



Before: Judge Sun Xiangzhuang

Registry: Geneva

Registrar: René M. Vargas M.

SHERALOV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Viacheslav Mysak

Counsel for Respondent:

Isavella Maria Vasilogeorgi, DAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former staff member of the United Nations Department for Safety and Security (“UNDSS”), contests the decision to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity.

2. For the reasons set forth below, the application is rejected on its merits.

Facts and procedural history

3. On 1 March 2002, the Applicant commenced employment with the Organization. Prior to his separation on 21 October 2022, he held the position of Security Coordination Officer at the P-4 level with UNDSS within the United Nations Integrated Security Workforce-Afghanistan on a permanent appointment.

4. By email of 17 April 2020, the Deputy Chief, Guard Force Unit (“GFU”), United Nations Assistance Mission in Afghanistan (“UNAMA”), reported to the Chief, GFU, UNAMA, that, on 17 April 2020, at around 0.20 a.m., the Applicant physically assaulted an unarmed IDG¹ security guard near the Social Centre inside the “United Nations Regional Office for Central Africa (“UNOCA”) compound” of UNAMA.

5. On the same day, the Principal Security Adviser, UN Security Afghanistan, directed the Special Investigations Unit (“SIU”) of UNAMA to enquire about the reported incident and prepare a preliminary fact-finding report for onward submission to UNDSS.

6. SIU interviewed six witnesses, including the complainant, between 19 and 28 April 2020. SIU interviewed the Applicant on 28 April 2020.

¹ IDG is a security company that provides unarmed guard services to UNAMA under a contract. IDG unarmed guards are part of the security personnel providing services in the UNOCA compound. IDG guards report, through their chain of command, to the Security Officers of UNAMA.

7. On 30 April 2020, SIU transmitted the preliminary investigation report, registered under case reference number SIU/KAB/047/20, to the Chief Security Officer, UNAMA. The report concluded in its relevant part that:

[N]either of the contradicting accounts provided by [the Applicant] and [the complainant] could be conclusively verified through witness testimonies, as no direct witnesses were reportedly present in the area during the subject interaction.

...

Even though there were no witnesses to the subject interaction between [the Applicant] and [the complainant], there were no findings unearthed to refute the allegation of the IDG guard that he was physically assaulted by [the Applicant]. Also, the account of [the complainant] was consistent with the testimonies of GFU response personnel and the reporting timeline of the incident.

8. By letter of 3 May 2020, the Chief Security Officer, UNAMA, informed the Principal Security Adviser, UN Security, Afghanistan, that he had reviewed the preliminary investigation report and he concurred with its findings and conclusions.

9. On 5 May 2020, the Integrated Conduct and Discipline Unit (“ICDU”), UNAMA, was advised by the Principal Security Adviser of a complaint of possible unsatisfactory conduct against the Applicant concerning alleged physical assault. ICDU was provided the preliminary investigation report dated 30 April 2020.

10. ICDU referred the matter to the Investigations Division of the United Nations Office of Internal Oversight Services (“OIOS”) for assessment and appropriate action.

11. After an initial assessment, OIOS considered that the matter would be best handled by UNAMA and, after consultations with UNDSS, referred the matter to the responsible official on 17 June 2020 for appropriate action in accordance with ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process).

12. Following receipt of the referral from OIOS, the responsible official requested ICDU to assess the SIU report. During the assessment, it was noted that the statement of the subject did not indicate full compliance with the provisions of

sec. 6 of ST/AI/2017/1 and, therefore, ICDU requested SIU to provide the subject with the information concerning his right to have an observer present at the interview and to retake his statement, if necessary.

13. The revised statement indicating that the staff member waived his right to have an observer present was provided to ICDU on 18 November 2020.

14. By Code Cable dated 28 December 2020, the Special Representative of the Secretary-General, UNAMA, referred the Applicant's case to the Office of Human Resources ("OHR") for possible initiation of disciplinary proceedings. It states in its relevant part that:

Having reviewed all the available evidence, I am confident that the allegation does not necessarily lack support in terms of corroboration, given the description of events, the consistency of the statements provided by the complainant and the multiple GFU personnel who arrived at the scene shortly after, the video recorded by the International supervisor of the GFU while at the scene, the destroyed strap of the complainant's UN ID card, all provide clear and convincing proof that the subject had physically assaulted or attempted to assault the complainant. Based on the totality of the evidence adduced, I find the allegation of assault to be credible and substantiated by clear and convincing evidence.

15. By memorandum dated 28 February 2022 (hereafter, "Allegations Memorandum"), OHR informed the Applicant of the allegations of misconduct on account of him having physically assaulted an unarmed IDG security guard, on 17 April 2020, by striking him on the face with his hand near the Social Centre inside the UNOCA compound. In the same memorandum, the Applicant was requested to respond to formal allegations of misconduct.

