UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2023/056
Judgment No.: UNDT/2024/079
Date: 11 October 2024
Original: English

Before: Judge Sean Wallace

Registry: Nairobi

Registrar: Wanda L. Carter

MOROLDO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Ludovica Moro

Counsel for Respondent:
Wei Zhuang AAS/ALD/OHR
Sergei Gorbylev AAS/ALD/OHR

Introduction

1. On 18 July 2023, the Applicant filed an application with the United Nations Dispute Tribunal sitting in Nairobi to challenge the disciplinary measure imposed on him by the Respondent.

2. On 30 July 2024, the Tribunal held a case management discussion (CMD) with the parties. The parties agreed that this matter was suitable for adjudication on the basis of the written record. Counsel for the Applicant was directed to file a tabular document highlighting the putative translation issues, which she argues had a material and substantive bearing on the impugned decision.

3. The parties agreed to engage in settlement discussions, but understood the Tribunal's direction that those discussions will not affect the deadline set for the filing of closing submissions. Closing submissions were filed at the end of August 2024.

Facts and Submissions

4. The Applicant has held various security related positions since he began serving the Organisation in 2004.

5. On 22 July 2015, he formed and registered a company in Italy called *Saroal* to "perform professional, scientific, and technical activities, and consultancy services." The Applicant was the sole administrator and shareholder of *Saroal*. The company email was what he used as his personal email address.

6. The Applicant submits that he established this company for purposes of work after his planned separation from the Organisation in 2015. Those plans, however, did not work out; and, because the company generated no revenue, and the cost of keeping the company 'open' and tax compliant, the Applicant began the process for the dissolution and liquidation of the company instead.

7. In January 2017, the Applicant participated in a public news broadcast. A month later, he also participated in a fair in Italy on anti-drone security technology.

8. After the fair, an Italian regional news channel broadcast a piece announcing an agreement between two Italian companies - MD Systems and *Saroal* - and MC-TECH, an Israeli company, for the distribution of anti-drone systems.

9. On 10 April 2019, someone anonymously reported the Applicant to the Office of Internal Oversight Services (OIOS) for having registered a company without prior authorisation of the Secretary-General and engaging in unauthorised outside activities.

10. A Report and an Allegations Memorandum were sent to the Applicant on 1 July 2022. The Applicant responded to the allegations on 12 August 2022.

11. On 26 April 2023, the Applicant was sanctioned. The Sanction Letter stated

> [T]he Under-Secretary-General has decided to impose on you the disciplinary measure of written censure and deferment for two years of eligibility for salary increment, pursuant to Staff Rule 10.2(a)(i) and (iii).

Considerations

Standard of review and burden of proof

12. Article 9.4 of the Tribunal's Statute, as amended on 22 December 2023, provides that in reviewing disciplinary cases:

> the Dispute Tribunal shall consider the record assembled by the Secretary-General and may admit other evidence to make an assessment on whether the facts on which the disciplinary measure was based have been established by evidence; whether the established facts legally amount to misconduct; whether the applicant's due process rights were observed; and whether the disciplinary measure imposed was proportionate to the offence.

13. The Tribunal's Statute generally reflects the jurisprudence of the United Nations Appeals Tribunal ("UNAT" or "Appeals Tribunal") (See, e.g., *AAC* 2023-UNAT-1370, para. 38; *Mizyed* 2015-UNAT-550, para. 18; *Nyawa* 2020-UNAT-1024).

14. The Appeals Tribunal held that:

> When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. (*Sanwidi* 2010-UNAT-084, para. 40).

15. However, UNAT also held that "it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him" or otherwise "substitute its own decision for that of the Secretary-General". In this regard, "the Tribunal is not conducting a "merit-based review, but a judicial review" explaining that a "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" (*Sanwidi*, *op.cit*).

16. In this case, the Applicant argues that the sanction imposed is disproportionate to the offense in question. As part of that claim, he also argues that the facts upon which the sanction was based were not all established to the required standard.

