors.

106. As such, the Administration could not have proper regard to the totality of relevant circumstances, including the Applicant's medical condition, before finding misconduct and applying the sanction imposed. In this respect, it must be emphasised that the sanction letter of 23 November 2020 merely mentions as a mitigating circumstance that the Applicant "suffered a brain tumour and underwent two brain surgeries". At no point does it refer to the Applicant having mental health issues, although this is a qualitatively different circumstance than merely suffering a brain tumour and undergoing two brain surgeries. Indeed, the Applicant suffered from a diagnosed PTSD and adjustment disorder. These elements could be of relevance when determining the "nature and gravity" of the Applicant's misconduct.

107. Therefore, all relevant factors were not properly investigated, such that the decision-maker was not in a position to adequately weigh all exculpatory or mitigating factors, notably, the Applicant's medical condition. Such failures consequently result in a manifestly unreasonable administrative decision. Accordingly, the Tribunal finds that the disciplinary measure applied in the present case was manifestly unreasonable and disproportionate to the misconduct.

Conclusion on the lawfulness of the contested decision

108. The Tribunal recalls its findings that the IGO failed to properly investigate the Applicant's medical condition upon being on notice of its possible relevance to the case prior to concluding the investigation, and that the disciplinary measure applied was manifestly unreasonable and disproportionate to the misconduct. As such, the contested decision fails to stand.

109. Moreover, the failure to consider the Applicant's mental health issues throughout the investigation and disciplinary proceedings seems to reveal a dereliction of the duty of care towards the Applicant as a staff member of the Organization, because his mental health condition was not properly considered before deciding on the termination of his service as the sanction to be applied to him. In this respect, the Tribunal recalls that:

> [t]he Organization has a duty of care towards its staff members. This duty of care required the Administration … to inquire further into the staff member's mental health once it was on notice of its possible relevance prior to concluding the disciplinary investigation and to making a final determination vis-a-vis the staff members' disciplinary sanction. It is not good practice to separate a staff member suffering from a mental health condition without first fully discharging its duty of care (see *Ouriques* 2017-UNAT-745, Judge Halfeld's Dissenting Opinion, para. 6).

110. Consequently, the Tribunal concludes that the contested decision is unlawful.

Whether the Applicant is entitled to any remedies

111. In his application, the Applicant seeks the rescission of the contested decision and requests his reinstatement in the service of UNHCR or compensation in lieu of rescission in the amount of 24 months' net base salary, as well as corresponding pension fund contributions and medical insurance. The Applicant further claims for moral damages in the amount of three months' net base salary.

112. The Tribunal recalls that the remedies it may award are outlined in art. 10.5 of its Statute as follows:

> As part of its judgement, the Dispute Tribunal may only order one or both of the following:
>
> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant…

Rescission of the contested decision and specific performance

113. Having found that the contested decision is unlawful, 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 measure must be set aside. This implies the reinstatement of the Applicant on his post and under the same kind of contract he held at the time of his separation.

114. 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).

115. Given that the Tribunal considers that the decision-maker did not have all relevant information to decide on the appropriate sanction due to the Administration's failure to properly investigate the Applicant's mental health condition and the impact it may have had on his behaviours, and 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 Applicant's case back to the Administration for proper treatment.

In-lieu compensation

116. The disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity concerns "termination" under art. 10.5(a) of the Tribunal's Statute, and thus the Tribunal must set an amount that the Respondent can chose to pay as an alternative to the rescission of the contested administrative decision.

117. In this respect, the Appeals Tribunal has consistently held that in-lieu compensation under art.10.5(a) of the Tribunal's Statute is "not compensatory damages based on economic loss" (see, e.g., *Eissa* 2014-UNAT-469, para. 27). Instead, it shall be "an economic equivalent for the loss of rescission or specific performance the Tribunal has ordered in favour of the staff member" (see, e.g., *El-Awar* 2022-UNAT-1265, para. 73; *Yavuz* 2022-UNAT-1266, para. 26). Hence, "the most important factor to consider in this context is the pecuniary value of such rescission" and the "nature and degree of the irregularities committed by the Administration … are of no legal relevance for the pecuniary value of the ordered rescission" (see *El-Awar*, paras. 73, 74).