16. On 12 April 2022, the Applicant submitted comments on the allegations of misconduct (hereafter, "Comments").

17. By letter dated 19 October 2022 (hereafter, “Sanction Letter”), the Applicant was informed that it had been established by clear and convincing evidence that he had engaged in serious misconduct and that the Under-Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”) had decided to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity, in accordance with staff rule 10.2(a)(viii).

18. By an incomplete application filed on 28 October 2022, the Applicant contested the decision to impose on him the above-mentioned disciplinary measure.

19. Upon its completion on 28 November 2022, the application was served on the Respondent who had until 28 December 2022 to file his reply.

20. On 22 December 2022, the Respondent filed his reply with a request to exceed the page limit.

21. On 31 March 2023, the Applicant filed his rejoinder.

22. On 6 April 2023, the Respondent filed a motion objecting to the Applicant’s rejoinder and requesting that it be stricken out from the record.

23. By Order No. 81 (GVA/2023) of 24 July 2023, the Tribunal granted the Respondent’s request to exceed the page limit, admitted the Applicant’s rejoinder into the case record, and invited the Respondent to file his comments on the Applicant’s rejoinder by 4 August 2023.

24. On 4 August 2023, the Respondent filed his comments on the Applicant’s rejoinder.

25. By Order No. 85 (GVA/2023) of 28 July 2023, the Tribunal convoked the parties to a case management discussion (“CMD”).

26. On 17 August 2023, the CMD took place, as scheduled, virtually through Microsoft Teams, with Counsel for each party and the Applicant present. At the

CMD, the Applicant disputed the facts underlying the disciplinary measure at issue but indicated that he did not have any witnesses to call.

27. By Order No. 102 (GVA/2023) of 18 August 2023, the Tribunal granted the Applicant's oral motion to adduce additional evidence, instructed him to file his submissions, and invited the Respondent to file his comments on the above-mentioned submissions.

28. On 31 August 2023, the Applicant filed his submissions pursuant to Order No. 102 (GVA/2023).

29. On 18 September 2023, the Respondent filed his comments on the Applicant's submissions of 31 August 2023.

30. Having reviewed the evidence on record, and considering the discussions during the CMD as well as the fact that the Applicant did not have any witnesses to call, the Tribunal found that an oral hearing on the merits would not add further value in its assessment of the matter. Consequently, by Order No. 125 (GVA/2023) of 20 September 2023, the Tribunal instructed the parties to file their respective closing submission by 2 October 2023.

31. On 1 October 2023, the Applicant filed his closing submission with four annexes.

32. On 2 October 2023, the Respondent filed his closing submission. He also requested the Tribunal to disregard the "three new documents" attached to the Applicant's closing submission, which in his view constituted new evidence.

33. By Order No. 134 (GVA/2023) of 6 October 2023, the Tribunal admitted the newly adduced evidence into the case record and instructed the Respondent to file his comments on the Applicant's new evidence by 11 October 2023.

34. On 11 October 2023, the Respondent filed an addendum to his closing submission.

35. On 16 October 2023, the Applicant filed his comments on the Respondent's closing submission and its addendum.

Consideration

Scope and standard of judicial review in disciplinary matters

36. The case at hand relates to a disciplinary measure of separation from service, with compensation in lieu of notice and with termination indemnity.

37. In disciplinary cases, the Tribunal's role is of judicial review, which requires it to consider the evidence adduced and the procedures utilized during the course of the 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.

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

Whether the facts on which the disciplinary measure was based have been established according to the applicable standard

39. It is well-settled law that when the disciplinary process results in separation from service, like in the case at hand, the alleged misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable (see sec. 9.1(a) of ST/AI/2017/1; see also, e.g., *Molari* 2011-UNAT-164, para. 30; *Ibrahim* 2017-UNAT-776, para. 34).

40. Clear and convincing proof requires more than a preponderance of evidence but less than proof beyond a reasonable doubt (see, e.g., *Molari*, para. 30). To meet this standard, “[t]here must be a very solid support for the finding; significantly more evidence supports the finding and there is limited information suggesting the contrary” (see *Applicant* 2022-UNAT-1187, para. 64). “Evidence, which is required to be clear and convincing, can be direct evidence of events, or may be of evidential inferences that can be properly drawn from other direct evidence” (see *Negussie* 2020-UNAT-1033, para. 45).

41. 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).

42. As such, the Tribunal will not examine in this respect the two issues that were not part of the charges against the Applicant, i.e., the damaging of the complainant’s ID card case and the influence of alcohol on him at the time of the incident. Indeed, what matters is whether the facts on which the disciplinary measure was based have been established.