Whether the facts on which the disciplinary measure was based were established by the preponderance of evidence

17. Pursuant to section 9.1 of ST/AI/2017/1, the standard of proof in disciplinary cases depends on the disciplinary measure imposed. Specifically, this document provides that the applicable standard of proof is:

> (a) Clear and convincing evidence, for imposing separation or dismissal of the subject staff members. This standard of proof is lower than the criminal standard of "beyond a reasonable doubt"; and
>
> (b) Preponderance of the evidence (more likely than not that the facts and circumstances underlying the misconduct exist or have occurred), for imposing any other disciplinary measure.

18. Since the sanction in this case was "written censure and deferment for two years of eligibility for salary increment", and not separation or dismissal, the facts must be established by the preponderance of the evidence.

19. The Applicant concedes some of the factual findings upon which the discipline was imposed, specifically, that he incorporated and registered a company, *Saroal*, in Italy without authorisation; that he sent emails from his official UN email account to his *Saroal* email account; and, that he accessed documents related to *Saraol* from his UN-issued laptop.

20. What the Applicant does contest is whether, as a representative of *Saroal*, he participated in a public news broadcast about the anti-drone system created by Israeli company MC-TECH, aired on 4 January 2017 in Italy, during which he spoke about the anti-drone system and the upcoming Udine fair; and whether during the Udine fair, on or about 10 February 2017, as a representative of *Saroal*, he participated in and/or assisted an Italian company, MD Systems, in a public demonstration of the anti-drone system.

21. Here again, the Applicant concedes that he participated in the news broadcast and the public demonstration. He disputes that he did so as a representative of *Saroal* and argues that the investigator provided a biased interpretation of the facts and misleading translations of documents.

22. On the issue of the translations, the Tribunal directed the Applicant to file a tabular document setting forth the documents of the original text, along with both the OIOS investigator's allegedly incorrect translation and the Applicant's proposed correct translation. He did so and challenged two translations, which are set forth below.

23. The first challenged translation is taken from the news broadcast of 4 January 2017. That video includes an interview with an expert security analyst, MC, who mentions a new anti-drone technology which is distributed by an Israeli company named "*Saroal*". The video also includes footage of the Applicant, with his back turned towards the camera "for security reasons", and a caption identifying him as "Operatore sicurezza Saroal" [*Saroal* security operator]. The Applicant is heard speaking, and his words are the subject of the first disputed translation.

a. The Original in Italian:

> *verrà effettuato un demo per vedere come funzionano questi sistemi antidroni. In quell'ambito questa azienda israeliana porterà i sistemi antidroni in Italia, autorizzati anche dal ministero della difesa Israeliano, e li verranno messi in operazione questi antidroni e verrà dimostrato come riescono a identificare e neutralizzare droni non autorizzati che entrano nelle zone protette.*

b. OIOS translation

> We will prepare a demo to show how those anti-drone systems work. Then, the Israeli company will start the shipping of those systems in Italy, with the authorization of the Israeli Ministry of Defence. During the fair, our company will show how the system works and how the software can detect and disable these drones that are entering no-fly zones.

c. Applicant's translation

> A demo will be made to see how these anti-drone systems work. In that context, this Israeli company will bring the anti-drone systems to Italy, also authorized by the Israeli Defence ministry, and these anti-drones will be put into operation, and it will be demonstrated how they can identify and neutralize unauthorized drones entering protected areas.

24. The Tribunal finds that the Applicant's version is a more accurate translation of the original statement than the translation done by OIOS. Obviously, the key difference is that the OIOS version inserts "our company", language which did not appear in the original Italian broadcast.