118. With respect to the amount of in-lieu compensation, an examination of the evidence shows that the Applicant was recruited on a one-year fixed-term appointment that was due to expire on 30 November 2020. In determining the amount of in-lieu compensation for persons who are recruited on a fixed-term appointment, the Tribunal "must take into account, among other things, the term of the contract and the remainder of the said term, if any, at the time of any alleged breach" (see, e.g., *Bagot* 2017-UNAT-718, para. 74). In the present case, the Applicant was separated from service on 30 November 2020 when his fixed-term appointment expired.

119. Moreover, a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal under staff regulation 4.5(c) and staff rule 4.13(c) and expires automatically, without prior notice, on the expiration date specified in the letter of appointment pursuant to staff rule 9.4. It is well-settled jurisprudence that "a fixed-term appointment ends with the effluxion of time and a person so employed

does not have a right or legitimate expectation of renewal" (see *Bagot*, para. 74; see also *Ahmed* 2011-UNAT-153, para. 42).

120. In the present case, the Respondent indicates in his submissions that "in light of the established and uncontested evidence of the Applicant's repetitive racist, sexist and homophobic comments, reinstatement is not a possible viable solution". Furthermore, the evidence on record shows that the investigation report was finalized on 6 February 2020, and the Applicant was notified of the allegations of misconduct on 29 April 2020, which was well before his separation date. As such, it is reasonable for the Tribunal to infer that the Applicant had no chance of renewal of his fixed-term appointment at the time of the contested decision.

121. Accordingly, the Tribunal finds no basis to grant any in-lieu compensation in the present case.

Compensation for moral damages

122. The Applicant claims moral damages in the amount of three months' net base salary. In support of his claim, the Applicant submits, *inter alia*, medical evidence dated 7 September 2022. He also testified during the hearing that the contested decision had worsened his health and altered his life drastically.

123. In this respect, the Tribunal recalls that art. 10.5(b) of its Statute requires that harm be supported by evidence. Specifically, the Appeals Tribunal has consistently held that "it is not enough to demonstrate an illegality to obtain compensation: the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on a cause-effect lien" and requires that "the harm be directly caused by the administrative decision in question" (see *Ashour* 2019-UNAT-899, para. 31; see also *Kebede* 2018- UNAT-874, para. 20).

124. Moreover, the Tribunal is mindful that "the testimony of an applicant alone without corroboration by independent evidence … is generally not sufficient to support an award of damages" (see *Ross* 2019-UNAT-926, para. 57).

125. However, in the present case, in addition to his testimony, the Applicant submitted independent medical evidence. Indeed, the medical report dated 7 September 2022 shows that further to the Applicant's psychological consultation sessions on 15 February 2021 and 3 March 2021, he was "diagnosed with Obsessive Compulsive Personality Disorder and Obsessive-Compulsive Disorder" and "[h]is condition requires systematic psychological treatment".

126. While it is true that the 7 September 2022 medical report does not mention any cause for the diagnosed disorders, the Tribunal notes that such disorders had never been mentioned in various medical reports issued prior to the contested decision but were observed soon after the imposition of the disciplinary sanction. There is no doubt that the contested decision further deteriorated the Applicant's psychological condition. The Tribunal thus finds a causal link between the Applicant's moral harm and the contested decision. Accordingly, the Applicant's diagnosed disorders merit a compensatory award.

127. Having regard to the total circumstances of the case, the Tribunal finds it appropriate to award USD5,000 as compensation under art. 10.5(b) of its Statute.

Conclusion

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

a. The disciplinary measure imposed on the Applicant is rescinded;

b. The Applicant's case is remanded to the Administration for proper treatment;

c. As compensation for moral damages, the Respondent is to pay the Applicant USD5,000;

d. The aforementioned compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable; and

e. All other claims are rejected.

(*Signed*)
Judge Teresa Bravo
Dated this 19th day of December 2022

Entered in the Register on this 19th day of December 2022
(*Signed*)
René M. Vargas M., Registrar, Geneva