43. In the present case, the facts on which the disciplinary measure was based are as follows:

on 17 April 2020, at around [0.20] [a.m.], [the Applicant] physically assaulted ... an unarmed IDG security guard, by striking him on the face with his hand, near the Social Centre inside the “UNOCA” compound.

44. The Applicant submits that allegations against him were not established by clear and convincing evidence. Specifically, he argues that the story was fabricated by the IDG security guard/the complainant and is a lie made up to cover the complainant himself because he found the complainant sleeping on duty, and the complainant smelled like hashish in the security post. The Applicant also alleged that the complainant had smoked hashish. Moreover, the Applicant contends that there were no eyewitnesses to the alleged physical assault, and no CCTV camera record of the incident in question was provided for transparency purposes.

45. The Respondent argues that the facts have been established by clear and convincing evidence.

46. Where key facts are disputed, the Tribunal is required to “make explicit findings pertaining to the credibility and reliability of the evidence and provide a clear indication of which disputed version it prefers and explain why” (see *AAC* 2023-UNAT-1370, para. 47). The absence of eyewitness to the physical assault and the lack of a recording of it on video further enhance such need. As such, a determination as to whether the physical assault in question occurred relies on the credibility of the Applicant and witnesses who provided statements to the investigation authority.

The credibility of the complainant’s evidence

47. The complainant provided, under oath, a detailed and coherent account of the physical assault in question, the circumstances leading to it and its aftermath.

48. Specifically, the complainant testified before SIU that at around 0.20 a.m. on 17 April 2020, the Applicant approached the security post QS 1.1, which he was guarding at the time of the incident. From approximately 10 meters from QS 1.1,

the Applicant motioned for the complainant to approach him. The complainant approached the Applicant and stopped at approximately two meters from him due to the then COVID-19-related restrictions. The Applicant still motioned for the complainant to come closer.

49. When the complainant refused to do so, showing the Applicant two fingers and saying “Corona, two meters”, the Applicant advanced towards the complainant quickly, grabbed the complainant’s UN ID card strip by his left hand, and hit the complainant with the open palm of his right hand on the left side of the complainant’s head. The complainant added that he managed to move his head a little, otherwise, the hit would have been a full-blow slap on his face.

50. The complainant further stated that after being hit, he ran towards the security booth and the Applicant followed him, appearing unstable on his feet. The Applicant then entered the security booth, where the complainant saw him speaking, first, on his mobile phone and, after, on the landline located in the security booth. The complainant also testified that he called his team leader by radio to report the situation when the Applicant entered the security booth.

51. While regrettably there is neither an eyewitness to the physical assault in question nor any security camera that could have captured the assault on video, the Tribunal finds the complainant’s evidence credible after considering the totality of the evidence on record.

52. First, the complainant’s account of the physical assault is corroborated by other witnesses’ testimonies and the documentary evidence. Specifically, witness Mr. A. S. S., IDG Team Leader assigned to UNOCA GFU, testified before SIU that he received a radio call from the complainant at around 0.20 a.m. on 17 April 2020, alerting him to the fact that one man had attacked him at his post. Witness Mr. S. S. S., UNOCA GFU Shift Supervisor, testified that upon arrival at the security post with Mr. A. S. S. a few minutes later, the complainant, who was standing near the security booth, informed Mr. S. S. S. that the Applicant attacked him. The photograph taken by SIU showing the complainant’s broken UN ID card case further corroborates the complainant’s testimony about the physical assault.

53. Second, the Applicant's contemporaneous behaviour, i.e., his attempt to bring some soft drinks to the complainant a few hours after the physical assault, further supports the complainant's account of the incident at issue. The evidence on record shows that at around 4 a.m. on 17 April 2020, the guard who replaced the complainant reported that the Applicant had brought water and juice to the security post QS 1.1, apologizing for his earlier behaviour. This evidence is further corroborated by the Applicant's own testimony before the SIU investigator that he took some soft drinks from his accommodation and brought them to the IDG security guard whom he caught sleeping earlier after he went to his accommodation.

54. While the Applicant stated that his behaviour was not intended as an apology but rather as an attempt to show the complainant that there were no hard feelings, the Tribunal does not consider it reasonable or logical for a senior staff member to engage in such behaviour in the very early morning after having caught a security guard on duty sleeping and with a smell of hashish. In the Tribunal's view, a more plausible explanation for the Applicant's contemporaneous behaviour is that he had physically assaulted the complainant.

55. Third, the complainant's account of the events immediately following the assault was corroborated by other witnesses. Regarding the complainant's own action, as discussed in para. 52 above, the testimony of witness Mr. A. S. S corroborates the complainant's statement that he called Mr. A. S. S. by radio, at around 0.20 a.m. on 17 April 2020, to report the assault.