25. The second challenged translation is from the investigation. It addresses an email sent by an MC Tech official (DM) to the OIOS investigator. The specifics of that challenge are set forth below.

a. Original in Italian:

> *Buongiorno Dott. Vittone,*
>
> *Le confermo che conosciamo il Sig. Moroldo da vari anni, con il quale c'è un sentimento di amicizia.*

Tale rapporto tuttavia non si è mai concretizzato in realtà in un rapporto commerciale in senso tecnico. Ne deriva che non esistono fatturazioni, contratti e quant'altro tra le nostre società.

In occasione della presentazione dell'evento cui Lei fa riferimento abbiamo semplicemente condiviso un interesse professionale a presentare il prodotto MC-TECH, tuttavia in contesti totalmente slegati tra le parti interessate.

A completamento di quanto sopra terrei a precisare che, proprio in ragione della citata amicizia, abbiamo sempre preferito evitare ogni coinvolgimento che andasse al di là della semplice reciproca cortesia.

Pertanto commercialmente MD SYSTEMS non ha mai avuto alcun rapporto con SAROAL. Rimango a Sua disposizione per qualsiasi ulteriore chiarimento.

Rimanendo a disposizione per qualsiasi chiarimento porgiamo cordiali saluti.

b. OIOS translated this as follows:

Good morning Mr. Vittone,

I confirm that we have known Mr. Moroldo for several years, with whom we have a friendly relationship.

However, this relationship was never actually materialized into a commercial relationship in the technical sense. As follows, that there are no invoices, contracts and anything else between our companies.

During the presentation of the event you refer to, we simply shared a professional interest in introducing/presenting the MC-TECH product, however the participation to the event was for different reasons (we had different reason to attend to this event).

To complete the above, I would like to point out that, precisely because of the friendship, we have always preferred to avoid any involvement that went beyond simple mutual courtesy.

Therefore, MD SYSTEMS has never had any commercial relationship with SAROAL.

I remain at your disposal for any further clarification.

Remaining available for any clarification, we send our best regards.

c. The Applicant’s translation of this is:

> Good morning Dr. Vittone,
>
> I confirm that we have known Mr. Moroldo for several years, with whom there is a feeling of friendship. However, this relationship never actually materialized into a commercial relationship in the technical sense.
>
> On the occasion of the presentation of the event you are referring to, we simply shared a professional interest in presenting the MCTECH product; however, in totally unrelated contexts between the parties.
>
> To complete the above, I would like to point out that, precisely because of the aforementioned friendship, we have always preferred to avoid any involvement that went beyond simple mutual courtesy.
>
> Therefore, commercially MD SYSTEMS has never had any relationship with SAROAL.
>
> I remain at your disposal for any further clarification.
>
> Remaining available for any clarification, we send our best regards.

26. The Tribunal finds that both translations are correct in this instance and that the variations are stylistic. The substance of the text is the same, regardless of which translation is used.

27. There was also a video of a news broadcast from the Udine fair which describes a presentation to law enforcement and private sector units of a security system designed to neutralise drone threats. According to the speaker, one product will be manufactured in Israel by MC-TECH and then distributed in Italy by two Italian companies, *Saroal* and MD Systems, pursuant to an agreement they have signed. The Applicant does not challenge the interpretation of this video.

28. Beyond the translation challenge, the Applicant argues that he did not participate in these videos as a representative of *Saroal*. Instead, he claims to have attended and participated in the public news broadcasts as a personal favour to his friends DM and MC, who are associated with MD Systems.

29. The Tribunal finds that this argument lacks credulity and violates common sense. How would the news reporter have associated the Applicant with *Saroal*, unless the Applicant or one of his friends spoke about *Saroal*? Clearly the Applicant

and/or his friends mentioned *Saroal* as a company with connections to both Italy and Israel and involved in the security field.

30. The Applicant also argues that the news broadcast falsely impugned him because *Saroal* never had any agreement with MC-TECH. While it may be true that these two companies did not have a signed agreement, that does not change the fact that someone (either the Applicant or one of his friends) must have told the news reporter that there was an agreement.