56. The complainant's testimony in relation to the Applicant's subsequent actions, i.e., the placement of two phone calls, is also corroborated by the testimonies of witness Mr. A. S. S. and witness Mr. S. B., Chief of Operations in the Integrated Security Workforce, UN Security, and the Applicant's supervisor at the time of the incident. Specifically, witness Mr. A. S. S.'s testimony regarding his calling the landline inside the security booth, which was answered by the Applicant, and the latter's self-introduction as "a terrorist" corroborates that of the complainant. Witness Mr. S. B.'s statement that at 0.25 a.m. on 17 April 2020, the Applicant called him and started talking to him incoherently about an exercise as

well as a “terrorist attack” further supports the complainant’s testimony that the Applicant talked to somebody on his mobile phone.

57. The complainant’s testimony regarding the Applicant’s physical instability while standing is further corroborated by the interview statements of witnesses Mr. S. S. S., Mr. A. S. S., Mr. G. D. (Deputy Chief, GFU), as well as Mr. W. P. (Mission Security Officer in UNAMA). A short video clip recorded by witness Mr. W. P. on record further supports the complaint’s testimony in this respect.

58. Finally, the Tribunal finds no merit in the Applicant’s claim that the complainant is not credible. To support his claim, the Applicant pointed to two inconsistencies between the Administration’s reports and argued that his open palm slapping the left side of the complainant’s head should have made the latter’s hat fall onto the ground.

59. In relation to the alleged discrepancy regarding whether the Applicant struck the complainant’s face or head, the Tribunal notes that the complainant’s under oath testimony in this respect is detailed and coherent. Specially, he testified before SIU that “the man advanced towards me quickly, grabbed my UN ID card strip by his left hand and while holding it, raised his right hand and with open palm hit me on the left side of the head. I managed to move my head a little when the blow came, so his blow grazed the back of my head, hitting me less than he intended. If I [had] not move[d], it would [have been] a full-blow slap in [my] face.”

60. While, ideally, the Administration could have been more precise, detailed, and consistent in its description of the assault, it is not unreasonable for it to state that the Applicant struck the complainant’s face given the situation described by him. Indeed, if the complainant had not moved his head, the Applicant’s palm could have hit the complainant’s face.

61. Turning to another alleged inconsistency, the Applicant points out that the complainant’s interview record shows that he saw one international male person approaching his post from the Transport Workshop side, whereas witness Mr. A. S. S.’s statement suggests that the complainant told him a man approached his post from the Social Centre Side.

62. While the Applicant did not provide any evidence showing that the Social Centre and Transport Workshop are located on two different sides vis-à-vis the Security Post QS 1.1, the evidence on record shows that the Social Centre is located on the same side/site as the Transport Workshop. Indeed, the testimony of witness Mr. S. B. shows that on the afternoon of 17 April 2020, during his meeting with the Applicant, the latter referred to the security guard booth as being near “the transport/social centre”.

63. Regarding the Applicant’s argument concerning the assumed fall of the complainant’s hat, the Tribunal finds it to be pure speculation. On the one hand, the short video clip on record shows that at the time of the incident, the complainant wore a beanie that does not appear to fall easily due to external force. On the other hand, as the complainant testified, he moved his head a bit and, thus, the Applicant hit him less than the latter intended. In the Tribunal’s view, the fact that the complainant’s hat did not fall onto the ground at the time of the strike further corroborates the complainant’s account of the incident in question.

64. Accordingly, the Tribunal finds that the complainant’s testimony regarding the physical assault in question is coherent, credible, and reliable, and that there is no inconsistency that could have undermined its credibility and reliability.

The credibility of the Applicant’s evidence

65. Turning to the Applicant’s credibility, the Tribunal notes that his account of circumstances leading to the alleged incident is not consistent with other evidence on record.

66. Specifically, in his interview record, the Applicant stated that on the evening of 16 April 2020, at maybe around 10-11 p.m., he went for a walk alone around the compound, for approximately 30 minutes, and then went to the Social Centre, where he ordered some food to take away to his accommodation and where he had two beers while waiting for his food order to be prepared.

67. This evidence is, however, rebutted by documentary evidence and other witnesses. Specifically, the documentary evidence on record shows that the Social

Centre did not accept food orders after 9.15 p.m. None of the witnesses testified before the SIU investigator that the Applicant had take-away food from the Social Centre with him. The CCTV screenshots of all individuals entering/exiting the Social Centre between 8 p.m. on 16 April 2020 and 2 a.m. on 17 April 2020 did not show the Applicant's walking in or out of the Social Centre after 9 p.m. Furthermore, according to witness Mr. S. B., when the Applicant narrated to him the events on 17 April 2020, he told Mr. S. B. that he attended a social function within the Compound instead of ordering take-away food at the Social Centre.

68. The Tribunal notes that upon being provided with the rebutting evidence, the Applicant did not refer to being in the Social Centre or to placing an order of food in his Comments. The inconsistency between the Applicant's testimony and the prevailing evidence undermines his credibility.

69. Moreover, in relation to the Applicant's account of the incident at issue, the Tribunal notes the internal contradictions between the Applicant's testimony during the investigation proceedings and his Comments in the disciplinary process. In fact, upon being confronted with the SIU's adverse findings, the Applicant adjusted his narrative in his Comments.

70. Specifically, in his interview record before SIU, the Applicant stated that after waking up the complainant, he talked to the latter about the importance of being alert while on duty, "asking about his background and about martial arts". According to him, he then initiated a small martial arts demonstration, and the complainant, in turn, showed him some martial arts moves as well. However, in his Comments, the Applicant stated that after waking up the complainant, and asking him to be alert while on duty, he told the complainant about the security exercises being conducted at the time, to stress the importance of why the complainant should not be sleeping while on duty. He added that they discussed sports, and that it was the complainant who steered the conversation to martial arts and initiated a demonstration, then asking him to show him some moves.

71. The Tribunal is of the view that the Applicant's subsequent adjustments to his account of the event at issue, particularly after having been confronted with the

totality of adverse evidence, further cast significant doubt on his credibility and reliability.

72. Accordingly, the Tribunal finds that the inconsistencies between the Applicant's testimony and the prevailing evidence on record, on the one hand, and the internal contradictions between his interview record and his Comments, on the other hand, suggest that he may have made false statements to cover up his misbehaviour.

The alleged fabrication of the accusation and collusion

73. The Applicant asserts that the complainant fabricated the physical assault allegation to cover up for him being caught sleeping on duty and smelling like hashish. He further alleges that the IDG personnel, i.e., the complainant, Mr. A. S. S., and Mr. S. S. S., as well as the GFU officers Mr. G. D., and Mr. W. P. colluded in that cover up to protect the interest of IDG and GFU.

74. With respect to the alleged fabrication of the accusation, apart from a blank assertion, the Applicant did not provide any evidence substantiating that the complainant was caught sleeping on duty or having smoked hashish.

75. In fact, none of the witnesses who arrived at the scene within just a few minutes following the incident referred to the Applicant claiming that the complainant was sleeping and had smoked hashish on the early morning of 17 April 2020. Furthermore, witness Mr. S. B.'s testimony shows that during their phone conversation immediately after the incident, the Applicant did not mention having discovered the complainant sleeping or smoking hashish but talked instead incoherently only about a "terrorist attack", and an "exercise". It was only on the afternoon of 17 April 2020, after having been informed that an investigation had been launched, that the Applicant alleged for the first time that he found the complainant sleeping.

76. Turning to the alleged collusion, the swiftness in the consecutive arrival of the witnesses on the scene does not support this claim. Having arrived one after another within just a few minutes following the incident, the IDG security guards

and the GFU officers could not have had sufficient time to collude to fabricate a story against the Applicant. In fact, the short video clip on record shows that Mr. G. D. was asking “what happened here”?

77. Furthermore, the Tribunal finds no evidence of ill motives for the alleged fabrication of the accusation and the collusion. The evidence on record shows that, according to the Applicant, he did not know the guard before the incident, and had no record of controversy with any other security guard in the UNOCA compound since his deployment in UNAMA in November 2018.

78. Therefore, the Tribunal finds that the Applicant’s claim of an alleged fabrication of the accusation, which is made in furtherance of his collusion argument, further undermines his credibility.

79. In conclusion, the complainant’s testimony of physical assault is detailed, coherent and corroborated by several witnesses’ testimonies, the Applicant’s contemporaneous behaviour, and the documentary evidence. In contrast, the Applicant’s evidence in relation to the incident in question lacks credibility and reliability.

80. Accordingly, the Tribunal is satisfied that the Administration has established the facts by clear and convincing evidence.

Whether the established facts legally amount to misconduct under the Staff Regulations and Rules

81. Regarding whether the established facts legally amount to misconduct, the Tribunal 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.

82. In the Sanction Letter, the USG/DMSPC concluded that the Applicant's actions constituted serious misconduct in violation of staff regulations 1.2(a), 1.2(b) and 1.2(f), and staff rule 1.2(f), which provide that:

Regulation 1.2

Basic rights and obligations of staff

Core values

(a) Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them;

(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;

General rights and obligations

...

(f) [Staff members] shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations...