31. This is classic marketing "puffery", that is, claiming something to be true to make the product more appealing. These news broadcasts, and the Udine fair, were clearly marketing opportunities for security vendors such as MD Systems. Indeed, DM and MC wrote a letter on the Applicant's behalf saying that the Applicant stepped in for the broadcast because MC-TECH did not have a representative in Italy "thus bringing out the need for someone to (at least apparently) represent it." It is consistent with this admitted act of puffery, that the trio also said there was an agreement between MC-TECH and *Saroal*.

32. Whether or not the statement about an agreement was true, the important thing is that the statements were made for public broadcast, either by the Applicant or by his friends with his consent.

33. Thus, the Tribunal finds that the facts are established, by a preponderance of the evidence: that the Applicant, without approval, established and ran an Italian company, *Saroal*; that on 4 January 2017, he participated in a public news broadcast as a representative of *Saroal* in which he spoke about the company's involvement in distributing an anti-drone system; and that on 10 February 2017, again as a representative of *Saroal*, he participated in a public demonstration of the anti-drone system at a fair in Udine which was also publicly broadcast on the news.

34. The Applicant does not argue whether the established facts amount to misconduct. Nor does he argue that his due process rights were violated.

Was the sanction proportionate to the misconduct?

35. The Applicant argues the sanction imposed on him was disproportionate to the offence. Specifically, he maintains that a written reprimand would have been more proportionate for having engaged in unauthorised outside activity which did not cause any harm (either financial or reputational) to the Organisation, and for using his UN email and laptop for outside activities.

36. It is settled law that 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.[1]

37. In *Samandranov* 2018-UNAT-859, the Appeals Tribunal cautioned that 'due deference [to the Administration's discretion to select the adequate sanction] does not entail uncritical acquiescence." Indeed, UNAT held that the Dispute Tribunal is obliged to "to objectively assess the basis, purpose and effects of any relevant administrative decision." The Appeals Tribunal further held that:

> The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline. The standard of deference preferred by the Secretary-General, were it acceded to, risks inappropriately diminishing the standard of judicial supervision and devaluing the Dispute Tribunal as one lacking in effective remedial power.

38. The Sanction letter says that

> [i]n determining the appropriate disciplinary measures, the Under-Secretary-General has considered the nature of [the Applicant's] actions, the past practice of the Organization in matters of comparable misconduct, as well as whether any mitigating or aggravating factors apply to [the] case."

[1] *George M'mbetsa Nyawa* 2020-UNAT-1024. *See also Ganbold* 2019-UNAT-976, para. 58; *Ladu,* 2019-UNAT-956, paras. 39 and 40.

39. It was found that the outside activities at issue here did not create a conflict of interest nor did the Applicant profit financially from his involvement with *Saroal*. Thus, the USG considered that there was no harm to the Organisation. She also found that this was the Applicant's first disciplinary case, that his long service to the Organization was a mitigating factor, and that there were no aggravating factors.

40. With respect to the past practice of the Organization in comparable matters,

> the Under-Secretary-General for Management Strategy, Policy and Compliance ("the Under-Secretary-General") has considered past practice of the Organization in comparable matters. The past practice indicates that unauthorised outside activities where no conflict of interest was apparent often resulted in disciplinary measures towards the less severe end of the spectrum, such as written censure plus loss of steps in the grade and/or deferment for a number of years of eligibility for consideration for step increment or promotion.

41. A review of the Compendium of Disciplinary Measures from 1 July 2009 to 31 December 2023, indicates that nearly all of the sanctions for misuse of information and communication technology resources involved the downloading or viewing of pornography on UN equipment. Those cases are clearly not comparable to this case.

42. A few others involve reporting personal telephone calls as official calls, which involved financial gain and a degree of deceit not present here. The sanction in those cases was written censure, plus a financial penalty. These are also easily distinguished from the facts in this case.