Rule 1.2

Basic rights and obligations of staff

...

Specific instances of prohibited conduct

...

(f) Any form of discrimination or harassment, including sexual or gender harassment, as well as abuse in any form at the workplace or in connection with work, is prohibited.

83. The Tribunal notes that while the Applicant submits that his actions do not constitute serious misconduct, he does not contest the Administration's conclusion that, if established, physically assaulting another person, namely an unarmed security guard, constitutes serious misconduct.

84. Since it is established by clear and convincing evidence that the Applicant physically assaulted an unarmed security guard while the latter was performing his duties, the Tribunal finds that the established facts amount to misconduct.

85. Obviously, striking another person is a serious affront to his or her dignity and personal worth. In doing so, the Applicant violated staff regulations 1.2(a) and 1.2(b). By physically assaulting another person, the Applicant did not conduct himself in a manner befitting his status as an international civil servant under staff regulation 1.2(f) either. Physical assault is also prohibited by staff rule 1.2(f) and is contrary to the aims and principles of the Organization as enshrined in the Preamble to the Charter of the United Nations (see *Halidou* 2020- UNAT-1070, para. 28).

86. Therefore, by engaging in the conduct in question, the Applicant violated staff regulations 1.2(a), 1.2(b) and 1.2(f), and staff rule 1.2(f). Accordingly, the Tribunal concludes that the established facts legally amount to misconduct.

Whether the disciplinary measure applied is proportionate to the offence

87. The jurisprudence of the Appeals Tribunal provides that “the Administration has a broad discretion when it comes to the choice of a disciplinary sanction” (see *Iram* 2023-UNAT-1340, para. 86). In this respect, the Appeals Tribunal has consistently held that:

The matter of the degree of the sanction is usually reserved for the Administration, which has discretion to impose the measure that it considers adequate in the circumstances of the case and for the actions and conduct of the staff member involved. This appears as a natural consequence of the scope of administrative hierarchy and the power vested in the competent authority. It is the Administration that carries out the administrative activity and procedure and deals with the staff members. Therefore, the Administration is best suited to select an adequate sanction able to fulfil the general requirements of these kinds of measures; to wit: a sanction within the limits stated by the respective norms, which is sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance. That is why the tribunals will only interfere and rescind or modify a sanction imposed by the Administration where the sanction imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity. This rationale is followed

without any change in the jurisprudence of this Tribunal (see, e.g., *Appellant* 2022-UNAT-1216, para. 45; *Iram*, para. 86).

88. Furthermore, “due deference must be shown to the Secretary-General’s decision on sanction because Article 101(3) of the United Nations Charter requires the Secretary-General to hold staff members to the highest standards of integrity and he is accountable to the Member States of the United Nations in this regard” (see, e.g., *Beda* 2022-UNAT-1260, para. 57).

89. 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”. In this regard, the Appeals Tribunal held that “[t]he 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” (see *Rajan* 2017-UNAT-781, para. 48).

90. In the case at hand, the Administration imposed on the Applicant the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity. This resulted from a careful consideration of the nature and gravity of the conduct in question, the past practice of the Organization in matters of comparable conduct, as well as mitigating and aggravating factors.

91. The Applicant does not challenge the Administration’s finding that separation from service is proportionate to the misconduct of physically assaulting another person.

92. Since the Administration established by clear and convincing evidence that the Applicant physically assaulted an unarmed security guard while on duty, the Tribunal is satisfied that the disciplinary measure applied in the present case was proportionate to the offence for the following reasons.

93. First, the Appeals Tribunal has consistently held that “[t]he physical assault of another [human being] is a fundamental violation of the ethos of the United Nations, the universal upper guardian of all human rights, including the right to

dignity and personal autonomy” (see *Desbois* 2023-UNAT-1318, para. 40; see also *Halidou*, para. 35). Hence, “when a staff member physically assaults another person without justification, a decision to separate the staff member will normally fall within the bounds of reasonableness and proportionality” (see *Halidou*, para. 28).

94. Second, an analysis of the Organization’s past practice on disciplinary matters shows that the measure of dismissal or separation from service has been consistently imposed on staff members who engaged in physical assault without justification. Cases of physical assault of security personnel during the exercise of their duties attract measures towards the severe end of the spectrum. Therefore, the Tribunal considers that the sanction applied in the present case is consistent with those applied in similar cases.

95. Finally, the Tribunal finds that in determining the appropriate sanction, the Administration duly considered aggravating and mitigating factors. In this regard, 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).

96. As aggravating factors, the Administration properly considered that:

- a. The Applicant assaulted an unarmed security guard while the latter was performing his duties;
- b. He refused to abide by instructions to return to his accommodation issued by the security officers who responded to the scene; and
- c. As a Security Coordination Officer, the Applicant’s conduct was in direct opposition to his duties, because he was the cause of physical harm to another person, and his actions entailed changes in the security assignments for the night in question and disrupted the night-time rest of the responding security personnel.

97. In this respect, the Tribunal agrees with the Administration that as a Security Coordination Officer, the Applicant had an increased obligation to protect UN personnel from physical harm, to abide by security-related instructions and to not disrupt normal security operations.

98. Turning to mitigating factors, the Administration duly considered that the Applicant had a long and satisfactory service record as a staff member, including service in numerous hardship duty stations and that his strike was not particularly strong and did not result in the victim requiring medical attention afterwards. As such, the sanction at issue—separation from service—is not the harshest measure available under the Staff Regulations and Rules of the United Nations.

99. Considering the above, and having weighed all factors involved, the Tribunal cannot but conclude that separating the Applicant from service in the case at hand was neither unlawful nor arbitrary, and fell within the range of reasonable disciplinary options. His misconduct damaged the substratum of trust in a manner that rendered the continuation of the employment relationship impossible. The termination of his employment was consequently proportionate.

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

100. 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. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense;

(b) Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct.

101. The Tribunal is satisfied that the key elements of the Applicant's right to due process in the disciplinary process were respected in the present case. Indeed, the evidence on record shows that the Applicant was fully informed of the charges against him, was given the opportunity to respond to the allegations, and was informed of the right to seek the assistance of Counsel in his defence. The Applicant does not claim that any of these key elements was not respected either. Also, the Tribunal finds that the disciplinary measure imposed on him is proportionate to the nature and gravity of his misconduct, and is consistent with those applied in similar cases.

102. Nevertheless, the Applicant submits that his due process rights during the investigation proceedings were violated. In support of his claim, the Applicant specifically argues that:

- a. He was not informed in writing or verbally, prior to or at the start of his interview, that he was the subject of an investigation and of the nature of the alleged unsatisfactory conduct;
- b. He was not informed of or did not exercise his right to an observer;
- c. SIU apparently did not investigate his assertion that the security guard had smoked hashish and that he was sleeping;
- d. The investigation relied only on synopses of the interviews of the other interviewees representing IDG Security Company and GFU who were protecting their own staff and their respective interest; and
- e. Conflict of interest was not taken into consideration.

103. In this respect, the Tribunal wishes to point out that not every violation of an applicant's rights would render the disciplinary sanction unlawful. It is well-settled case law that "only substantial procedural irregularities will render a disciplinary measure unlawful" (see *Sall* 2018-UNAT-889, para. 33; see also *Abu Osba* 2020-UNAT-1061, para. 66; *Muindi* 2017-UNAT-782, para. 48). The Appeals Tribunal added in *Sall*, at para. 33, that:

Even a very severe disciplinary measure like separation from service can be regarded as lawful if, despite some procedural irregularities, there is clear and convincing evidence of grave misconduct, especially if the misconduct consists of a physical or sexual assault.

104. The onus is on an applicant to provide proof of the lack of due process and how it negatively impacted the outcome of the investigation and/or the disciplinary process (see, e.g., *KC* UNDT/2021/127, para. 70; *Williams* UNDT/2023/066, para. 93).

105. Bearing in mind the above jurisprudence, the Tribunal will in turn review the Applicant's alleged procedural irregularities occurred during the investigation process.

106. First, with respect to the Applicant's right to be properly informed, the Tribunal is not persuaded by his submission that he was not informed of the nature of the alleged unsatisfactory conduct and that he was the subject of an investigation. In fact, the Applicant's interview record clearly shows that at the start of his interview, he was informed about the nature of the allegations against him and the purpose of the interview. Specifically, the Applicant was informed that the investigation was pertinent to an incident report submitted by the complainant, alleging that at around 0.20 a.m. on 17 April 2020, the Applicant physically assaulted the complainant. He was further told that he was invited for the interview as an alleged offender. The Applicant also confirmed to the investigator that he understood the purpose of the interview.

107. Second, in relation to the Applicant's submission regarding his right to an observer, the Tribunal notes that sec. 6.10 (a) of ST/AI/2017/1 provides in its relevant part that a staff member who has been identified as the subject of an investigation shall be "[p]ermitted to be accompanied by a staff member to act as an observer during an interview". Read literally, the text suggests that to exercise such right, it is the Applicant's responsibility to make a request, but he did not do so. In fact, a supplemental statement signed by the Applicant on 18 November 2020 shows that he had waived his right to an observer.