43. In the category of unauthorized activities and conflict of interest, most involved conflicts from outside employment with financial gain, so these are also distinguishable given the finding of no conflict of interest in this case. There were several cases involving unauthorized activities without conflict of interest or financial gain. For those without aggravating factors, all but one resulted in a written censure.

44. The Respondent cites other cases they claim to be similar in which the sanction included more than just a written censure. However, these too are distinguishable as they involve financial gain to the staff member, financial loss to the Organisation or holding a senior position elsewhere. This leaves only two cases in which the sanction exceeded a written censure versus four in which written censure was deemed sufficient. Unfortunately, the Compendium does not explain why those two cases were treated more harshly.

45. In the circumstances before it, the Tribunal finds that the additional sanction of deferment for two years of eligibility for salary increment to be arbitrary, excessive and obviously absurd. *See*, *Jaffa* 2015-UNAT-545, para. 22; *Sanwidi* 2010-UNAT-084, paras 39-42; *Portillo Moya*, UNAT-2015-523, para. 21; and *Sall*, 2018-UNAT-889, para. 41.

46. Of course, the imposition of a sanction is not just a mechanical exercise, since the sanction should not be "more excessive than is necessary for obtaining the desired result." *See Sanwidi* 2010-UNAT-084, para. 39, as confirmed in *Applicant* 2013-UNAT-280, para.120; *Abu Jarbou* 2013-UNAT-292, para. 41; *Akello* 2013-UNAT-336, para. 41; *Samandarov* 2018-UNAT-859, para. 23 and *Turkey* 2019-UNAT-955, para. 38.

47. In *Kennedy* 2024-UNAT-1453,[2] the Appeals Tribunal provided the following guidance:

> Under our jurisprudence, the proportionality inquiry of Staff Rule 10.3(b) seeks to ensure that a disciplinary measure is reasonable and not more excessive than necessary to obtain the desired result. This analysis respects the need for decision-makers to balance legitimate concerns and respond to individual facts, while also meeting the obligation to treat staff members fairly and rationally. We thus look, among other factors, to the seriousness of the offence, the employment history of the staff member, including any prior discipline as well as aggravating or mitigating factors, and the context of the violation. The proportionality analysis also involves

[2] The Appeals Tribunal cited *Samandranov* 2018-UNAT-859, *Sajiv Nair* 2023-UNAT-1394 and *Balin Szvetko* 2023-UNAT-1311 as authorities for holding thus.

> examining whether similar violations have resulted in similar disciplinary measures.

48. For example, when the staff member profited financially from the misconduct, imposing a financial sanction beyond mere written censure would be appropriate. The same is true where the Organization suffers a financial loss as a result of the misconduct. Neither circumstance exists in this case to justify the financial penalty, denying him a salary increase for two years, given that his performance ratings seem to be exceptional.

49. Indeed, a written censure would have been a suitably "meaningful consequence" (*Kennedy op.cit.*) and sufficient to impress upon the Applicant the error of his actions. The record indicates that he acknowledged that he should have sought authorisation before registering *Saroal*, and the company never really operated. The registration is akin to registering an internet domain name in case one wants to use it in the future. Similarly, his activities regarding the Udine fair seem to have been a "spur of the moment" error unlikely to be repeated.

50. The Tribunal therefore finds that the sanction in this case was disproportionate to the misconduct by adding to the written censure an additional, unnecessary, arbitrary and excessive penalty of a two-year deferment of an increment to his salary.

Conclusion

51. The Application is GRANTED in part.

52. The Tribunal rescinds the decision to defer the Applicant's eligibility for salary increment by two years.

53. In all other respects, the Respondent's decision is affirmed and the Applicant's prayers refused.

(Signed)
Judge Sean Wallace
Dated this 11th day of October 2024

Entered in the Register on this 11th day of October 2024

(Signed)
Wanda L. Carter, Registrar, Nairobi