108. There is also no merit in the Applicant's argument that his right to due process was violated because he had not been informed of the right to an observer when he was interviewed. Indeed, staff members are presumed to know the Regulations and Rules applicable to them (see, e.g., *Vukasović* 2016-UNAT-699, para. 14; *Kissila* 2014-UNAT-470, para. 24). Nevertheless, the Administration informed the Applicant of such right after having interviewed him, and provided him an opportunity to review his investigation records and to express his disagreements as well as comments.

109. Third, turning to the Applicant's claim that the Administration failed to investigate his allegations that the complainant was sleeping and had smoked hashish, the Tribunal recalls its finding in paras. 74 and 75 above that there is no evidence in this respect. In fact, even the Applicant himself did not claim that the complainant was sleeping or had smoked hashish at the time of the inquiry immediately following the incident. He only raised such allegations for the first time on the following afternoon after he had been informed that an investigation against him had been launched. Accordingly, there are no sufficient grounds or reasons that would have allowed the Administration to initiate an investigation against the complainant (see, e.g., *Nadeau* 2017-UNAT-733/Corr.1, para. 34).

110. Fourth, the Tribunal finds no merit in the Applicant's submission that the investigation authority relied only on synopses of the interviews of the other interviewees representing the IDG Security Company and GFU. Indeed, not all witnesses interviewed worked for IDG Security Company or GFU. Furthermore, the investigation report on record clearly shows that its conclusion was based on an analysis and a holistic consideration of the full written record of all witnesses interviewed by SIU as well as the Applicant, email correspondence, photographs, screenshots of video clip, and a sketch plan. In fact, the Applicant received the above-mentioned evidence as supporting documents to the Allegations Memorandum.

111. Finally, the Tribunal is not convinced by the Applicant's claim of conflict of interest. To support his claim, the Applicant attempts to establish that SIU had a conflict of interest and should not have acted as the investigation authority. He also

asserts that GFU had a conflict of interest and thus it was highly possible that CCTV footage depicting the incident was not provided to SIU on purpose.

112. The Tribunal recalls that a conflict of interest arises where a matter under investigation involves circumstances that would make it appear to a reasonable and impartial observer that an investigator's participation in the investigation of a matter could be inappropriate (see *Duparc* UNDT/2022/074, para. 70). The Applicant did not demonstrate any circumstance that could have rendered the participation of SIU inappropriate in the case at hand. In fact, the evidence on record shows that OIOS considered that this matter would best be handled by UNAMA and, after consultations with UNDSS, referred it to UNAMA.

113. Regarding the Applicant's claim that GFU withheld CCTV video footage, the Tribunal finds that it is mere speculation not supported by any evidence. Indeed, a careful review of the photographs on record taken from all sides of the exterior of Security Post QS 1.1 does not reveal any sign of a camera having been installed around QS 1.1. In fact, the only equipment mounted on the exterior walls of QS 1.1 are two headlights: one above the door and, the other above the side window.

114. The Tribunal finds no indication that GFU purposefully withheld CCTV footage from the SIU investigator either. The email communications on record show that GFU handed over any relevant CCTV footage to SIU. As such, the alleged violation of a standard operating procedure, even if established, is inconsequential and has no impact on the outcome of the investigation.

115. To sum up, the Tribunal finds that the Applicant failed to establish any substantial procedural irregularities. He also failed to demonstrate how the alleged procedural irregularities could have negatively impacted the outcome of the investigation and disciplinary proceedings.

116. The Tribunal is of the view that even if established, the irregularities identified by the Applicant are of no consequence on the establishment of the facts relevant to the determination of proportionality given the kind and amount of evidence proving the Applicant's misconduct. As the Appeals Tribunal stated in *Michaud* 2017-UNAT-761, para. 60:

This is also one of those cases where the so-called “no difference” principle may find application. A lack or a deficiency in due process will be no bar to a fair or reasonable administrative decision or disciplinary action should it appear at a later stage that fuller or better due process would have made no difference. The principle applies exceptionally where the ultimate outcome is an irrefutable foregone conclusion, for instance where a gross assault is widely witnessed, a theft is admitted or an employee spurns an opportunity to explain proven misconduct.

117. Accordingly, the Tribunal finds that the Applicant failed to substantiate his claim that his rights to due process during the investigation and disciplinary proceedings were violated.

118. In light of the above, the Tribunal upholds the disciplinary measure imposed on the Applicant.

Whether the Applicant is entitled to any remedies

119. In his application, the Applicant seeks the rescission of the contested decision.

120. Having upheld the disciplinary measure, the Tribunal rejects the Applicant’s request for its rescission.

Conclusion

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

(Signed)

Judge Sun Xiangzhuang

Dated this 31st day of October 2023

Entered in the Register on this 31st day of October 2023

(Signed)

René M. Vargas M., Registrar, Geneva